The EU trade and investment agenda:

quashing the aspirations of the Arab Spring?

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CONTEXT

In response to the 'Arab Spring', the EU is launching negotiations for **Deep and Comprehensive Free Trade Agreements (DCFTAs)** with four Arab countries in transition – Egypt, Jordan, Morocco and Tunisia. Along with Libya, these four countries (united in a regional free trade area under the Agadir Agreement[1]) make up the Deauville Partnership, which was launched by the G8 in 2011 to support transition states towards becoming "free, democratic and tolerant societies".

Through DCFTAs, the EU is now pushing to extend and consolidate its preferential trade relations with these countries. But **many civil society organisations are concerned about the risks** that the 'investment protection chapters' of these agreements pose for the Deauville countries – in terms of their freedom to set their own policy, and promote inclusive growth and sustainable development.

Since the Lisbon Treaty in 2009, the responsibility for negotiating investment issues has shifted from individual EU member states to the central European level. This means the EC can now negotiate 'investment chapters' with Free Trade Areas such as the Deauville Partnership countries. A **key element of investment agreements are investment dispute settlement clauses**. These grant transnational corporations the right to sue governments before international investment tribunals over policy measures that potentially damage their profitability (see Box 1).

Claims and awards over profits lost because of policy changes run into hundreds of millions of dollars, with **severe impacts for public spending, particularly in developing and transitional economies**. The Agadir countries already face several investment disputes and it is likely the number of arbitration cases will increase as these transitional countries set out new social, economic and political policies in response to the wave of popular discontent that swept the region in 2010-2011.

The neoliberal economic model which the Agadir countries have been pushed to adopt for more than 30 years helped fuel this discontent by **failing to raise standards of living and provide employment and social justice for populations**. Alarmingly, the DCFTA negotiations now carry the threat that this failed model will be strengthened and continue to dictate trade and investment relations between the EU and its Southern Mediterranean neighbours.

The EU, as their largest trading partner, **should support the efforts of the Agadir countries** (and the wider MENA region) **towards more sustainable and equitable growth and development models**, rather than facilitate closing down policy options by seeking to establish frameworks that allow transnational corporations and foreign investors to challenge political decisions in the public interest – essentially giving the 'market' a bigger role in determining policy than the state.

While alarming, DCFTA negotiations **potentially offer a window of opportunity to rebalance investment relations** and to bring them in line with the aspirations of the recent social upheavals that forced regime change in Egypt, Tunisia and Libya and fostered a reform agenda in Jordan and Morocco.

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Neoliberal economics: their role in the Arab Spring

Poverty, lack of employment and corrupt leaders ignoring the need for equitable redistribution of economic growth drove people to the streets in Egypt, Tunisia, Libya and other North African states in 2010-11 to demand regime change. A key factor was deep dissatisfaction with 'neoliberal economic policies'.

Neoliberal economics – as promoted by the IMF and World Bank, among others – see foreign investment as key to development. Since the 1980s, Egypt, Tunisia and Libya all diligently followed IMF and World Bank advice to restructure their economies and embark on economic liberalisation to make themselves more trade and investment friendly. This included developing export- and private sector-led growth, cutting back government spending, opening up and deregulating markets, privatising state-run industries and 'liberalising' trade by reducing import and export barriers.

But today we can see that these neoliberal policies (called 'structural adjustment programmes' or 'SAPs') contributed to the economic and social crises that triggered the Arab uprisings of 2010-2011. While corrupt regimes failed to ensure any meaningful redistribution of wealth, and allowed the benefits of economic growth to accrue to a small, wealthy elite, SAPs had severe social repercussions for the less well-off. Egypt, Tunisia, Jordan and Morocco all saw poverty rise as a result of structural adjustment. Privatisation of public enterprises went hand in hand with mass redundancies and the elimination of public sector jobs, while reduced public spending had a negative impact on public services, including in health and education. Reforms in the labour market to attract foreign investment led to wage reductions and job insecurity.

This growing inequality, lack of social opportunities and political repression caused tensions well before the mass mobilisations of 2010-2011. In Egypt in 1996, a wave of privatisations and deterioration in working conditions sparked a series of labour strikes.[2] As such, the 'Arab Spring' uprisings must be seen as the tipping point of long-burning dissatisfaction with these policies. So why are they back on the agenda, stronger than ever?

NEOLIBERAL ECONOMIC 'BUSINESS AS USUAL': A RECIPE FOR RENEWED SOCIAL UNREST

Despite its chequered history, the neoliberal 'development' model is alive and well in North Africa. In response to the Arab Spring, the G8 announced support for 'economic transitions and social reform' to the tune of US$20 billion via international development banks (of which G8 members are major shareholders). The IMF is issuing new loans to the Arab Spring countries, that will lock them in to long-term economic strategies on the same neoliberal footing that gave rise to the Arab Spring protests in the first place. The mantra for economic restructuring, reduced public spending and market liberalisation is familiar and includes recommendations to prioritise improvements in the business environment and bring down minimum wages (for example in Morocco, with the aim to reduce youth unemployment). To raise government revenues, there are also recommendations to bring in a modern value-added tax[4] which –as an indirect tax measure, and without compensatory measures – can disproportionally affect the living standards of the poor.

In response to the Arab Spring, the EU is also continuing virtually unchanged its economic policies towards the Southern Mediterranean. Europe continues to advocate for enhanced market access and post-establishment protections for its investors, including in the Deep and Comprehensive Free Trade Agreements it is preparing to negotiate with Egypt, Tunisia, Morocco and Jordan. There is little sign of a fundamental rethinking of the model underpinning relations with these Agadir countries that takes into account the wider socio-economic drivers of the revolutions.

EU trade negotiations and DCFTAs: ever-deeper neoliberal economics

One of the key responses of the EU to the Arab Spring has been a deepening of trade and investment relations with the region. The EU already holds Association Agreements with most countries in the Southern Mediterranean, with the exception of Libya, and is now seeking to expand these trade agreements into so-called Deep and Comprehensive Free Trade Agreements (DCFTAs).

DCFTAs are offered to countries such as Morocco, Jordan, Tunisia and Egypt who are engaged in political and economic transformation. Libya is currently the only country in the Southern Mediterranean without an EU Association Agreement, but since the fall of Gaddafi, the EU is only too keen to support Libya with what it sees as critical 'diversification of the economy and the creation of employment and trade opportunities' as well as 'partnerships with business and investors'.[5]

These IMF-approved DCFTA negotiations are aimed at 'further liberalisation of trade in agriculture, liberalisation of trade in services, accreditation and acceptance of industrial products and regulatory convergence'.[6] It sounds familiar, and alarm bells should be ringing.

EU–Arab trade relations: a snapshot

80% of all **Tunisian** exports are to the EU. Key exports include textiles and clothing, food products, petroleum products, chemicals, and phosphates.[7]

30% of **Egypt's** trade is with the EU, while EU imports of goods from Egypt are dominated by energy, chemicals, textiles and clothes. Egypt's main services exports to the EU include travel services and transport.[8]

Morocco's main exports include inorganic chemicals, crude minerals, fertilizers, petroleum products, clothing and textiles, citrus fruits, vegetables and fish. France (19.7 %) and Spain (18.2 %) are key trading partners.[9]

The EU is **Jordan's** second biggest trading partner after Saudi Arabia. EU imports of goods from Jordan are dominated by chemicals and mineral products. Jordan also exports travel services.[10]

Prior to the popular uprising in **Libya**, the EU accounted for 70% of Libya's total trade and continues to be a fundamental energy exporter to the EU.[11]

PREDICTED ADVERSE IMPACTS OF DCFTAs

DCFTAs will go well beyond current (already damaging) levels of liberalisation. An Independent Sustainable Impact Assessment (SIA) of the Euro-Mediterranean Free Trade Area – commissioned by the European Commission itself[12] – corroborates potential highly negative impacts for the Arab countries from free trade with the EU. Any economic welfare gains, the SIA says, are associated with large increases in imports and – without flanking measures – steady declines in domestic production.[13] The SIA projects that the manufacturing industry could shrink by as much as 29.6% in Jordan, 69.6% in Egypt, 64.1% in Morocco and 65% in Tunisia. Production reductions of over 90% can be expected in key sectors such as food and beverages, textiles and clothing, leather and footwear.

The associated loss of employment is calculated at 3% in Jordan, rising to 8% in Egypt, Morocco and Tunisia, with an accompanying downward effect on wages, with increased poverty as a result. The SIA further foresees negative effects on the distribution of income as a result of free trade, as potential welfare gains are expected to predominantly accrue to more wealthy consumers instead of to the less well-off and small producers. Further adverse impacts include a significant loss in government revenues in some countries, with potential for consequent social impacts through reduced expenditure on health, education and social support programmes; greater vulnerability of poor households to fluctuations in world market prices for basic foods; and negative environmental impacts, including on water resources, soil fertility and biodiversity and increased pollution levels.

DCFTAS: PROTECTING INVESTORS, FIRST AND FOREMOST

The Mediterranean region is of strategic importance to the EU, economically and politically,[14] so for the EU, 'investment protection agreements' are crucial to restore investor confidence in the region's transition states. To this end, the European Commission has identified investment protection, along with competition policy and public procurement, as a high priority area in the DCFTA negotiations.[15]

EU investment policy aims to provide EU investors and investments with legal certainty and a stable and predictable regulatory environment in which to conduct their business.[16,17] But until an EU-level investment agreement is agreed, individual member states' 'bilateral investment treaties' (BITs) govern investment relations with the Agadir countries and Libya. BITs establish the terms and conditions for investment, setting up a legally binding protection framework aimed at improving investor confidence and encouraging investment flows between the signatories to the agreements. Between them, Egypt, Morocco, Tunisia, Jordan and Libya have a total of 74 BITs with EU countries.

DCFTA COUNTRIES ARE COMPROMISING THEIR RIGHT TO SET POLICY-AND PAY THE PRICE IF THEY ASSERT IT

The bilateral investment treaties typically contain clauses on fair, equitable and non-discriminatory treatment, protection from (indirect) expropriation, the elimination of performance requirements (such as the hiring of local staff or the use of local resources as inputs) and the free movement of capital/profit repatriation. These clauses, which are generally very broadly phrased and thus open to expansive interpretation, are enforceable through a dispute settlement mechanism that allows companies to sue sovereign states directly before international tribunals for compensation in case of government (regulatory) actions that can undermine their future profits.

About 93 per cent of all international investment protection agreements contain this provision.[18] But these provisions are coming under increasing critical scrutiny as they impact on host government policy space to regulate in the public interests, and damages can lay a heavy burden on public budgets. Awards in investment treaty arbitration cases, which can run into hundreds of millions, are payable from public budgets, which perversely shifts investment risks onto society.

Box 1 Egypt: paying the price of 'investor protection' arbitration

Egypt is facing several arbitrations that relate to the reversal of contracts concluded in the days of the Mubarak regime. Corruption cases such as these are controversial, as the new government wants to deal with the legacy of its predecessors, while claimants argue they acted in good faith according to the regulations and conditions provided by the legitimate government at the time. Egypt, fearing more costly international arbitrations – Egyptian arbitration lawyers say claims are rarely below US$50-60 million (plus legal expenses)[19] – and a further loss of investor confidence, is increasingly seeking to settle corruption cases out of court. Current arbitrations include:

Indorama International Finance Limited v. Arab Republic of Egypt (ICSID Case No. ARB/11/32), which relates to the Mubarak regime's IMF-backed privatization programme of the 1990s. There is a campaign to overturn the sale of state assets sold at that time, allegedly below market value to Mubarak supporters. According to the Egyptian Center for Economic and Social Rights, between 1991 and 2009 a total of 382 companies were sold for a total of US$9.4 billion.[20] Lawyer Khaled Ali, who ran for president in 2011, is actively involved in the drive to annul corrupt contracts entered into by the Mubarak government.

Ampal-American Israel Corporation and others v. Arab Republic of Egypt (ICSID Case No. ARB/12/11) deals with a politically sensitive case over a gas deal signed with Israel by the old regime on unfavourable terms for Egypt. The new Egyptian government announced it would cancel the contract with EMG – the consortium in which Ampal has a 12.5 per cent stake – after having first sought to up EMG's gas purchasing price which allegedly had been set uncompetitively low by the former regime. Ampal claims the cancellation of the EMG contract amounts to an unlawful expropriation. Other EMG shareholders have also filed claims. To give an idea of what can be at stake in such claims: EMG has indicated that the group's international shareholders could pursue legal claims to the amount of 8 billion US dollars in damages.[21] For comparison: Egypt's 2012-2013 health budget is estimated at 4.5 billion US dollars.[22]

Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt (ICSID Case No. ARB/11/6), is being conducted under the Kuwait-Egypt BIT relates to the cancellation of the company's free zone status under the Mubarak regime and the increase of the gas price supplied under a contract.

Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt (ICSID Case No. ARB/11/16), deals with allegations of corrupt dealings with the former regime. In 2011, Egypt sentenced Damac chairman Hussain Sajwani to five years in prison and a fine of US$40.5 million for acquiring land for the Gamsha Bay luxury resort development from Egypt's ex-president Hosni Mubarak at below-market prices.

'INVESTMENT DISPUTE SETTLEMENT' UNDERMINES COUNTRIES' OWN JUDICIAL DEVELOPMENT

In the Arab countries in transition, investor-to-state dispute threatens to bypass efforts to build a stable domestic institutional framework.

International arbitration disputes between private parties and nation states can be administered under a series of institutions and arbitration rules. The principle organisation for investor to state dispute settlement is the International Centre for Settlement of Investment Disputes (ICSID). In addition to ICSID, investment treaty arbitrations can take place under the auspices of among others the International Chamber of Commerce, the Stockholm Chamber of Commerce, the London Court of International Arbitration (LCIA) and many local arbitral institutions and rules, with the arbitration rules of the UN Commission on International Trade Law (UNCITRAL) as a preferred option for ad hoc arbitrations.

International investment tribunals such as these are a parallel legal channel that circumvents national legal systems. Foreign investors are not required to first exhaust local legal remedies, but can revert directly to the international level. The arbitration system is widely criticised for its secrecy – proceedings typically take place behind closed doors and little to no information is divulged about (the settlement of) cases – and conflicts of interest among arbitrators. International law firms profit handsomely from investment arbitration cases and have played a dubious role in the proliferation of investment arbitration cases since the 1990s, actively alerting companies to the potential profits in ISDS litigation.

ARBITRATION BOOM: INTERNATIONAL LAW FIRMS PROFIT

The boom in investment arbitration is fuelled by international law firms who have discovered investment dispute settlement as a growth market in which there is much money to be made (see Box 2). Lawyers and consultants are actively advising foreign investors to consider invoking BITs protection when they feel they have been treated unfairly or required to give up contractual rights without adequate compensation. In Egypt, several companies that the government clamped down on for alleged corrupt dealings with the former regime have taken their case to ICSID. Egypt has seen six new ICSID cases since the start of the Arab Spring, most relating to the reversal of contracts concluded in the days of the Mubarak regime.

Investment dispute settlement is a highly lucrative business. Legal costs of ICSID cases average over USD 8 million,[23] in which the largest cost component are the fees and expenses for legal counsel and experts. These are estimated to average about 82% of the total legal costs of a case. The remaining 16% relate to arbitrator fees.[24] As such, both international law firms acting as counsel in arbitration cases as well as dispute arbitrators have a vested interest in preserving and expanding the investor to state dispute settlement industry.

Box 2 Heads we win, tails you lose: how law firms drum up business

Norton Rose, one of the top-20 investment arbitration law firms[25], has a whole section on its website devoted to the Arab Spring,[26] in which they exhort foreign investors to not simply accept economic losses as a result of the political unrest in the Arab Spring countries, including Libya, Egypt and Tunisia, but to investigate their options to claim damages under bilateral investment treaties. Norton Rose mentions losses arising "from physical and economic damage to property during riots and unrest, from the cancellation of concessions by the incoming governments, or from major policy changes contradicting the investors' legitimate expectations".

C5 MENA Investment Forum (formerly Euroforum), a think tank that provides "the business intelligence that corporate decision-makers need to respond to challenges and opportunities around the world"[27] staged a conference in June 2012 on Investment Protection in North Africa focusing on detecting and assessing risk exposure, and to prepare tailored investment strategies in a period of regime change. The conference, which brought together business leaders and top legal advisers, included various workshops on how to prepare for potential claims from new regimes, how to renegotiate contracts with transitional regimes and how to use BITs to resolve investment disputes.[28]

ICC MENA Investment Conference: The heightened interest for arbitration opportunities in the Arab Mediterranean region is reflected in the fact that the International Chamber of Commerce – as a leading institution for the resolution of commercial disputes – is hosting its first annual conference on International Arbitration in the Middle East and North Africa (MENA) in Dubai this April. The conference will bring together practising lawyers, corporate counsel, arbitrators, mediators, business professionals and academics coming from or doing business in the MENA region and will be looking at the consequences of the Arab Spring two years on.

RISE IN ARBITRATION CASES IN THE WAKE OF THE ARAB SPRING

The turmoil and political instability of the Arab Spring has had a negative effect on **foreign direct investment** (FDI).[29] Egypt saw more than US$8 billion in capital flight last year, while inflows fell to about US$3 billion. Apart from some investment from Gulf countries, Egypt is unable to attract foreign direct investment. Tunisia, where unemployment has reached a five-year high and now stands at 19%, finds itself in a similar situation.[30]

For the Arab region, commentators predict that the fall-out of the Arab Spring may generate a flood of investment claims, including international arbitration claims. Investment arbitration lawyers predict more disputes in areas such as mining, water, and agriculture.[31] The situation may be exacerbated by the protracted financial crisis, as in times of economic adversity companies are more willing to enter into litigation.

In addition to commercial disputes, the Arab Mediterranean States, who have entered into a large number of BITs, are also involved in a considerable and rising number of international treaty arbitration cases. In 2010, the Middle East and North Africa accounted for 9% of new cases at ICSID.[32] In 2011, that share had risen to 13%.[33] In fact, with 18 cases Egypt is party to more than 50% of all investment treaty arbitrations against countries in the region. Tunisia is involved in 3 cases (1 new), Jordan and Morocco in 5 and 3 (older) cases respectively. With 4 new cases against it at the time, in 2011 Egypt ranked second highest (after Venezuela) in the list of countries facing investor claims.[34] And commentators agree that there are likely more cases in the making as commercial disputes are elevated to the level of treaty arbitration, and new policy directions post-Arab Spring impacting on investors' "legitimate expectations" may give rise to further claims.

Investment protection: how it restricts public policy

There are several elements in the DCFTA countries' investment climate that may come under scrutiny in EU trade and investment talks. Post-revolution measures have been taken that could give rise to additional arbitration claims.[35] Several of these measures, in particular requirements to ensure employment and training opportunities for local workers, are aimed at ensuring incoming investment contributes to local development objectives. Other measures are aimed at shielding sensitive or emerging sectors from premature competition. Measures and policies of host countries designed to protect their economic interests, but which may come under pressure from DCFTA requirements, include the following:

Tunisia, while actively encouraging (export-oriented) foreign investment in key industry sectors, including call centres, electronics manufacturing, automotive parts and textile manufacturing, at the same time screens potential FDI to minimize the impact of the investment on domestic competitors and employment. Tunisia does not grant foreign investors the same rights as national economic actors in the agriculture sector, and places limits on foreign equity shareholding in sensitive sectors, including the services sector. The country allows foreign investment in certain state monopoly activities (electricity, water, postal services), but only on a special establishment or concession agreement and with certain restrictions on trade activities.

In **Morocco**, ownership in some sensitive sectors, such as phosphate mining, is reserved for the state and private ownership is not permitted. Like Jordan, Morocco has no general foreign investor performance requirements, but foreign investors complain about labour regulations, the difficulty of laying off staff and vague rules regarding the employment of foreign personnel.

Jordan operates several foreign trade zones that offer special incentives, including exemption from taxes, to investments relating to new industries that depend on advanced technology; industries that require locally available raw material and/or locally manufactured parts; industries that complement domestic industries; industries that enhance labour skills and promote technical know-how; industries that provide consumer goods and that contribute to reducing market dependency on imported goods. At the same time, Jordan maintains a state monopoly in sensitive sectors such as energy, water and food security, which are not open to investment. However, Jordanian law does not provide preferential treatment for the state-owned enterprises in these sectors.

Egypt continues to strongly regulate foreign investment. The country requires joint ventures in specific sectors, for example in upstream oil and gas developments. Following the revolution, Egypt put in place capital transfer restrictions that prevent foreign companies from sending more than US$100,000 out of Egypt without a valid commercial purpose, original documentation, and approval by the Central Bank of Egypt. Labour rules prevent foreign companies from hiring more than 10% non-Egyptians (25% in free zones). In privatisations, new owners are sometimes required to retain all workers. For most skilled jobs employers may hire foreign workers on a temporary six-month basis, but must also hire two Egyptians to be trained to do the job during that period. Only jobs where it is not possible for Egyptians to acquire the requisite skills will remain open to foreign workers. Foreigners are not allowed to operate sole proprietorships or simple partnerships. Individual or corporate ownership of agricultural land is expressly prohibited by law. There is a 49% ceiling on foreign ownership of insurance companies.

FOREIGN INVESTMENT PROTECTION V. HOST STATE PUBLIC POLICY: EU MIXED MESSAGES

Protective measures of this kind can conflict with the EU's trade and investment agenda, which seeks near-full reciprocal liberalisation of trade, elimination of non-trade barriers and maximum investment protection, including the right to challenge public interest (re) regulations. The range of policies that can be challenged under bilateral investment treaties (including environmental policies, energy policies, health policies, and policies related to economic crises) as well as the size of damages can impact heavily on public budgets and the willingness of governments to act in the public interest. Worryingly, the European Commission's thinking on foreign investment dispute settlement also appears to be going in the direction of more non-monetary remedies in the settlement of disputes, including the repeal or reversal of the contested measures concerned.[36] Where the scale of awards already has an adverse effect on governments' willingness to enact public interest measures, such an approach allows corporate interests an even more outright privileged hold over political decision-making.

The EU's Trade Department meanwhile on the one hand underlines as principles of EU investment policy that "home and host states fully retain their right to regulate the domestic sectors", as well as freeing the flow of capital payments and investment-related capital movements "while preserving the possibility to take safeguard measures in exceptional circumstances". But on the other hand, the EU is proposing stronger rules to clamp down on countries violating EU trade and investment rights and interest, and to enforce compliance with international trade and investment rules. The new regime is to include EU trade sanctions when a country does not comply with an arbitration ruling under multilateral or bilateral dispute settlement rules.

Thus, the EU approach at the very least sends out a mixed message. This may be attributed to pressure from those member states that are big outward investors to uphold the maximum protection for foreign investors as enshrined in their own bilateral investment treaties, and resist a rebalancing of the current rights-oriented framework with investor obligations, including in relation to corporate conduct and the observance of social and environmental standards.

Alternatives to the current investment framework

Since governments have agreed to a system that currently benefits corporations at the expense of the public interest they also have the power to change it. The aim of attracting productive investment to fulfil people's needs cannot be realised in the context of the current framework of investment treaties. It is for transition governments to follow the example of countries such as Brazil, South Africa, Bolivia and Ecuador, which have either never concluded international investment treaties or have started to terminate existing agreements and pledged to not sign new ones. Or governments could follow Australia's example and exclude the investor-state dispute settlement process from their investment agreements, so preventing companies from suing states in international tribunals.

ARAB COUNTRIES MAY NEED INVESTMENT...BUT OF THE RIGHT KIND

Arab countries need foreign investment to realise their development goals, including employment opportunities for a young and growing work force. But not all foreign investment is beneficial, and the contribution of FDI to social and economic development has all too often not been positive. DCFTA countries looking to economic reforms to better meet the needs of the population need more – not less – regulation to attract the right kind of investment, including performance requirements to ensure incoming investment contributes to local economies and domestic development.

The current investment protection framework highlights the need to balance investor rights with investor obligations – private gain must not come above wider social, environmental and economic interests. A new equilibrium is needed, where investors are not allowed to hold public policy-making hostage with excessive claims for loss of future profits, while governments should be better enabled to hold private (foreign) companies to account for (potentially) harmful corporate activities. The current arbitration system is non-reciprocal. Foreign investors cannot be sued for violating human rights or environmental standards. Governments can only act as a defending party in the international arbitration system, where corporate claimants are the only ones eligible for compensation.

Various authoritative institutions, including UNCTAD and the ILO are also increasingly criticising the current investment protection framework and advising amendment. UNCTAD voices its concerns regarding the investor-to-state dispute settlement system, underlining that "host countries – both developed and developing – have experienced that the possibility of bringing ISDS claims can be used by foreign investors in unanticipated ways. A number of recent cases have challenged measures adopted in the public interest and policymakers in some countries have found that international investment agreements can unduly constrain their domestic regulatory prerogatives".[37] The ILO is critical of the fact that investment agreements exclusively protect the property rights of foreign investors, without making any binding connection with international social standards, including labour and environmental obligations. Even where bilateral agreements suggest respect for internationally recognised human rights, these are never binding obligations.[38]

The governments of the Agadir countries can draw strength from the activities of other countries when negotiating positions on investment with the EU. The motivations of countries like Venezuela, Bolivia and Ecuador to opt out of ICSID; Australia, which has announced it will no longer include investor to state dispute settlement in any future investment agreements; or South Africa, which has begun to review its investment treaties to bring them more in line with its longer-term development objectives can be a learning experience.

Alternatives to the EU's investment agenda

REJECTING 'BUSINESS AS USUAL' FOR SUSTAINABLE DEVELOPMENT

European investment may be important to the Agadir countries, but they should not automatically comply with the EU's demands for more trade liberalisation. In their negotiations with the European Union, the Southern Mediterranean countries should insist on revisiting the substantive content of the bilateral investment agreements that govern their current investment relations with EU Member States so as to rebalance investor rights and protections with investor obligations and bring BITs provisions in line with the political, social and economic development objectives of the Arab Spring.

RENEGOTIATING EU MEMBER STATES' BILATERAL INVESTMENT TREATIES

The EU is unlikely to want to accommodate a more inclusive growth and development-oriented agenda in relation to investment as long as the bilateral investment treaties with EU member states are still in place. Any rebalancing of investor rights with obligations relating to investor behaviour will be opposed by EU member states as a reduction from the protections currently offered by their own bilateral investment treaties.

So to reorient the investment framework, the Agadir countries should begin by demanding renegotiation of their bilateral investment agreements with EU member states. Not least because, even if a more progressive EU investment chapter should emerge, its negotiation, ratification and implementation will be years in the making, while all the while the existing BITs – which, with their very broadly phrased open-ended protections enforceable by ISDS, constitute a serious public policy hazard, in particular for smaller, weaker countries – would remain in force.

WHAT ARE THE ALTERNATIVES?

Alternatives are out there. Many proposals have been put forward to amend or overhaul the international investment protection framework.

What civil society thinks: Arab civil society rightly warns that the EU's trade and investment policy will not bring about the kind of reforms that would promote equity, as they reduce state freedom to decide the orientation of its economic system, with potentially far-reaching social, economic and development implications, as measures to safeguard universal public services, labour conditions, environmental protection, and even financial stabilisation measures etc. come under threat from liberalisation, deregulation and privatisation. It has sounded the alarm about premature liberalisation carrying the risk of deindustrialisation and concentration of production in primary commodities.[39]

This critique is reflected by civil society in Europe, which actively seeks to influence the policy debate surrounding the EU´s trade and investment negotiations and the frameworks and mandates that govern it. In the run up to the European elections of 2014, European civil society groups focusing on trade and investment will be campaigning for an Alternative Trade Mandate[40] for Europe's trade negotiations that also includes recommendations on what criteria investment chapters therein should meet to contribute to sustainable development. It includes the following:

- International trade and investment agreements must include binding obligations for foreign investors and signatory states to ensure that foreign investment serves social, environmental and human rights goals. This requires a commitment to firmly embed the regulatory framework for foreign investment in the international framework of social, labour, economic, human rights and ecological standards. Rights and obligations set out in human rights law and in the respective treaties and agreements,[41] as well as in national laws, must prevail over the privileges of foreign investors. Investors that violate fundamental rights must be held accountable. Affected communities and governments must have the possibility to bring transnational corporations to court.
- Investments should be thoroughly assessed and only been given the go-ahead if they have a demonstrable positive impact on affected communities, do not undermine the stability of affected ecosystems and contribute to wider social and environmental goals.
- States are obliged to distinguish between harmful and beneficial investments in relation to sustainable development, to regulate corporate conduct and enforce good investor behaviour so that investment is steered towards democratically decided policy objectives.
- States (both those that are a source of, and those that are a destination for, investment) have an obligation to maintain economic and financial stability, which should include preventing over-reliance on foreign investment, as well as prudent policies in relation to free flows of capital, which may include caps on expatriating corporate assets and profits.
- Investors must respect human rights and environmental standards, and foreign investors and their subsidiaries should bear legal liability in their home states for human rights violations, environmental destruction and corrupt practices in the countries they operate in. Clauses in investment treaties that stand in the way of states' obligation to respect, protect and fulfil human rights, and their duty to ensure sustainable development, must be terminated.
- Investors' abuses of human rights must be open for judicial remedy in a comprehensive and legally binding corporate accountability framework, to which citizens and communities have access. The international community must establish an international court for abuses of human rights committed by transnational companies.

With a growing number of countries directly and negatively affected by the investor bias of the current system, the call for a reorientation is even reaching vested institutions.

In 2012, the OECD-hosted **Freedom of Investment (FOI) Roundtable** in which governments from all regions in the world participate, embarked on an assessment of the dispute settlement system applicable to investor-state disputes under investment treaties (ISDS). A scoping paper was prepared that listed many key and contentious issues in relation to the current ISDS system.[42] A public consultation was held between 16 May and 9 July 2012, the outcomes of which are available on the OECD website. They will be used to "influence individual and joint government policies as well as future initiatives relating to ISDS both at the OECD and other international organisations"[43].

The United Nations Conference for Trade and Development is proposing an **Investment Policy Framework for Sustainable Development (IPFSD)**[44] to assist the development of a new generation of investment policies that "place inclusive growth and sustainable development at the heart of efforts to attract and benefit formulating national investment policies and in negotiating investment agreements or revising existing ones". UNCTAD's new Guidelines for Investment Policy-making were presented in February 2013.

The UN's Special Rapporteur on the Right to Food, Professor Olivier De Schutter, recently published a book on foreign direct investment and human development[45], which concludes that the far-reaching protections to investors' rights that we see today annul, or at least seriously diminish, the benefits developing countries have a right to expect from the arrival of FDI and examines a variety of tools that could be used, by capital-exporting and capital-importing countries alike, to ensure that FDI works for development, and that international investment agreements contribute to that end.

To strengthen the debate on alternatives with a practical tool to review the nature and purpose of international investment agreements as they stand, the International Institute for Sustainable Development developed a Model International Agreement on Investment for Sustainable Development has the clear purpose "to foster international investment that is supportive of sustainable development aspirations and requirements in both the North and South". It seeks to develops provisions that balance the rights and obligations of investors, host states and home states; and includes specific proposals to address the flaws in the investor to state arbitration system.

The growing body of critical analysis of the current system for investment protection provides governments with ample ingredients to determine political visions on how to rebalance investment protection with legitimate public interest concerns, which may range from modest amendments to a more fundamental resetting of the system.

Conclusion

The export-led growth model, based on privatisation, liberalisation and attracting foreign direct investment has largely failed to deliver for the countries of the Arab Spring.

The investment policy of the EU – as laid down in the EU's Member States' bilateral investment treaties and continued in the current mandate of the European Commission to negotiate on investment - has played a key part in this failure – designed exclusively to protect the position of investors and not taking into consideration wider public interests. As such, the EU's investment framework is at odds with the call for protection of people's basic economic and social rights, and to address the fundamental inequalities in the Agadir countries that emanates from the Arab Spring. Where the Arab revolutions, in response to the needs of the people, call for more inclusive and sustainable growth and a more equitable distribution of wealth, trade and investment policies should be redesigned accordingly. Investment must be managed to contribute to development objectives.

To respond to the social revolutions, the Agadir countries must look for revised policy frameworks, including on trade and investment, that allow them to choose new policy directions as needed. The EU, as their largest trading partner, should support the efforts of the Agadir countries (and the wider MENA region) towards more sustainable and equitable growth and development models, rather than facilitate closing down policy options by seeking to establish frameworks that allow transnational corporations/foreign investors to challenge political decisions in the public interest.

In a letter to the European Commission in February 2012, 43 civil society organisations from the Arab region wrote: "While Arab countries are seeking to revise their constitutions and their development plans, they are also addressing their regulatory capacities to serve the public interest and to redress violations of citizens' economic and social rights undertaken by previous regimes as well as exploitation of the countries national resources and economic assets."[46] For that reason, an Arab CSO delegation that visited the EU institutions in September 2012 called for an assessment, (prior to their conclusion) of the new areas included in the EU's DCFTAs: competition policy, government procurement, and, last but not least, investment protection and their impact on the right to development.[47]

While investors should be entitled to a reasonable level of protection, this should not detract from government's prerogative to reregulate in good faith to reflect new policy priorities. Both home and host country governments should consider their extra-territorial obligations and link behaviour of transnational investors to international social and environmental standards.

The Agadir countries should refrain from signing any far-reaching investment agreement until they are clear on how they wish to harness investment for the more inclusive growth and sustainable development demands that underpinned the social and political protests in their countries, and on how trade and investment frameworks should be redesigned and redirected to suit their chosen development path.

Endnotes

1 In February 2004, Egypt, Jordan, Morocco and Tunisia signed the so-called Agadir Agreement, which entered into force in 2006. The agreement 'aims at harmonizing of general and sectoral economic policies in member countries in relation to foreign trade, agriculture, industry, financial and taxation systems, services, and customs with the view of achieving objective competition amongst member countries. The agreement provides for full liberalization of trade in industrial and agricultural goods as of its date of entry into force. Moreover, member countries are committed under the Agreement to eliminate all non-tariff barriers including quantitative restrictions, financial, administrative and technical barriers that may be imposed on imports.' (Source: http://www.mit.gov.jo/Default.aspx?tabid=733)

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6 http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/euromed/

7 CIA World Fact Book: Tunisia. At: https://www.cia.gov/library/publications/the-world-factbook/geos/ts.html

8 European Commission/DG Trade – Bilateral relations: Egypt. At: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/egypt/

9 CIA World Fact Book: Morocco. At: https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html

10 European Commission/DG Trade – Bilateral relations: Jordan. At: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/jordan/

11 The EU was Libya's major source of imports and its largest market for exports in 2010. EU imports from Libya are dominated by energy, in particular petroleum and petroleum products. EU exports to Libya consist mainly of fuels and mining products, machinery and transport equipment, and agricultural products. Source: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/libya/

12 De EU's past and present Sustainability Impact Asessments can be accessed at: http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/ The Terms of Reference for the EMFTA SIA were issued in 2003. The SIA was completed in three stages: Phase 1 in 2004, Phase II in 2006, and Phase III end 2007.

13 Sustainability Impacts of the EuroMediterranean Free Trade Area, Final Report on Phase 2 of the SIAEMFTA Project, March 2006 (Revision), p.18. At: http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_131340.pdf

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16 Source: http://ec.europa.eu/trade/creating-opportunities/trade-topics/investment/

17 The EU's Trade Department highlights the EU-Korea Free Trade Agreement as the most recent example of an agreement that reflects EU investment policy negotiations. The text of this agreement can be found at: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/korea/

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27 http://www.c5-online.com/about_c5

28 For a full programme, see: http://www.c5-online.com/investmentmena

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34 UNCTAD – IIA Issues Note – No. 1, April 2012.

35 Claims may also arise from failure of the state to protect the physical security of investment, for example in Tunisia, where various branches of French retailing companies such as Géant and Monoprix were looted and burned in the upheavals of January 2011.

36 Gaukrodger & Gordon, 2012, p. 28.

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SEATTLE TO BRUSSELS NETWORK

The S2B network is the European part of the global 'Our World Is Not For Sale' network (OWINFS). The S2B network includes development, environment, human rights, women and farmers organisations, trade unions, social movements as well as research institutes.

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www.tni.org

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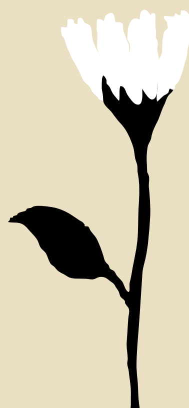

41 This includes the Universal Declaration on Human Rights and numerous – ratified and for signatory states binding – international treaties, such as the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as in the International Covenant on Civil and Political Rights and many regional human rights instruments the International Labour Organisation (ILO) conventions and environmental treaties and declarations, such as the Rio Declaration (1992), the Convention on Biological Diversity (1992) and the Kyoto Protocol (1997).

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