Reclaiming Public Interest
in Europe's International Investment Policy

EU INVESTMENT AGREEMENTS IN THE LISBON TREATY ERA: A Reader

Seattle to Brussels Network

CONTRIBUTORS

TNI · CEO · 11.11.11 · SOMO · M.A.I.S. · CRBM · Both ENDS · WEED

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This publication comes at a crucial time. The Lisbon Treaty has given the European Commission added clout; it can now negotiate trade and investment treaties by itself, on behalf of all 27 members States. Thanks to Lisbon, an already undemocratic Europe has become even less so and is using its broad mandate to inflict as yet untold damage on the rest of the world through a series of apparently technical trade and investment treaties to pry open the markets of poorer, more vulnerable countries.

At home, as well-informed Europeans can tell you, the Commission governs on behalf of a tiny minority and above all on behalf of transnational corporations and banks whose innumerable lobbyists in Brussels are well paid to make sure things stay that way. The quite different interests of small and medium sized enterprises that provide 90 percent of European employment are disregarded; popular sovereignty is an outdated myth and European citizens are reduced to the status of consumers in an evermore market-oriented, neoliberal space about which they have little to say.

A geopolitical entity—in this case the European Union--unwilling to defend the interests of the vast majority of its own people, one which is busy actively downgrading their public services and hard-won rights, can hardly be expected to care anything about the rights of people elsewhere. Every Bilateral Investment Treaty, every Economic Partnership Agreement that the EU has drawn up with a weaker country has proclaimed this truth anew. All the rights are on the side of the corporations, all the obligations fall upon the treaty's victims. Heads I win, tails you lose. The goal is to satisfy the demands of transnational business to be given everywhere an absolutely free hand.

This business agenda has not changed since the late 1990s when the Multilateral Agreement on Investment, secretly negotiated inside the OECD, was defeated by citizen action. Similar action is required now, jointly undertaken, shared and coordinated by European citizens with those of the target States. The social, labour and environmental rights of citizens everywhere are jeopardised by treaties imposing total freedom for investors and zero protection for their captive "partners". The valiant example of Bolivia shows it is possible to resist.

Do not be put off by the apparent complexity of the issue. Throwing up a smokescreen of complexity is another Commission specialty along with communications and information barriers nearly as difficult to penetrate as the vaults of the European Central Bank. The basics are simple; those who have written for this publication know them inside out and have explained them here in clear language.

Everything you need is in these pages: the best way to undermine a system that has only contempt for democracy is to read, learn, share the knowledge and act.

Susan George, June 2010
President of the Board of TNI and honorary president
of ATTAC-France [Association for Taxation of Financial
Transaction to Aid Citizens]

Introduction: 50 years of BITs is enough

The S2B Investment Working Group

1 December 2009 was a remarkable day. In Geneva, the WTO organised its 7th Ministerial Conference to examine its role, or lack thereof, in the global crises and discuss the failed Doha Round negotiations. Meanwhile, in Frankfurt, a conference celebrated the 50th anniversary of the world's first Bilateral Investment Treaty (BIT), signed on 25 November 1959 between the Federal Republic of Germany and the Islamic Republic of Pakistan[1]. Finally, the day marked the entry into force of the Lisbon Treaty, taking competence on foreign direct investment (FDI) away from the European Member States and incorporating it into the common commercial policy of the European Union.

That transfer of competence is the latest episode in the European Commission's struggle to obtain a larger role in investment policy (see chapters 5 and 7). It has already been the subject of numerous discussions and speculations in past months, and will become even more hotly debated in the coming weeks when the European Commission produces proposals on how to put this competency shift into practice. As the Commission and Member States continue to wrangle about who gets what, and the business groups strive to make sure their interests are secured (see chapters 2 and 3), the Seattle to Brussels network wants to open up the debate and call for a thorough overhaul of current BIT practice (see the S2B statement). This reader is hopefully a valuable contribution to that debate.

Since 1959 more than 3000 BITs have been signed, mostly in the past 15 years and mostly between developed and developing countries. BITs originated from the desire of developed countries to secure financial and legal protection for their investors, and their investments, in developing countries. In order to persuade developing countries BITs are often presented as development instruments: because they offer protection to investors, they will attract investments. However, there is little proof that this is indeed the case, let alone that BITs promote productive and sustainable investments (see chapters 4 and 6).

A corner stone of the protection offered by BITs is the possibility for investors to sue governments before international arbitration panels. Since the first such case in 1990, more then 300 cases have followed, often resulting in governments paying enormous amounts of compensation (see chapters 11 and 13). This has not only attracted international law firms, responding to the prospective business opportunities, but has also made some governments more cautious about what rights and obligations BITs should contain and how they should be formulated. There is a growing realisation that investment protection should not undermine the rights of governments to regulate and design policies to further public interests, to protect human rights and to foster sustainable development.

Important in this new consciousness is the fact that developing countries have become a source of foreign investments. Countries exporting investments (home countries) have become importers (or host countries) too and, since BITs are reciprocal, developed countries have recently found themselves subject to legal challenges by foreign investors. So far the (Western) European countries, in contrast with the USA and Canada, have largely been spared such challenges and have consequently not felt the need to redraft their model texts for negotiating BITs. However, that may change in the future in response to actions such as the case brought by the Swedish investor Vattenfall against Germany, seeking compensation of more than 1.4 billion Euros, (see chapter 12).

The main bone of contention surrounding BITs is the so-called investor-to-state dispute settlement mechanism. Its very existence is exceptional since international agreements in general only contain provisions pertaining to state-to-state dispute settlement. Within BITs, investors are allowed to completely by-pass the domestic legal system and go straight to international arbitration; a highly opaque process, to the extent that even the exact number of cases cannot be established.

Within these arbitration panels, the often vague BITs provisions are consistently interpreted in favour of private investors. This is somewhat unsurprising, given that most BITs have the protection of the interests of investors as their sole stated objective. In order to avoid the hollowing out of the rights of governments to regulate and act to serve the public good, and in order to create more balance between rights and obligations, it is therefore necessary to broaden the objectives, make provisions more precise, build in limitations and add obligations for investors and home country governments too. To this end, many various organisations have proposed viable alternatives to the BIT agreement infrastructure (outlined in chapter 15); all that remains is the political will to adopt these proposals, laying the foundations for a fairer system of international trade.

Most of the BITs are made up of the following standard provisions[2]:

- A preamble with **objectives** of the agreement: mostly limited to investor protection, sometimes accompanied by investment promotion.

- **Definitions** of investors and investment: often very broad, including portfolio investments and intellectual propriety rights, expanding the coverage of the protection offered.

- **Pre-establishment rights or market access (MA)**: gives investors the same rights to make investments as domestic or other foreign investors. Usually BITs do not offer much market access but rather focus on protecting investments that have already been allowed to enter into the country.

- **National Treatment (NT)**: gives foreign investors at least the same treatment and protection as domestic investors.

- **Most Favoured Nation (MFN)**: guarantees the signatories, and their investors, treatment equal to the country with which the host has the most favourable terms.

- **Fair and Equitable Treatment (FET)** : while NT and MFN take the treatment of domestic or other foreign investors as a reference point, FET offers a minimum or specific level of protection. In the past this has been interpreted very broadly by arbitration panels.

- **Full protection and security**: offers protection against damage caused by third parties.

- **Restrictions on expropriation**: limits the possibilities for public authorities to expropriate foreign investors and obliges to pay full and prompt compensation.

- **Indirect expropriation or "regulatory takings"**: controversial notion that expropriation can also be an indirect result of a government action. This opens the door for challenges against all kinds of government policies; for instance protection measures that increase the costs of environmental exploitation and therefore reduce expected profits.

- **Free Transfer of Funds**: allows investors to repatriate funds related to investments (profits, interests, fees and other earnings).

- **Limits on local content requirements**: bans or limits the possibility of governments to require that foreign investors use local "contents", such as inputs and staff.

- **State-to-state dispute settlement**: creates a mechanism to solve disputes between the countries ("parties") arising from the agreement; usually starts with consultation and mediation before moving to arbitration.

- **Investor-to-state dispute settlement**: unique provision that gives investors the right to challenge the government of the host state before international tribunals such as ICSID (World Bank), UNCITRAL (United Nations) or the International Court of Arbitration in Paris.

On the other hand there are a number of provisions that rarely show up in BITs:

- **Broader objectives:** including sustainable investment

- **Transparency**: especially with regard to the dispute settlement mechanism

- **Obligations on the home country:** to promote sustainable investments, transfer technology, fight corruption, etc

- **Obligations on the investors**: to respect the law, human rights, labour rights, corporate social responsibility rules (see Chapter xyy Obligations of corporations)

- **Obligations to exhaust domestic remedies**: obligates investors to first seek redress before domestic administrative and legal procedures and courts before turning to international arbitration

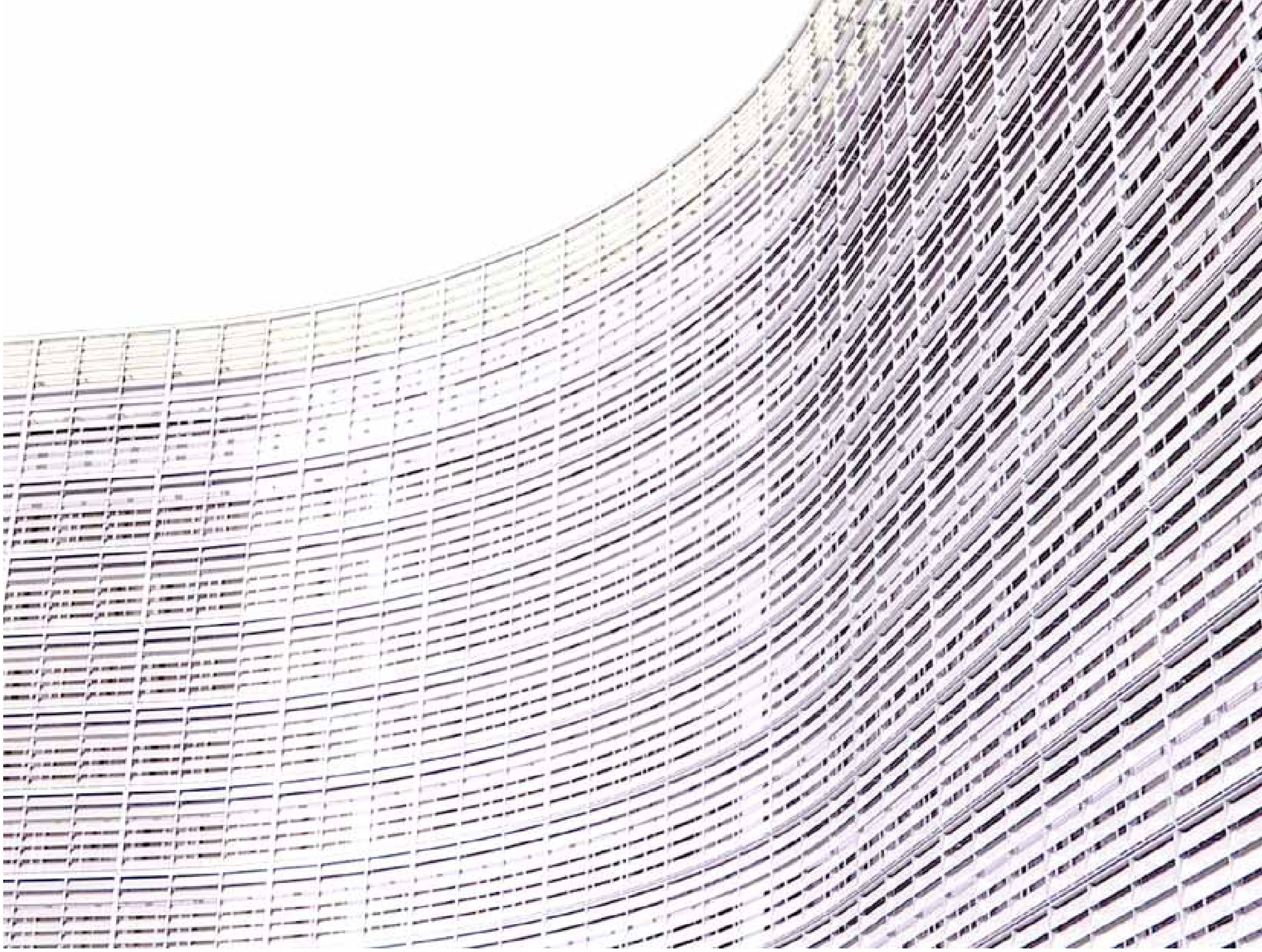
- Obligations of the host country to respect and implement **international labour conventions and environmental agreements**, supplemented with enforcement mechanisms involving trade union and civil society consultation.

The Lisbon Treaty has not only put FDI within the common trade policy of the European Union, but has also placed common trade policy within the Union's broader foreign policy; and that foreign policy within the overall objectives of the Union, which include poverty eradication, respect for human rights and a commitment to sustainable development.

Regardless of whether the European Union returns the competence on FDI to Member States or the European Commission takes over BIT negotiations, never again should BITs be allowed to exclusively serve the interests of investors.

The S2B Investment Working Group
June 2010

1 http://www.50yearsofBITs.com
2 See some general introduction to BITs such as Peterson, L. E., May 2005, The *Global Govenance of FDI: Madly off in all directions*, FES Occasional Papers, Geneva, N°19. Available online at http://library.fes.de/pdf-files/iez/global/50084.pdf; Cotula, L., August 2007, *Investment Treaties*, IIED Sustainable markets Investment briefings, N°2., Available online at http://www.iied.org/pubs/pdfs/17013IIED.pdf



Section 1 Europe's current and future investment policy

1. The Lisbon Treaty and the new EU investment competence

Marc Maes, 11.11.11

With the coming into force of the Lisbon Treaty on 1 December 2009, foreign direct investment (FDI) has been added to the list of issues belonging to the exclusive EU common trade policy[1]. This implies that EU Member States cannot continue concluding BITs and that the Commission will take over their competences.

Prior to the Lisbon Treaty, very few preparations had been made to fill the vacuum it created. No transition mechanism was created for the Member States, nor were any guidelines for the way the Commission would deal with FDI outlined. Also, no common interpretation was agreed for the exact meaning and implications of the new treaty text.

Nevertheless, the DG Trade did create a new "Investment Policy Unit" led by Jean-François Brakeland, who has since been briefing various stakeholders of the Commission's proposed approach. The issue has also been discussed in the EU Council's Trade Policy Committee (TPC) which is the working party of the Council that deals with the EU's trade policy. The TPC is composed of trade experts and diplomats from the EU Member States and was until 30 November 2009 known as "Committee 133".

Scholars continue to debate the possible interpretations of the Lisbon Treaty, but it is the decisions taken by the EU institutions that will determine the new investment policy framework of the EU, and there is no doubt that it is the European Commission which will propose the way forward. From the Commission's briefings and information circulating among the Member States and in the Parliament, the following two-step approach has become clear:

The Commission will come out by the end of June with two proposals

1- a draft regulation to fix the vacuum created by transferring FDI competence to the EU-level

2- a communication proposing the new EU investment policy which feeds into negotiating mandates for EU investment agreements (or investment chapters within trade agreements)

The Temporary Regulation

The Commission will produce a draft regulation which will be submitted to both the Council and the European Parliament (as the Lisbon treaty has given the EP legislative powers in the field of the common trade policy).

The regulation will do two things: recognise or "grandfather" the existing BITs and delegate the newly obtained EU powers back to the Member States. The draft is ready but the Trade Commissioner has insisted that it be released together with the Communication.

- **Grandfathering** the existing BITs: this will allow the Member States to maintain their existing agreements. The regulation will recognise all Member States' BITs that are in force on the day the regulation becomes active; including Member States' BITs ratified after the Lisbon Treaty came into effect. The regulation may set an end date on the validity of the Member States' BITs and the Commission is also expected to attach certain conditions to this temporary situation. One condition is certain: the BITs must comply with EU law, which implies that some states will have to renegotiate existing agreements to make them compliant[2].

- **Delegation of competence or empowerment.** This may seem quite peculiar, but the fact that the Lisbon Treaty has handed competence to the Union does not prevent the Union from delegating it back to Member States, something which has been done before. The delegation will allow the Member States to re-negotiate their BITs, but also, it seems, to negotiate new BITs. The immediate questions arise: How long will it last? And what conditions will be attached to this delegation?. Conditions could include: Member States having to notify the Commission or ask permission; the Commission sending an observer to the negotiations; new BITs having to contain certain provisions; and new BITs contributing to the broad policy objectives of the Lisbon Treaty including sustainable development, poverty eradication and the respect for human rights.

It is clear that the draft regulation will lead to long discussions in the Council's TPC as well as in the Parliament. It will be one of the first major pieces of trade legislation that the Parliament will have to deal with. This of course will open opportunities for civil society organisations to voice their concerns and present proposals.

The Temporary Situation

Since the co-decision procedure (or 'ordinary legislative procedure' as it is now called) can take as much as 18 months, it will take some time before the current vacuum is filled. The Commission has admitted the vacuum exists and that this is a delicate legal situation, leaving the door open for challenges. In response, they have not issued any formal recommendations but have allegedly made the informal suggestion that Member States can continue to ratify BITs they have signed and sign the BITs they have initialled. They may also be allowed to round off ongoing negotiations depending on how far they have progressed. They should, however not launch any new negotiations. The Commission is also said to have indicated that Member States should terminate their BITs with other Member States, because these BITs have created inequality between EU investors within the EU (this is actually one of the problems of BITs, not just within the EU but also between foreign investors and local investors in all the countries that have signed BIT agreements).

It is clear that the Commission's informal advice signifies it is not intending to stop Member States from rounding off their BIT-negotiations or ratification procedures. But this does not seem to shield any member state government from legal action by its citizens for illegally negotiating investment agreements.

The New EU Investment Policy

Together with the draft regulation, the Commission is preparing a Communication on the content of the new EU investment policy which it will present at the same time.

The Commission has indicated it does not intend to negotiate BITs with all possible countries, but that it wants to concentrate on the large trading partners like India, Canada, Russia, China and Mercosur. The Commission also prefers to include investment provisions in the Free Trade Agreements (FTAs) rather than to negotiate stand alone investment agreements, although it may negotiate these with countries that it is not negotiating FTAs with (like China). It seems that some of these trading partners, like Canada, are themselves demanding an investment protection chapter in their FTA with the EU, which probably explains why the Commission decided not to wait until autumn to present its communication, as it had announced earlier.

With regard to content, the main concern of the Commission is to achieve "*legal certainty and maximum protection for EU Investors*"[3]. The Commission also said it is not seeking a detailed template but rather a list of principles which can be referred to for each particular negotiation. To this end, Member States have been invited to make suggestions, including whether they, for instance, want to include certain clauses (labour, environment etc.), or want to exclude certain sectors (culture, agriculture, etc.).

Remaining Issues

In the meantime the discussion regarding the definition of FDI is not solved, meaning the scope of the EU's competence remains an open question. Regardless, it will be difficult to maintain that FDI includes portfolio investment, which will therefore probably remain a member state competence. But in that case, EU BITs including portfolio investment would be "mixed agreements" (involving competences form the EU and the Member States). Such agreements would not only require a consensus in the Council but also ratification by all Member States.

Conclusion: the EU's new investment competence will lead to important and lengthy discussions in and among Member States, the Commission and the Parliament. These discussions will not only open up opportunities to call for a new EU approach but also for a thorough revision of the BITs-practice of EU Member States.

1 Art.207 of the Treaty on the Functioning of the EU (TFEU).

2 Note that besides the coming into force of the Lisbon Treaty another important event occurred in 2009 affecting the EU Member States BITs- practice. On 3 March 2009 the European Court of Justice ruled against Sweden, Austria and Finland for their failure to adapt their BITs to the EU competence on transfer of capita. The Court ruled that these countries had to renegotiate all their BITs containing non compliant articles. This ruling implied that all other EU Member States having BITs with such articles would have to renegotiate their BITs. The Commission estimates that about 300 BITs must be renegotiated. The ruling was repeated on 19 November with regard to Finland. See: http://internationallawobserver.eu/2009/03/03/ecj-on-the-duty-of-member-states-to-eliminate-incompatibilities-of-their-BITs-with/ and http://ec.europa.eu/internal_market/capital/framework/court_en.htm

3 Quoted from the public part of the highly censored EU document [5667/10 WTO 25] : *Outcome of proceedings of the Trade Policy Committee (Full Members) meeting on 22 January 2010.* http://register.consilium.europa.eu/pdf/en/10/st05/st05667.en10.pdf

2. The corporate investment agenda

Pia Eberhardt, Corporate Europe Observatory (CEO)

"Now that the Lisbon Treaty is set to enter into force, the Commission will have new tools to foster the interests of Europeans doing business abroad. The new competences on investment should be used to improve the capacities for our companies to invest in a more legally secure environment."

European Services Forum (ESF) in a letter to Commission President Barroso, November 2009

Transnational corporations and their lobby groups have long been actively involved in the global crusade for investment liberalisation and the protection of their property rights abroad. But for now, Europe's corporate lobby still seems to be analysing the implications of, and establishing its position on, the EU Commission's new investment powers. However, past business campaigns on investment, industry's aggressive agenda in the EU's trade talks and some of the initial corporate reactions to Brussels' new powers are reason enough to be worried about a renewed push for handcuffing states and societies through a new corporate investment regime.

From the MAI to the WTO to the FTAs

In the 1990s coalitions including the International Chamber of Commerce (ICC) and the European Roundtable of Industrialists (ERT) feverishly campaigned for the infamous Multilateral Agreement on Investment (MAI) in the OECD. After the collapse of the MAI talks, European industry in particular pushed hard for an investment agreement in the WTO. While this campaign also failed, business does not seem to have given up on the idea of a multilateral investment agreement. Just recently, the American Chamber of Commerce to the EU stated that "the WTO should be the forum... to find common ground on FDI [foreign direct investment]"[1].

But in recent years, pending a multilateral initiative, corporate lobbying around investment has mainly targeted bilateral and regional free trade agreements (FTAs). Here, the EU Commission's trade department works hand in hand with big business. Long before FTA talks start, DG Trade sends detailed questionnaires to key industry groups asking for their input and specific interests. During negotiations, high-level officials have monthly exclusive meetings with lobby groups like the European employers' federation BusinessEurope, in which they share sensitive negotiation details and receive concrete examples of the investment barriers industry wants them to remove. Big business is also represented in the EU's market access teams, working in Brussels and on the ground in 30 countries outside the EU to identify and get rid off any investment regulations that stand in their way.

What BusinessEurope and others want from the FTA-negotiations copies their MAI and WTO investment liberalisation agenda:

· **the removal of all conditions and regulations for foreign investment** which could be used to maximise benefits for host societies. These regulations range from limiting foreign ownership of European companies to preventing so-called performance requirements; including, for example, an obligation for foreign banks to lend to small and medium enterprises (SMEs).

· **equal treatment of all foreign and domestic companies**, which prohiBITs governments from giving special support to domestic companies or those from other countries in the region.

· **unfettered repatriation of profits from foreign subsidiaries**, irrespective of any potential balance of payment problems and the nature of the companies' contribution to the host state economy.

The investment provisions in the recently concluded FTAs with Korea, Peru and Colombia serve as examples in illustrating how the EU serves as a willing executioner for these interests. The agreement with Peru and Colombia, for instance, guarantees European investors access to the manufacturing sector in those countries. In regard to Korea, the FTA has liberalised investment in nearly all service and non-service sectors.

The Corporate Wish-List for the Commission's New Investment Powers

There is one thing that business does not yet get from the EU's FTAs: legal protection for foreign investment. Until now, the Commission could negotiate investment liberalisation, but simply did not have the power to ask for investor protection. This changes under the Lisbon Treaty, which grants full investment powers to the EU.

While BusinessEurope has seen this as the Treaty's key trade policy change, the corporate investment lobby has not yet declared its hand. However, a number of key corporate interests are emerging in the debate.

To start with, industry craves legal security for the 1,700 or so BITs of EU Member States. EU members have lost their power to negotiate and implement these deals meaning that, at the moment, any arbitration panel could question their legality, which BusinessEurope warns "would leave the EU company concerned with no legal defence of its rights[2]". No wonder corporate lobby groups want to see current BITs integrated into EU law – ideally "without prior time-consuming examinations" as the German government demanded, echoing German business demands[3]. Such an examination could raise uncomfortable questions about the lack of environmental and labour clauses in BITs and their built-in investor-to-state dispute settlement.

But European business wants more than just to secure the status quo, as legalising existing BITs will be of little benefit to corporations from EU countries which only have a few of these treaties. And it will take too long until a fully fledged EU level investment policy will fill that vacuum. So industry wants to see legislation introduced that not only 'grandfathers' existing treaties, but also enables Member States to update them and negotiate new ones[4].

And what is the corporate vision for the future EU-level investment policy? European business wants treaties that "provide at least as many investment rights as currently provided by member state BITs[5]". This includes the above mentioned corporate shopping list of one-sided investment liberalisation plus investor protection, particularly against expropriation, as well as investor-to-state on top of state-to-state dispute settlement.

Whether these elements should make up a model EU BIT or simply guide case-by-case negotiations with third countries seems to be a contentious issue within the business community. The German industry federation (BDI) in particular is engaged in a campaign for a model treaty based on the tough German standard enshrined in the country's existing 120 plus BITs[6] (see article xxsee chapter 3). To back this agenda, the BDI together with the German government conducted a study of German firms' experience with BITs. It praises the current system, warns of the danger of weaker standards and reduced attention to corporate needs as possible consequences of Brussels' new powers, and calls for joint action from the German government and industry to ensure German style investor protection at the EU level[7].

BusinessEurope, on the other hand, argues against a model investment treaty and wants to see a more flexible approach, addressing specific corporate concerns on a country-by-country basis[8]. This seems to be in line with the Commission, which has already stated its reluctance to go for an investment template. But the Commission has assured industry that maintaining current BITs as "favourable standards" will be one of its "mantras"[9].

Most likely, the EU will start to apply these standards to large markets, either in stand alone investment treaties or in investment chapters of FTAs. If BusinessEurope has its way, Russia and India will be test cases[10] in which the rights of European companies will be strengthened and the space of governments and societies limited through Europe's new corporate investment regime. They will definitely have enough opportunities in meetings with the Commission to put their points across, but civil society and a hopefully watchful European Parliament will be following them closely.

1 AmCham, EU Position Statement on Investment, 25 September, 2009. http://www.amchameu.eu/Documents/DMXHome/tabid/165/Default.aspx?Command=Core_Download&EntryId=4548

2 BusinessEurope Information Note: *Foreign Direct Investment under the Lisbon Treaty*, 12 January 2010. http://www.spcr.cz/files/bjakubcova/information_note_FDI_Lisbon_Treaty.doc

3 BmWi Pressemitteilung, Bundeswirtschaftsminister Brüderle trifft EU-Handelskommissar De Gucht, 15 April 2010. http://www.bmwi.de/BMWi/Navigation/Presse/pressemitteilungen,did=338628.html?view=renderPrint

4 Interview with Pascal Kerneis, Managing Director of the European Services Forum, Brussels, 25 March 2010.

5 BusinessEurope Note: *The Lisbon Treaty and EU External Trade Policy*, 26 November 2009, http://www.ierc.bia-bg.com/language/en/uploads/files/news__0/news__f30757785447e374762be51ed5de97ae.doc.

6 Adrian van den Hoven, Director of BusinessEurope's International Relations department, interview, Brussels, 31 March 2010. He stated, "Germany has like 200 BITs. They are the ones who push the model, because this German model is all encompassing, no flexibility."

7 BMWi/BDI/PriceWaterhouseCoopers (2010): Unternehmensbefragung zum Thema: Investitionsschutz nach Lissabon. http://www.agaportal.de/pdf/dia_ufk/presse/dia_unternehmensbefragung_lissabon.pdf

8 Interview with Adrian van den Hoven, 31 March 2010.

9 Email from DG Trade's Lucas Lenchant to DG Trade colleagues containing a report about a meeting with BusinessEurope on the Lisbon Treaty, 26 November 2009, dated 1 December 2009. Obtained through access to documents requests under the information disclosure regulation.

10 European Commission, Report from the meeting with BusinessEurope on investment – 06/01/2010, dated 8 January 2010. Obtained through access to documents requested under the information disclosure regulation.

3. European investment policies: 20 years constructing an architecture of protection for TNCs

Cecilia Olivet, TNI

In 1988, with the launching of the EC-International Investment Partners (EC-IIP), the European Commission (EC) began promoting European investment in developing countries, particularly Latin America, Asia and the Mediterranean, by financing the expansion of joint ventures with businesses operating in the regions.[1] These initial efforts were followed, progressively over the years, by more aggressive strategies and policy instruments designed to, on the one hand, promote the rise of European multinational corporations and, on the other, create a political, economic and juridical architecture based on the norms and regulations of, among others, the World Trade Organisation (WTO), Free Trade Agreements (FTAs), Bilateral Investment Treaties (BITs), the International Monetary Fund (IMF), and the World Bank (WB), which constitute the core elements of the *Lex Mercatoria*. This juridical framework would allow European Transnational Corporations (TNCs) to penetrate key sectors of the economy in developing countries and simultaneously to operate under an architecture of impunity[2]. Revisiting some of these early documents is instructive; then, in contrast with today, the EC was more frank in describing their objectives and did not feel obliged to disguise their aims with development language.

In 1995, the EC released a communication titled, *"A Level Playing Field for Direct Investment World-Wide"*, in which they raised concerns that Bilateral Investment Treaties (BITs) and Regional Trade Agreements (such as NAFTA) were creating a non-transparent and discriminatory regime for European investment. They described what they called *"the principal rules of the game"*, which included: *"free access for investors and investments"*, *"national treatment for investors and their investments"* and *"accompanying measures to uphold and enforce commitments made to foreign investors"*[3]. However, in a clear display of double standards, the same Communication noted, *"In any case, it is in the Community's interest to retain under any international agreement on investment the right to advance its regional integration without necessarily being forced to extend de jure such mutual liberalisation measures to third countries"*[4].

They go on to identify two spaces where efforts could be concentrated to advance a multilateral framework for investment protection: the World Trade Organisation (WTO) and the OECD, based on their proposal for a Multilateral Agreement on Investment (MAI)[5], adding that a parallel strategy should aim for *"the conclusion of bilateral EC-third country investment treaties"*[6]. The essential features of the EC proposal were expressed in a comment by Sir Leon Brittan, then Commissioner for external economic relations: *"Investment should be the next great boost to the world economy, following the powerful impulse given by the removal of trade barriers in the Uruguay Round. To make this a reality we need to tear down existing obstacles to investment and stop new hurdles being thrown up in its way. Nothing short of a comprehensive set of binding international rules will open up areas for investment which are currently closed and create a level playing field for international investors, which is so vital for the European economy"*[7]. This influential Communication set the stage for the future of EU's strategy towards investment liberalisation.

Between 1995 and 2003, the European Union, with the EC an active member of the WTO Working Group on the Relationship between Trade and Investment, put all its weight behind the proposal to include investment as part of the WTO Doha Development Agenda[8]. Over those nine years, the European Union fought hard to convince WTO members to agree to a multilateral investment framework that would assure investors rights and not allow discriminatory measures against foreign capital. The key line of argument presented by the Commission against states having the right to discriminate was that they, *"remain unconvinced of the benefits to the general good, as opposed to private interests…"*[9] Furthermore, the EC stated *"we do not see the reason for additional, discriminatory regulation on FDI. Any given policy on investment should be applied to all investors, domestic and foreign"*[10].

However, developing countries were also part of this WTO working group, and they had expressed concerns that multilateral rules of investment would curtail developing countries required flexibility to regulate foreign direct investment and TNCs operations. They also argued that FDI can produce negative effects on the host country's economy and that there is no guarantee that multilateral rules on investment would enhance investment flows.

The arguments presented by the EC - that FDI is key to promoting development, as well as economic and social growth – did not prove convincing and the idea of including investment rules under the WTO was dropped in 2003. The opinion of the EC did not match the evidence that an investment framework based on investors' rights without obligations does not contribute to development. Furthermore, their arguments ignore the fact that governments should have the flexibility to discriminate between investors in order to regulate in the public interest. This is how Western European countries, for example, developed; under restrictions of investor's rights and tight capital control.

After the MAI was defeated (1998) and investment issues were thrown out of the WTO agenda by developing countries (2003), the European Union continued to pursue its objectives through a third channel: bilateral investment treaties. Between 2000 and 2010, the European Union Member States signed hundreds of BITs, all containing the same type of provisions that the EC could not enforce through multilateral means.

While the EC has consistently pursued a binding investor protection framework, when it comes to investors obligations the EC suggests corporations will voluntarily *"take their responsibilities as good corporate citizens"* and that a voluntary code of conduct is sufficient.[11] The double standards are another proof that at the heart of these proposals lies the interest of European business.[12]

With the entry into force of the Lisbon Treaty, the European Commission acquired its long awaited full competences to negotiate comprehensive investment protection and liberalisation measures with third countries. In line with these changes, the EU is developing a new EU investment policy, which will be the basis for negotiations of future EU BITs and investment chapters in EU FTAs. It is expected that an EU model investment agreement, whatever form it eventually comes to take, will be as far reaching (if not more) in terms of investment protection as the current EU members states BITs. It is also expected that, at the same time, the EC will continue to promote a voluntary code of conduct for its own TNCs and avoid creating any type of compulsory regulations relating to investor obligations.

Twenty years ago, when the EC first developed its investment strategy, there was widespread belief, with little room for dissenting voices, in two key assumptions: a) to sign to a regulatory framework that protects corporations is a condition *sine qua non* for a country to receive foreign investment; and b) investment flows are the answer to foster development, job creation and technology transfer. However, today, there is significant evidence that corporations are still willing to invest in countries run by governments that demand obligations from TNCs; e.g. after the re-nationalisation of the natural gas industry in Bolivia in 2006, Repsol and Total (among others) decided to remain in Bolivia and to accept an increased government share of revenues as well as new conditions in the contract. Finally, FDI, under a framework of deregulation and protection for TNCs, has not contributed to development and decent job creation.

Reviewing the EC's demands and ambitions for investment liberalisation and investor protection over the past 20 years, we see that the Commission has been, and continues, dogmatically promoting the same rules with the same arguments; always in spite of the strong evidence available that significantly undermines their fundamental assertions regarding the nature of foreign direct investment and TNCs. It is no longer believable that companies will behave as "good corporate citizens" without any binding regulation, or that development in third world countries is not dependent on governments´ capacities to maintain policy space that allows them to defend their people's interests and basic needs. Neither is it credible that corporations can be trusted to replace the role of the government on certain key areas related to basic public services and human rights such as health, education, energy, telecommunications, among others. Moreover, it can not be reasonably maintained that BITs have not harmed third world countries development. Especially considering the enormous damage caused by corporations taking governments to international tribunals such as ICSID, particularly following the economic crisis, as governments sought to use policy to alleviate recession and encourage domestic growth.

The current situation presents a real challenge for social movements, civil society and progressive forces in Europe and the rest of the world. There is now an opportunity to try to influence the debate on how the new EU investment policy and future investment agreement will look. However, it is important to recognise that the European Commission are fully aware of whom they represent and the consequences of the EU demands on third countries. Many observers have already pointed out that what is lacking is not evidence, but political will. One thing is clear, the correlation of power is in favour of TNCs[13]. Will their power still prevail in the renewed EU investment framework? Inverting the prevalent logic in order to give priority to the rights of the majority, by promoting mechanisms to control multinationals' activities, remains the challenge for social movements and civil society campaigns across Europe and the Global South.

1 Commission of the European Communities (1991) 'EC-International Investment Partners Facility for Latin America, Asia, and the Mediterranean region'. COM (90) 575 final, 7 March Available online at http://aei.pitt.edu/4933/01/003167_1.pdf

2 Permanent Peoples Tribunal (2010) Veredict of the Session "The European Union and Transnational Corporations in Latin America: policies, instruments and actors complicit in the violations of people's rights", Madrid 14-15 May. http://www.enlazandoalternativas.org/IMG/pdf/TPP_MADRID_2010_ES.pdf

3 Commission of the European Communities (1995) 'A Level Playing Field for Direct Investment World-Wide'. Communication from the Commission. COM (95) 42 final, 1 March. Available online at: http://aei.pitt.edu/6195/01/003345_1.pdf

4 ibid

5 The Multilateral Agreement on Investment (MAI) was drafted by members of the OECD between 1995–1998. A strong campaign by civil society groups and the criticism of developing countries led to France's announcement in October 1998 that it would not support the agreement, effectively killing the proposal.

6 Commission from the European Communities, 1995

7 Brittan, Leon (1996) 'Investment liberalisation: a new issue for WTO' Cologne, 11 June - SPEECH/96/154 Available online at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/96/154&format=HTML&aged=1&language=EN&guiLanguage=en

8 Investment was together with competition policy, government procurement and trade facilitation one of the so-called "Singapore issues" that developing countries, supported by civil society, stopped from being included under WTO negotiations during the 2003 WTO Cancun Ministerial Conference. For a details analysis, see: Khor, Martin (2004) 'The "Singapore Issues" in the WTO: Implications and Recent Developments', Third World Network. Available online at: http://www.policyinnovations.org/ideas/policy_library/data/01284/_res/id=sa_File1/

9 WTO - World Trade Organisation (2000b) 'Communication from the European Community and its Member States', WT/WGTI/W/89, October. Available online at: http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W89.doc

10 WTO - World Trade Organisation (2000) 'Communication from the European Community and its Member States', WT/WGTI/W/84, June. Available online at: http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W84.doc

11 WTO, 2000: 6

12 An example of the influence exerted by business interest groups on the drafting of the EU's investment strategy can be found at a leaked document, prepared by DG1 (External Relations: Commercial Policy and Relations with North America, the Far East, Australia and New Zealand) of the European Commission for a meeting of the EU Council's Article 113 Committee in December 1998, published by Corporate Europe Observatory. This document reveals not only the mindset of the Commission but also the substantial influence of business interest groups on the drafting of this strategy (see European Commission (1998) 'WTO New Round: Trade and Investment', Discussion Paper, (I/M/2) 15th December. Available online at: http://archive.corporateeurope.org/mai/eu/113invest.html

13 Wahl, Asbjorn (2002) 'Labour and investment', in Investment and competition negotiations in the WTO – What's wrong with it and what are the alternatives?, Seattle to Brussels. Available online at: http://www.s2bnetwork.org/s2bnetwork/download/S2B-InvestmentWTO-Brochurefinal.pdf?id=31

4. Pre-Lisbon external investment policy of the EU

Roos Van Os, SOMO

Introduction

From its outset, the Common Commercial Policy (CCP) has been a crucial aspect of the European Economic Community, granting exclusive competence to the EU on trade matters. However, prior to the Lisbon Treaty, this competence did not include foreign direct investment (FDI), and when it did the EU focussed on issues of market access and liberalization (i.e. opening markets for European direct investors) and not on the protection of foreign investment.

Former judicial base of the EU with regard to foreign investment

The former EC Treaty did not contain an explicit legal foundation that enabled the EC to initiate action on foreign investment. Before the entry into force of the Lisbon Treaty, the competence on FDI had been mixed; liberalisation and protection were divided up between the EC and its Member States. Two layers of rules with regard to FDI co-existed.[1] First, Member States had concluded numerous bilateral investment treaties (BITs). These treaties conventionally apply to the protection of established investments against expropriation and discrimination, with enforcement mechanisms through State-to-State and Investor-to-State arbitration, but do not contain provisions on market access. Second, the trade agreements of the EU with third countries focused on market access and non-discrimination for committed investments, with enforcement mechanisms through a State-to-State dispute settlement mechanism that applied to the whole agreement.

This dual EC approach stemmed from articles and provisions in the former EC Treaty such as Article 56 EC on capital movements and provisions on the freedom of establishment and the CCP, which 'grant arguably some competence to the EC with regard to the entry and operation of foreign investment.'[2] Leal-Arcas argues that the undefined scope of provisions on harmonizing the internal market could provide the EC with the mandate to regulate protection of foreign investment from expropriation. Furthermore, articles on development cooperation could add another legal basis for inserting investment promotion provisions into international agreements, with an investment component, concluded by the EC.[3] Member States (MS) had several times rejected proposals of the Commission to widen EU competence regarding the expansion of the CCP to FDI at the international conferences in Maastricht and Amsterdam.[4] The internal strife between the MS and the EC resulted in proceedings against individual Member States who concluded BITs that were incompatible with the EC Treaty.[5]

Global Europe and the Minimum Platform on Investment

In 2006, the European Commission published its 'Communication Global Europe: Competing in the World.' 'Global Europe' emphasized the need to pursue a *"far-reaching liberalization of services and investment"*[6]. The European Commission explicitly stated that it aims for WTO-plus commitments in FTAs, "*by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation. Many key issues, including investment, public procurement, competition, other regulatory issues and IPR enforcement, which remain outside the WTO at this time can be addressed through FTAs*."[7]

Following the EC's unsuccessful search, overall several years, to upgrade its external investment mandate, it began to look for alternative ways to include foreign investment provisions in negotiations. The European Commission observed in 2006: "*In comparison to NAFTA countries` agreements EU agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European Investors are discriminated vis-à-vis their foreign competitors and the EU is loosing market shares*."[8] In November that same year, the Council adopted the 'Minimum Platform on Investment for EU FTAs', a template for future investment FTA negotiations. It placed emphasis on services and investment liberalization within the context of the 'Global Europe' strategy. The Minimum Platform is used as a basis for negotiations on trade in services and establishment (i.e. investment) in practically all EU FTAs,[9] with the objective of strengthening EC enterprises' access to foreign markets. The negotiating mandates authorising the Commission to negotiate with third parties contain clear references to the Platform reflected in, amongst others, theEU Cariforum European Partnership Agreement (EPA), the EU-Korea FTA and the negotiating mandate of the agreement between the EU and India.[10] Without discussing all provisions of the mandate, some illustrative elements are pointed out in the following section, especially focusing on the EU-Cariforum EPA. [11]

Content of investment provisions in trade agreements

'National Treatment' indicates that the foreign investor must be given rights to be treated no less favourably than local investors. The national treatment provision in the Minimum Platform follows GATS Article XVII, applying to pre as well as post-establishment. However, instead of referring to service suppliers, it refers to investors and, instead of referring to measures affecting the supply of a service, it refers to measures affecting establishment. In this way the commission expands its negotiating competence for mode 3 (commercial presence) services delivery to cover 'establishment' in all sectors.[12] The EPA Cariforum investment discipline resembles this component from the Minimum Platform (see article 68),[13] while the EU-Korea agreement follows the GATS discipline.[14]

Another significant element in the template was the proposal for a Most-Favored-Nation (MFN) clause for services covering establishment provisions.[15] The rationale behind this proposal is to ensure investors from the EU are offered the same terms as any preferred partner. Looking at the India-EU and the Asean-EU negotiating mandate, the Commission seems to mirror the Minimum Platform mandate on the MFN clause quite closely, with no exception for regional economic integration agreements.[16] In the Cariforum EPA, however, the EC has made a concession on this point. Article 70 provides a MFN clause for services and investment. With respect to measures affecting commercial presence, Cariforum states shall accord to EU investors and commercial presences MFN treatment, i.e. similar to that given to *"any major trading economy."*[17] This means that when a Cariforum country signs an agreement with a major (developing) country, all the terms of the EPA apply to the EU.

Third, on non-trade concerns, the Minimum Platform includes a non-lowering of standards clause to be included in the preamble, thereby falling outside the scope of the dispute settlement mechanism. As an example, chapter 13 of the FTA with Korea deals with labour rights and the environment, the Korea-EU FTA calls for both parties to enforce their laws and to not weaken them to encourage trade and investment, however, there provisions are not covered by the agreement's dispute settlement mechanism. Non-Trade Concerns appear to form a huge obstacle in the EU-India FTA negotiations, where the EU insists on including them in the agreement and India, refused to go ahead with the negotiations if such clauses are made part of the agreement. In the Cariforum EPA, Article 72 deals with investors' behaviour. It includes obligations on the signing parties to take necessary measures to ensure that investors:

do not make use of bribes or other kinds of corruption;

act in compliance with the core labour standards the parties have ratified;

do not circumvent international environmental or labour agreements of which the parties are members;

and establish and maintain, where appropriate, local community liaison processes.[18]

Furthermore Article 73 states that that the parties shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation standards, or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity. The provisions of Articles 72 and 73 are subject to dispute settlement, which is very rare in EU FTAs.

Concluding remarks

The Pre-Lisbon situation, with regard to external investment rules and practices within the EU, has shown a movement from a clear absence of any explicit legal mandate on FDI, to FDI slowly moving into negotiations with external partners. This trend has been motivated by considerations of competitiveness and fear of losing market share – mainly to US investors. In general, it appears the EC was, before it was officially mandated to act on FDI, anticipating a future in Lisbon terms.

1 European Commission, 2006, *Issues* Paper: Upgrading the EU Investment Policy. 268/06, Brussels. http://www.iisd.org/pdf/2006/tas_upgrading_eu.pdf

2 Rafael, L.A., 2009 , *Towards the Multilateralization of International Investment Law* , The Journal of World Investment and Trade, Vol. 10, issue 6, p. 865-919.

3 ibid

4 Burgstaller, M., June 2009, *Vertical Allocation of Competences for Investment Treaties,* EU, AIELN Inaugural Conference. http://aieln1.web.fc2.com/Burgstaller_panel3.pdf

5 Brugge, G.S., 2010, *The 'Global Europe' Services and Investment Agenda: Bringing Politics Back Into the Study of EU Trade Policy Investment provisions in current EU FTAs*, Paper presented at the EU in International Affairs Conference, Brussels, 22-24 April

6 European Commission, *Competing in the World*, 2006 External Trade Communications. http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf

7 ibid

8 EC, *Minimum platform on investment for EU FTAs – Provisions on establishment in template for a Title on "Establishment, trade in services and e-commerce*. European Commission 38/06. http://www.iisd.org/pdf/2006/itn_ecom.pdf

9 See DG Trade issues note dated 31 May 2006: *Upgrading the EU policy and Global Europe competitiveness strategy.* http://register.consilium.europa.eu/pdf/fr/10/st06/st06456.fr10.pdf

10 Ibid and Brugge, G.S., 2010

11 Bungenberg, M., 2008, *Centralizing European BIT Making under the Lisbon Treat*y, Paper (draft version) to be presented at the 2008 Biennial Interest Group Conference in Washington, D.C., November 13 – 15. http://www.asil.org/files/ielconferencepapers/bungenberg.pdf

12 European Commission, 2006

13 Economic Partnership Agreement between the CARIFORUM States and the EU, Dec. 17, 2007. http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf.

14 FTA between Korea and EU, CHAPTER SEVEN TRADE IN SERVICES, ESTABLISHMENT AND ELECTRONIC COMMERCE. http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145166.pdf

15 The text reads "*With respect to any matters affecting establishment…shall accord to the Community's establishments and investors a treatment no less favourable than that they may accord to any third country with whom they conclude an economic integration agreement after the signature of this Agreement.*"

16 Brugge, G.S., 2010

17 Economic Partnership Agreement Between the CARIFORUM States and the EU

18 ibid

5. Future forms of EU investment competence
The German model BIT as a minimum level of protection

Ross Eventon, TNI

Goals of the Business Community

A recent BusinessEurope information note stated,

"[The EU should seek to] maintain an equally high level of protection of investors: In line with the objective of maintaining legal certainty, the EU can be expected to pursue as high a level of protection for investors as Member States have done to date through BITs. This would mean that the EU would try to emulate the rights provided to investors found in existing Member State BITs in its future treaties."[1]

The statement suggests the business community aims to obtain, at the very least, a level of investor protection equal to their current BIT framework. We can assume that BIT agreements offering the highest level of investor protection will be considered the most desirable as a baseline for any future EU competence mechanism. Germany, the most economically powerful nation in Europe, has pushed for an EU 'Model BIT' text to be created, based on its current model treaty. The German 'Model BIT', created in 2005, updated in 2009, and rarely varying from the final signed agreement, grants extensive rights to investors and provides a guide to the baseline of investor protection desired by business and lobby groups. Notably, many EU states, including large capital exporters like the UK, have similar provisions in their existing treaties.[2]

The German Model BIT[3]

A number of aspects of the German model can be briefly outlined here:

-The preamble has barely altered since Germany signed the first ever BIT with Pakistan in 1959. The introductory text erroneously assumes a strong correlation between the signing of a BIT and FDI, and there is no focus on the need to attract quality FDI to support sustainable development.

-The agreement contains an obligation for international arbitration allowing private foreign investors to bypass domestic courts to sue governments directly in opaque international tribunals.

- As is common amongst EU and North American BITs, the text uses a very broad definition of investment, including *"claims to any performance that have an economic value"* and *"claims to money or any performance having an economic value"*. The latter could cover a variety of commercial contracts and transactions not commonly associated with FDI.

- The BIT covers Intellectual Property Rights (IPR) *per se*, without requiring those Intellectual Property Rights to be connected to an investment operating in the host state. Also covered are intangible rights such as "good will" and "know-how".

- The Umbrella Clause broadens the scope of the treaty to include other private commercial contracts, taking arbitration out of hands of the domestic state – even in the case where separate agreements state domestic methods should be used.

- The National Treatment and Most Favoured Nation provisions restrict states from taking measures to enhance local production or enterprise for fear of breaking this provision. There are no exceptions allowed for national treatment standards, where the state may be attempting, for example, to develop local industry or empower marginalised groups.

Assessing the individual articles of this agreement from a development perspective, the International Institute for Sustainable Development (IISD) found a range of problems with the German model:

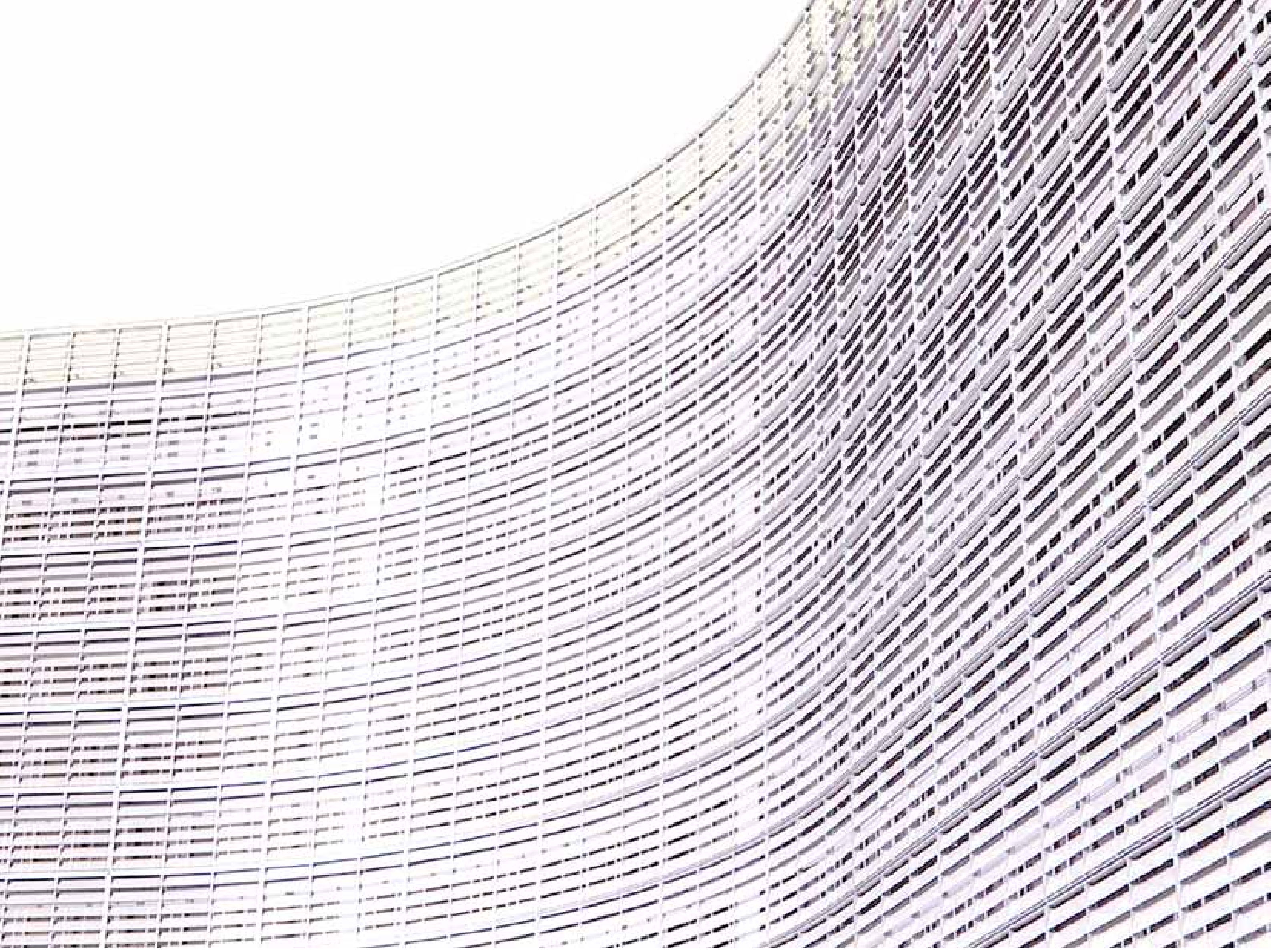
"The German Model Treaty and German BITs have negative implications for host state governments, insofar as they restrict the ability of developing state governments to take policy measures designed to promote development objectives."

They go on to note, *"some of the international law obligations agreed by developing states under the German BIT program can in fact impact negatively on their sustainable development aspirations."* Therefore the German BIT Model, considering the stated commitments of the EU, does not constitute a suitable baseline of parameters for any future mechanism.

1 Business Europe Information Note, *Foreign Direct Investment Under the Lisbon Treaty,* 12 Jan 2010

2 German and UK BIT agreements with the Pacific Island states, for example, *"show consistent themes even though they cut across civil and common law legal systems...and different time spans."* See Malik, M., April 2006, *Report on Bilateral Investment Treaties between European Union Member States and Pacific Countries*. The report concludes *"The Pacific-EU [UK and Germany] BITs reflect the same situation common to other regions",* they contain broad definitions and scope for uncertainty which *"makes it more difficult for states to take measures for the public good as they risk being in breach of their obligations under a BIT and therefore attracting claims for compensation by investors."* They also contain *"few exceptions that allow states to take measures to serve their development needs."*

3 The following is a summary of Malik, M., Nov 2006, *Time for a Change: Germany's Bilateral Investment Treaty Programme and Development Policy*, Dialogue on Globalization, Occasional Papers, No.27. The IISD analysis concerns the original 2005 Model BIT, which has since been superseded by a 2009 Model. The provisions discussed here, however, remain in the updated version.



Section 2 What's wrong with the current investment regime?

6. BITs, FDI and Development

Myriam Vander Stichele, SOMO
Ross Eventon, TNI

Do Bilateral Investment Treaties Attract FDI?

The effect of ratifying a BIT on the allocation of foreign direct investment is a relatively neglected area of study. Where the relationship has been examined, the evidence suggests BITs have a negligible effect on FDI. A 1998 UNCTAD analysis found a weak correlation between the signing of BITs and changes in FDI flows.[1] A more thorough World Bank report in 2003[2], which empirically tested whether BITs have had an important role in increasing the FDI flows to signatory countries over the period 1980 to 2000, found, *"such treaties act more as complements than as substitutes for good institutional quality and local property rights."* The World Bank report particularly highlights recent high profile legal cases, which *"demonstrate that the rights given to foreign investors not only exceed those enjoyed by domestic investors, but expose policy makers to potentially large scale liabilities and curtail the feasibility of different reform options."*

Over a twenty year period of analysis, the report found little evidence that BITs stimulated investment. The empirical evidence especially highlighted how countries with weak domestic institutions had not received significant benefits following the signing of a BIT. Rather, countries with strong domestic institutions had the most to gain, with the BIT acting as a complement to, as oppose to a substitute for, broader domestic reform. Consequently, *"those that are benefiting from them are arguably the least in need of a BIT to signal the quality of their property rights."*

Despite the BIT granting rights to investors from both countries, *"in practice there is usually tremendous asymmetry as almost all the FDI flows covered by BITs are in fact in one direction."* In those cases where FDI did flow in both directions, they noted a reluctance to sign BITs; *"while OECD governments are keen to secure such rights for their companies overseas, they balk at granting such rights to MNCs within their own borders."*

This is seen most clearly in the number of countries with substantial FDI who do not hold BIT agreements. Japan, the second largest source of FDI in the world, has only 4 BITs. The US does not hold a BIT with China, despite the latter being the largest developing country destination for US FDI. Brazil, a receiver of substantial FDI, does not hold any ratified BIT agreements. Similarly, numerous countries that have ratified BIT agreements are having difficulties attracting FDI, particularly sub-saharan Africa. In the case of Cuba, 60% of the countries with which they hold a BIT have no foreign investments in the country. Recognising the significance of these trends, the report concludes, *"a BIT is not a necessary condition to receive FDI"*.

Is Foreign Investment Good for Development?

The impact of foreign direct investment (FDI) on development is a much debated topic. Whilst International Financial Institutions, such as the World Bank and the IMF, as well as the OECD and its Member States, have increasingly promoted FDI, many NGOs, labour unions and civil society groups have emphasised the negative effects - illustrated by case studies documenting human rights violations, harmful environmental practices, and tax evasion by Transnational Companies (TNCs) in developing countries.

Most of the investment promotion mechanisms, investment friendly regulations or treaties that countries enter in to are based on the assumption that foreign investors need to be attracted through measures that protect them or provide them with financial benefits. Very few to no instruments or criteria have been built into any such instruments to assess their impact on economic and social development, the environment, and the welfare of the stakeholders - such as the labour conditions of the workers.

Despite the pursuance of these policies, and their being advocated by the International Financial Institutions, the historical evidence suggests FDI needs to be extensively managed by the host nation in order to encourage a developed domestic economy. South Korea and Taiwan are considered success stories of industrial development in the post World War Two period. In less than thirty years, both countries managed to increase their per-capita income from a level similar to Ghana and Nigeria in 1960 to a level on a par with Spain and Portugal today. Their experiences with FDI, and how it contributed to economic growth, therefore provide important lessons for today's developing economies. Both countries used extensive controls on foreign investment in terms of ownership, entry and performance requirements, as well as tax incentives to promote spillovers from FDI. The Korean government, for example, actively encouraged joint ventures with foreign companies to promote the transfer of technology and management skills, and screened FDI to ensure that the 'right' kind of technology was acquired and the royalties charged were not too excessive. In Taiwan, investment approvals were only given on the condition that TNCs helped domestic suppliers to upgrade their technology. Moreover, it is crucial to recognise that every developed economy, including the USA, Japan and the UK, used similar strategies to benefit from FDI in times of industrialisation.

The empirical findings contradict the national investment promotion policies and the proliferation of trade and investment agreements aimed at the liberalisation of FDI that have been advocated by the World Bank, the IMF and the OECD and its member countries. Under these arrangements, developing countries are severely restrained from using industrial policies or other regulations that have been successfully applied in the past by the Asian Tiger economies and rich Western countries to reap the benefits of foreign investment.

Development can only be facilitated by foreign investment when the right policies are in place. Investment treaties and investment promotion initiatives should not be uni-vocally directed at investment liberalisation and protection, but created with specific social, economic and environmental development targets in mind that need to be regularly assessed and reviewed. In addition, governments should retain (in trade and investment agreements) freedom of regulation and policy, especially to achieve poverty eradication, technology transfer, respect for human rights and environmental protection. Where enforcement of national labour and environmental laws is lacking, and international standards are not respected, international initiatives to ensure enforcement by TNCs should become part of investment promotion mechanisms.

1 UNCTAD, 1998, *Bilateral Investment Treaties in the Mid-1990s,* United Nations, New York.

2 Hallward-Driemeier, M., 2003, *Do Bilateral Investment Treaties Attract FDI? Only a bit…and they could bite*, Policy Research Working Paper Series 3121, The World Bank.

7. NAFTA's investment chapter and Mexico's economic downturn

Manuel Pérez-Rocha[1], Institute for Policy Studies

Shortly after the European Union concluded its Free Trade Agreement (FTA) with Mexico in 2000, Pascal Lamy, then EU Trade Commissioner, explained that, "From an EU perspective, it provided NAFTA parity (Mexico gave us more than 90 per cent of what it had given the US, and in some areas more - e.g., such as goods, services and intellectual property)".[2] Today the EU is going after the 10% it did not get with Mexico through FTA's with other countries aiming to include NAFTA style investment chapters.[3] These investment chapters would bundle together at the EU level numerous Bilateral Investment Treaties (BITs) that individual EU Member States have with third countries (including those with Mexico).

After 15 years of implementation, NAFTA has not produced the "spill over" effects promised by its promoters; on the contrary, poverty, joblessness[4] and the concentration of wealth have steadily increased.[5] Today, defenders of NAFTA simply point to purely quantitative effects - increased trade and foreign direct investment - to try to demonstrate its success. However, Mexico has not been able to profit from these increased levels of FDI. This is due largely to the severe limits placed by NAFTA's Chapter XI on the government's ability to design and implement policies that could make FDI beneficial to endogenous economic growth, as well as implement measures designed to protect the public interest and the environment.

Examples of the Impacts of NAFTA´s Investment Rules in Mexico

· **Foreign Investors Obtain Millions of Dollars in Foreign Tribunals**. Under NAFTA rules, US and Canadian corporations have sought millions of dollars in compensation for indirect expropriations in supranational tribunals, such as the World Bank's ICSID.

· **Mediocre Economic Growth**. Since 1994 Mexico has experienced paltry growth levels. Until 2006 the average yearly GDP growth per habitant was merely 1.58%.[6] This is explained by both the lack of endogenous growth,and Mexico's economic dependence on the US (80% of Mexico's exports are to the US, a figure that has remained unchanged since 1994).

· **Great Profits by Foreign Banks in Mexico.** Since NAFTA, about a quarter of FDI in Mexico has been concentrated in the acquisition of the assets of its banking system. In 2009, just three foreign banks (Citicorp of the U.S. and BBVA and Santander from Spain) concentrated 71.18% of the sector's profits, which increased 11% as compared to 2008, despite the serious economic downturn in Mexico.[7]

· **Lack of Credit for Production.** Banks in Mexico have reduced to a minimum the level of credit to productive activities and in particular to small and medium companies that generate half of the country's GDP and most of the jobs.[8] The slump of credit began precisely with the implementation of NAFTA and foreign banks taking over the banking system; in 1994 credit in Mexico represented 37% of GDP.[9]

· **The concentration of FDI following NAFTA.[10]** Under NAFTA, 90% of FDI has targeted the manufacturing and financial sectors, both located in a few areas of industrial and urban development. In contrast, rural areas receive scant FDI; the five states with the highest levels of marginalization receive only 0.60% of FDI.

· **Repatriation of Profit.** Prohibition of capital controls under NAFTA and BITs permit foreign companies to repatriate their profits without any conditions (like reinvestment of a certain percentage). In 2009, while Mexico's economy sank, the three largest foreign banks -Citicorp, BBVA, Santander- saw their profits increase to almost $4 billion USD.

· **Increased FDI has not contributed to higher living standards in Mexico.** During NAFTA, labor costs in the manufacturing sector, which represent 51% of "Mexican" exports and receives 51% of FDI, decreased by 46.2%, while workers productivity increased 76.1%.[11] The minimum wage in Mexico fell by 20.45% of its purchasing power from 1994 to 2006. During the first four years of the Calderon presidency (2006 – 2010) the purchasing power for minimum wages has slipped a further 47.1%[12]

In Conclusion

Mexico´s economic downturn – reflected ultimately in the growth of poverty on the one hand and increased concentration of wealth on the other[13] - and its dependence on the US economy reflect the critical need to shift from a *laissez faire* investment regime to one in which the State can regain the policy space to regulate FDI, through democratic participation of economic agents, in order to meet developmental goals and tackle poverty and joblessness.

Increased levels of trade and investment, as well as economic growth, should not be seen as an objective *per se*. It is necessary to strengthen new models of participatory development that define what should be produced, for whom and with which objectives. Economies accepting FDI must take into account possibilities for redistribution as a means to reduce the enormous economic asymmetries between countries. This is one of the fundamental principles of the European Common Market.

Associations of producers, civil society organizations and policymakers around the world are exploring alternative approaches that would promote a more equitable balance between corporate interests and the broader public interest. This includes withdrawing from the current system, re-writing the rules to support sustainable development and to protect national sovereignty, and replacing the system with alternative institutions.[14] The NAFTA model is a success only in terms of concentration of wealth; if the EU is serious about coherence and fairness it should stop seeking "*NAFTA parity*" with third parties.

1 Associate Fellow of the Institute for Policy Studies in Washington D.C.; member of the Executive Committee of the Mexican Action Network on Free Trade (RMALC) and regular contributor to the Transnational Institute in Amsterdam.

2 http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118831.pdf

3 According to an internal memo of the European Commission "in comparison to NAFTA countries' agreements, EC agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European investors are discriminated against vis-à-vis their foreign competitors and the EC is losing market shares."

4 http://www.jornada.unam.mx/2009/11/14/index.php?section=economia&article=023n1eco

5 http://www.jornada.unam.mx/2010/04/21/index.php?section=economia&article=024n1eco

6 Arroyo Picard, A., *México a13 años del TLCAN, Elementos para la reflexión en Centroamérica,* Investigador de la UAM-I/RMALC.

7 http://www.jornada.unam.mx/2010/04/22/index.php?section=politica&article=002n1pol; http://www.americalate.com/2009/10/30/desaparecieron-75000-empresas-en-seis-anos/ According to the World Bank, the economic crisis has resulted in 5 million more Mexicans considered living in poverty -half of the 10 million Latin Americans who fell into poverty due to the crisis - and tens of thousands of small and medium companies have closed down.

8 Manuel Pérez-Rocha, "Tratados de Libre Comercio y su Impacto en el Crédito Bancario: El Caso de México", en "La Crisis Financiera y el Comercio Hacia una Respuesta Integrada en México y el Caribe, selección de ponencias". SELA y Center of Concern, 2009.

9 Morales E. Francisco, Observatorio Bancario México, BBVA, Servicios de Estudios Económicos, 2 de spetiembre, 2009.

10 From Alberto Arroyo Picard: "México a13 años del TLCAN, Elementos para la reflexión en Centroamérica" Investigador de la UAM-I/RMALC.

11 Op Cit

12 http://www.jornada.unam.mx/2010/04/15/index.php?section=opinion&article=026o1eco

13 http://www.jornada.unam.mx/2010/04/21/index.php?section=economia&article=024n1eco

14 To learn more, see: www.justinvestment.org.

8. How BITs restrict policy space to prevent or alleviate financial crises

Myriam Vander Stichele, Somo

As they are presently formulated, BITs - as well as foreign investment liberalization articles in trade and investment agreements - can contribute to creating a financial crisis in a country, aggravate an existing financial crisis, and make a crisis more costly.

Many cross-border financial movements are protected by BITs

BIT agreements signed by EU Member States contain broad definitions of foreign "investment", including all kinds of rapidly transferable capital, such as shares of a company (portfolio investment) or financial transactions resulting from, for instance, derivatives contracts. In addition, foreign investments can also be establishments by foreign banks, insurance or investment companies and trades in shares or derivatives. BITs rules often also cover capital used to maintain or increase investments, i.e. to make investments profitable. In the case of foreign banks and financial investors, this means that BITs cover all the capital movements related to financial and payment activities to third countries; in the case of banks this includes often significant financial transfers that constitute part of the financial services they offer. BITs explicitly stipulate that payments related to these investments, including full repatriation of the investment and dividends, should be allowed to be transferred without delay, in a freely convertible currency at the prevailing market rate of exchange. In other words, placing restrictions on such capital movement is forbidden.

Rules on unrestricted cross border transfers contribute to financial crises

Capital movements and cross border payments related to foreign investors can be substantial, particularly for small countries. They can influence the balance of payments or exchange rate causing currencies to appreciate or depreciate. Countries are then forced to rectify these changes through costly interventions in currency markets. When capital movements change exchange rates, the price of imports or exports can change substantially, having a grave economic or even social effects; for instance, imports can become much more expensive. Once the value of a currency decreases, investors might very rapidly take their money out of the country, or speculate against the value of the currency, worsening the economic situation or even causing a financial crisis, as was the case in Asia in 2007. In times of financial crisis, large capital movements and speculative operations can aggravate the financial and economic crisis of a country.

Fewer safeguard measures in times of financial crisis

Control on capital inflows and outflows are now increasingly recognised as playing an important role in protecting economies against swift and speculative capital movements. However, under many BIT agreements capital controls on volatile investments are forbidden. Countries are therefore unable to take measures to control capital movements in case of balance of payments problems, financial crisis or economic problems, or even as precautionary measures to prevent financial and currency volatility. Within the EU, the European Court of Justice has condemned countries that did not include a rule in the EU constitution allowing Member States to take some safeguard measures against capital movements from third countries[1].

Beyond the particular BIT articles on transfer of payments related to foreign investments, other BITs articles can be problematic for host countries in times of financial crisis. These articles prohibit measures that might be necessary to prevent or reduce a financial or economic crisis, but which can result in investor to state disputes. Examples of such BITs articles are:

- *National treatment,* which ensures that in times of crisis, vulnerable national companies may not be treated more favourably than large foreign investors. Were the host country required to support or bail out a small national bank, they would also be required to do so with foreign banks. Similarly, when foreign banks or other industries have received financial or other support from their home country, they cannot be treated less favourably than national banks or companies in the host country, even if this results in unfair competition.

- *The most favoured nation clause* (MFN) means that investors from a home country that is in crisis, with the inevitable risks of volatility and defaults, cannot be treated differently than investments coming from stable home countries.

- The BITs articles related to *fair and equal treatment*, as well as direct and indirect expropriation, prohibit a number of measures that governments might take in times of crisis. A clear example is the more than 40 ICSID cases against Argentina for measures taken to alleviate a financial crisis in the country, such as the revision of the exchange rate. Foreign investors accused the state of reducing their profits and the value of their investments.

BITs restrictions being reinforced by other agreements

It is important to note that BITs can be used in combination with agreements on free trade in services (services trade is defined as establishment of a foreign service provider, i.e. FDI). 60% of FDI is in the services sector. These agreements - which include the General Agreement on Trade in Services (GATS) included in the WTO, and bilateral trade agreements - open up markets for services investments, including financial services, and prohibit countries restricting the operations of services suppliers. Once a market is open and an investment is inside a country, the BIT articles protect investors and their cross border capital movements, making it even more difficult to take measures to prevent or alleviate a financial crisis.

The free trade and investment agreements negotiated by the EU in the past few years include substantial commitments to liberalise markets in most services sectors, as well as restrictions on foreign investment regukation and capital controls. This new model of free trade and investment agreements, which follow the GATS rules, reduce the policy space of governments to prevent or deal with financial crises. If these free trade and investment rules are combined with the investment protection rules of BITs, the policy space before and during a financial crisis will become very limited for the home as well as the host country, including the EU.

1 See: http://internationallawobserver.eu/2009/03/03/ecj-on-the-duty-of-member-states-to-eliminate-incompatibilities-of-their-BITs-with/ and http://ec.europa.eu/internal_market/capital/framework/court_en.htm

9. Argentina and Bilateral Investment Agreements (BITs)

Julio C. Gambina, ATTAC-Argentina[1]

Beginning in 1976, the economic organisation of Argentinian society underwent a deliberate programme of regressive restructuring. Substantial modifications were made relating to financial legislation and foreign investment; including mechanisms to facilitate a phenomenal inflow of capital in the late 1970s, 1980s and particularly the 1990s. Rising foreign debt, the privatisation of companies, and the free movement of capital deepened the dependency of the Argentine economy, in a process that principally favoured capital coming from Europe[2]. Whilst promoting these changes to the economy, state and society, the ruling dictatorship resorted to terrorism to silence growing protest and popular organisation.

Modifications to the 'legal security' of foreign investors

The 1990s was the decade of uncompromising liberalisation. Argentina's entire institutional framework was modified to favour capital inflow and the 'legal security' of foreign investments. The convertibility regime in force between April 1991 and December 2001, which tied the Argentinian Peso's exchange rate to parity with the US dollar, was a significant factor in orientating the domestic economy to benefit foreign capital.

The result was a phenomenal growth in foreign debt, leaving the country in receivership (2001-2010) and forcing the remittance of large sums out of the country to meet interest payments and cancel debts. Notable also was the progressive transfer of the local economy to foreign control, a process particularly evident at the higher levels of business management[3].

Following the proliferation of BITs, the alteration of legal norms to defend the interests of foreign investors has become increasingly prominent. Argentina held such agreements with the USA, Japan, and, the largest number, with European Union countries; a Free Trade Agreement (FTA) is currently being negotiated between the European Union and Mercosur, facilitated considerably by the temporary presidencies of these organisations being held by the governments of Spain and Argentina respectively.

The results of these BITs and FTAs have been catastrophic, orientating Argentina's economic activity in the interests of transnational corporations and major national economic actors. As a result of this legislation the country has found itself subject to the constant blackmail of global tribunals, particularly the International Centre for the Settlement of Investment Disputes (ICSID). After the crisis in 2001, the country was heavily sued before the ICSID tribunal by external investors who felt their interests were injured by modifications to the political economy. The essential criticism was opposition to the currency devaluation at the beginning of 2002, which broke with 11 years of convertibility between the dollar and the peso. Argentina had ratified their membership of ICSID in 1991, one month before the convertibility regime came into effect, with the foreign investments of those years being attracted by the unbeatable conditions for generating and expatriating profits. Any question of revising these conditions led to legal action being taken against the Argentinian State.

That there have been more than 40 law suits before the ICSID relating to Argentina - triple that of any other State sued - demonstrates the subordination of Argentina, as well as the threat to other countries of the global South, to the strategies of capital's offensive against national sovereignty. Amongst other reasons, these law suits were initiated in response to new conditions in the functioning of the economy following the government's attempt to alleviate the crisis. Cases were brought in protest against relative price changes, the application of new (provincial and national) taxes, and particularly in opposition to the revised exchange rate policy and the application of export restrictions.

Beginning in 2002, these legal actions initiated a negotiation process between the companies and the government. The results overwhelmingly favoured the companies, which have received concessions in the form of tariffs in exchange for the withdrawal of legal actions. In this way, they continue to meet their turnover and earnings targets, maintain the remittance of profits abroad, and ameliorate (back in their central offices) the effects of the global economic recession.

Political Change and Popular Resistance

A political change has taken place in the Latin American region during the first ten years of this 21st century. Argentina is part of this process, although it remains far from the radicalism of reforms undertaken elsewhere on the continent; such as the new definitions of "21st Century Socialism" in Venezuela and "Community Socialism" in Bolivia; actions such as the investigation into the Foreign Debt (Audit Commissions in Ecuador); or the renouncing of membership of the ICSID by the countries that make up the Bolivarian Alliance for the

Americas (ALBA). Whilst in Argentina a critique has emerged of the neoliberal discourse that dominated the 1990s, it has not resulted in substantial modifications to the neoliberal institutions of that period.

This is the challenge that the movements resisting global capital in Argentina now face: combining pressure on Parliament to call for the 'condemnation' of BITs and FTAs, with a popular campaign to raise awareness throughout society of the damage caused by a legal system that surrenders legal sovereignty and subordinates economic development to the will, profits, accumulation and domination of transnational capital.

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2 Bayer, O., Boron, A., Gambina, C., 2010, *El Terrorismo de Estado en la Argentina,* Ediciones Espacio para la Memoria, Buenos Aires.

3 See official information in the National Survey of Large Companies (Encuesta Nacional de Grandes Empresas, ENGE), on the website of the Institute of Statistics and Census (Instituto de Estadísticas y Censos, INDEC).

10. Vattenfall vs Germany: A troubling precedent

The S2B Investment Working Group

In April 2009 the Swedish energy utility Vattenfall brought the German government to international arbitration.[1] The arbitration challenges environmental restrictions imposed on a €2.6 billion coal-fired power plant under construction along the banks of the Elbe River. Vattenfall is seeking €1.4 Billion in damages (together with pre and post-award interest) for delays and restrictions imposed upon the company's project.[2]

The challenge is taking place at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID)[3] under the terms of the Energy Charter Treaty.[4] It follows a bumpy relationship between the investor Vattenfall and the city of Hamburg. Ever since Vattenfall first announced its plan to build the coal-fired power plant in 2004, the project has stirred controversy on a number of fronts. A coalition of environmental and political groups have maintained that the plant would be far larger than what is needed to meet Hamburg's energy needs, and would take an unnecessarily destructive toll on the environment. It is argued that a variety of smaller, more environmentally friendly alternatives exist. As a result, in October 2007 around 12,000 citizens signed a petition objecting to the power plant.

Despite the public opposition, the City of Hamburg agreed to a provisional contract with Vattenfall in 2007 for the construction of the plant, which included certain environmental limits on the impact of the plant on waters in the Elbe River. The terms of the contract were, however, made dependent on the final permit. Hamburg's Urban Development and Environment Authority (BSU) then issued a preliminary construction permit in November 2007, allowing Vattenfall to proceed with certain aspects of construction. Final approval was granted in September 2008, and included additional restrictions on the power plant's impact on the Elbe River. (i.e., impact on water volume, temperature, and oxygen content). It is these additional measures relating to water quality in the Elbe River that appear to be at the heart of the dispute.

According to the City of Hamburg, the conditions stipulated in the water permit are necessary under European Law, and are consistent with the restrictions required of all industry along the Elbe River. Hamburg has explained that it is striving to meet the EU's Water Framework Directive, which requires all EU Member States to ensure certain levels of water quality in rivers, lakes, estuaries, coastal waters and groundwater by 2015. Vattenfall, however, counters that the water regulations would make the plant impractical and uneconomical, and go beyond what was agreed in the 2007 contract with the City of Hamburg. On March 15 2010, news outlets reported the proceedings were suspended and Vattenfall and the German government were exploring a possible settlement, although no information has been released by either party.

Germany's well over 130 investment treaties, including the Energy Charter Treaty, have important implications for environmental regulation and policy in Germany and partner States. In particular, changes in policies or laws which have adverse implications on a foreign investor may be challenged in international tribunals for violating the fair and equitable standard, or constituting a compensatory expropriation. As a result, international investment law may require compensation for investors where German law would not.

The case is particularly troubling given that the water regulations appear to be an implementation of EU-wide law. With future measures on climate change soon to be agreed at the international level, it is worrying that this may be a prelude to arbitration cases not just in Germany, but any state that takes the measures necessary to implement new global standards and targets. If implementation of internationally agreed measures is subject to challenge, this makes environmental regulation and policy-setting especially difficult where a government makes environmental commitments at the regional or global levels, whether to reduce greenhouse emissions or to protect water sources in Europe.

Many environmental laws and policies have been challenged under investment treaties including: the bans of various chemicals for environmental reasons (for example, a gasoline additive and a type of lawn pesticide); a permit refusal for a hazardous waste landfill; an export ban on PCB waste; and measures requiring open-pit metallic mines to backfill. Though not all claims have been successful and many are still pending or have been settled, the problems for environmental regulation and policy setting remain. The dispersed system of tribunals makes it impossible to rely on past decision or to predict future decisions of other tribunals. Moreover, the threat of arbitration can have a so-called regulatory 'chill effect', meaning states will seek either lower standards be applied or none at all. Finally, even where governments win, they may well be left with very significant arbitration costs.

Vattenfall v Germany has brought Germany's international investment policies to the attention of local decision-makers and the public. Unfortunately, international investment arbitration is now conducted behind closed doors in Germany. This lack of transparency has been addressed by other States that have been sued under international investment treaties: the United States, Canada and Mexico as well as a number of other States have amended their treaties and laws to make all phases and documents in investment disputes public. Nothing in the ICSID Arbitration Rules inherently imposes such secrecy. Moreover, in order to avoid broad interpretations of standards such the fair and equitable standard or expropriation, many countries have begun using more restrictive language in their investment treaties. Germany has not yet taken any of these steps, perhaps because until today Germany has not been sued (to public knowledge). Given the extensive net of investment treaties Germany has concluded, and given Germany's generally strong environmental leadership position, it is likely that this case will not be the last.

1 Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6)

2 http://www.iareporter.com/articles/20090719_3

3 http://icsid.worldbank.org/ICSID/FrontServlet

4 http://www.encharter.org/

11. Bolivia resisting the global investment agenda

Antonio Tricarico - Campagna per la riforma della Banca mondiale
Roberto Sensi - Ong M.A.I.S.

In the 1980s and 1990s Bolivia, like many Latin American countries, went through a process of neoliberal reform guided and financed by the World Bank and International Monetary Fund. State expenditures were slashed, capital account, trade and monetary policies were liberalized and state enterprises were closed. During this process the country's economic assets were broken up and, by the mid-1990s, many local companies were owned by large foreign multinationals. In addition to the economic failure that followed, privatization placed strategic resources for economic development and essential services for meeting human needs at the disposal of profit-seeking corporations, and essentially beyond the reach of the population.

The December 2005 elections led to the landslide victory of Evo Morales who, responding to popular demands, announced Bolivia would be willing to accept foreign investors *"as partners, not bosses"*. Over 40 contracts with foreign gas and oil companies were subsequently renegotiated, increasing government revenues and securing its direct participation in decisions related to the domestic economy. This take-back was done legally, without direct confiscation and led to no investment arbitration cases. Then, in April 2007, Morales' government announced its intention to re-negotiate the terms of 1995 privatization of the telecommunication company Entel, owned by Italian giant STET, now Telecom Italia. Considering direct communication and information services are considered increasingly vital for social and economic development, the Bolivian government proceeded with nationalisation through the transfer of 47% of Entel's stock from a public pension fund to the Ministry of Public Work. In order to recover majority control of the company, negotiations were also initiated with ETI N.V (European Telecom International SV)[1], – a Dutch registered company fully controlled by Telecom Italia and the major investor in Entel - to buy 3% of its stock. ETI N.V., which retained 50% of the shares in the company, protested the decision of the Bolivian government, arguing such a move might have decreased the overall market value of Entel.

Telecom Italia subsequently made a formal threat to move to arbitration at ICSID; ETI's investment was covered by a bilateral investment treaty signed in the '90s between Bolivia and The Netherlands which, like most of these agreements, guarantees secrecy and protection to foreign investors. On May 2nd 2007 President Morales reacted by announcing Bolivia's removal from ICSID membership and initiating the withdrawal procedure; a 6 month process according to standard international law practice. However, before the membership withdrawal procedure was legally completed, ETI N.V. presented a formal request to ICSID to open arbitration on the case in order to get full-market value compensation for its alleged losses relating to its future commercial presence in country, claiming *"Bolivia destroyed the value"* of its investment. Two days before Bolivia was to formally and definitively exit ICSID the chair, Mrs. Ana Palacio, initiated the case against Bolivia and started proceedings to set up an arbitration panel to dispute the case.

The Controversies of the Case

The complaint of ETI was both controversial and unique for different reasons. From the legal and procedural perspective, Boliva had filed an official request to withdraw from ICSID before the company filed the complaint. Nonetheless, according to ICSID regulations it takes six months before such a withdrawal becomes effective. Furthermore, even though jurists claimed that provisions under the Bilateral Investment Agreement Bolivia-Netherlands – providing an arbitration venue at ICSID - were still in place despite Bolivia's decision to quit this international organisation, under the bilateral agreement ETI was requested to give explicit written communication to Bolivia about its wish to submit the dispute to an arbitrary tribunal. The La Paz government withdrew and this communication did not occur. Finally, the Bolivian government was willing to negotiate a new agreement with the Italian investor in La Paz, not in front of an international court.

Regarding the content side of the case, ETI claimed that it had invested millions in Bolivia and performed adequate service. However it was highly questionable that Bolivia's move to acquire minority share of Entel did affect ETI's investment. The Bolivian government argued that ETI had been taking vast amounts of money out of the country and therefore hardly invested in Bolivia. Moreover, ETI did not pay the required taxes on the capital outflows[2] and failed to deliver promised services. At the same time, ETI had sought to avoid to pay tax in Bolivia. In fact, according to the Bolivian revenue office, on 14th March 2007 a resolution of the *Superintendencia Tributaria de Bolivia* summoned Entel to pay profit taxes worth $54.1 million dollars. In addition the tax regulatory authority was prosecuting Entel for a case of tax evasion amounting to $27.6 million dollars in 2002. Finally, it was not clear whether ETI had fulfilled an agreement with the government, made when it gained control of Entel, to invest $480 million in the country.

The Nationalisation and ICSID

On May 1st 2008 President Morales issued a nationalisation decree covering all stocks of ETI. In response, ETI began an unprecedented legal strategy to secure its position in the international arbitration case by attempting to have national courts in the US and UK intervene and freeze bank accounts in order to prevent Bolivia from being able to carry out a nationalisation. However, the strategy ultimately failed and in 2008 the case moved back to ICSID. Whilst Bolivia appointed Philippe Sands as its lawyer, with the aim of questioning the jurisdiction of the case, Telecom Italia tried to politicise the issue by requesting intervention from the Italian government and European Commission. By the end of 2008 the arbitration panel had suspended the proceeding and accepted Bolivia's exemption from the jurisdiction of the case, stating this would be investigated and debated further in 2009.

In October 2009 the proceedings surprisingly discontinued at the request of the Claimant. Consequently, by mutual agreement between the parties, the process moved outside of ICSID. The premature ending to the case leaves little information as to what formally occurs when a country decides to leave ICSID in the same manner as Bolivia. It is clear that, at a certain point, ETI requested a change of venue and Bolivia accepted. Reportedly, Telecom Italia suggested a new arbitration process, in Bolivia, to negotiate compensation for alleged damages deriving from Entel's nationalisation. This new arbitration is still pending and no more information has been made available. However, the fact that the investor was forced to accept a new arbitration venue represents a major victory for Bolivia and its people.

The historical decision made by Morales has had significant consequences both in relation to the specific Entel dispute case and on overall arbitration investment governance. In fact, with this act, Bolivia reaffirmed its own right to self-regulate investment policies in a way that makes a more balanced investor-state relationship possible. Bolivia didn't close the door to foreign investors that, as in the case of ETI, moved to the country to carry out profits, but made it clear that multinational corporations would no longer be free to make huge profits at the expense of the country's development.

The story of ETI in Bolivia is not one of massive, notorious or flagrant corporate negligence and stupidity – as was the case with Bechtel's water privatization in Cochabamba. Rather, it is an example of 'business as usual', where essential services and human needs are subordinated to profits. In calling for a renegotiation of ETI's presence in Bolivia, the Morales administration – responding to a popular mandate – was questioning this prerogative. Essentially, that meant confronting a company's ability to use Bolivia solely for profit and export capital to Italy through a dubious 'mailbox company' incorporated in The Netherlands, instead of investing systematically in desperately needed services in Bolivia. Through its unprecedented action, Bolivia re-affirmed the primacy of national sovereignty and the domestic judicial system over the priorities of foreign investors.

1 This company set up without an address and which only has a postal letter box. ETI, a subsidiary of Telecom Italia, is the biggest shareholder of ENTEL and a company practically without employees. It is part of a group of Dutch companies which include International Communication Holding (ICH) N.V. (with no employees) and Telecom Italia International N.V. (with seven employees), the holding company of Telecom Italia. It was established by Telecom Italia in the Netherlands in order to benefit from tax advantages offered in the country, and the Bilateral Investment Treaties which it has signed with a number of countries in the South.

2 Under the privatization agreement, ETI waited for years to make its move. Finally, under a lame duck, transitional government secured highly questionable measures certifying their investments and giving a green light to capital draw-downs. Consequently, Bolivia has legitimately questioned the measures of past governments.

12. Violations of peoples' rights by European TNCs: the cases in Latin America presented to the Permanent Peoples' Tribunal[1]

Compiled by Cecilia Olivet, TNI[2]

European Transnational Corporations (TNCs) are regarded as the "engines" of Europe's growth economy and as drivers of development in the Global South. However, in Latin America and the Caribbean, European TNCs have positioned themselves in strategic areas of the Latin American economy, resulting in increased impoverishment, the pillaging of natural resources, dismantling of public services, conflict, criminalisation of social protest and devastation of the environment.

Over the past few years, European TNCs in Latin America and the Caribbean have been challenged by social movements and civil society organisations from both Latin America and Europe (united in the bi-regional network Enlazando Alternativas) for their systematic abuses of human rights. Extensive documentation of these violations were presented to the Permanent People's Tribunal (PPT)[3] in three separate sessions in Vienna (May 2006[4]), Lima (May 2008[5]) and Madrid (May 2010[6]).

In Vienna and Lima, the Sessions on "Neoliberal Policies and European Transnationals in Latin America and the Caribbean" exposed and assessed the mechanisms responsible for violations of human rights, labour rights and environmental standards committed by more than 25 multinational companies. The session on "The European Union and Transnational Corporations in Latin America: policies, instruments and actors complicit in the violations of people's rights", held in Madrid, focused on European institutions, policies and actors who are complicit in creating an architecture of impunity for the operations of TNCs.

In total, the three sessions of the Tribunal considered 48 cases of TNCs from 12 sectors operating in Latin American and Caribbean countries. Each specific case presented to the Tribunal clearly demonstrated that the reported violations are not isolated incidents, but are repeated systematically. The cases presented at the Tribunal: exposed the major impacts of TNC behaviour, which communities and individuals suffered; gave greater visibility to the instruments that facilitate and cause these outcomes; and finally, identified the actors responsible for these outcomes and the motivations behind their actions. Furthermore, the Tribunals accused the European Union and European governments of being complicit in the crimes of transnational corporations by creating the conditions for violations to take place.

What follows is a brief summary of the evidence of violations of fundamental human rights by TNCs, highlighted in the verdicts of the last two sessions of the Permanent Peoples' Tribunal[7]:

a) Attacks on labour rights:

Evidence was presented of exploitation of labour, the criminalization of social protest, (characterised by violent repression that has reached the extreme of causing numerous violations of the individual's right to life and liberty), as well as criminal charges ranging from crimes of association to terrorism. The persecution of trade unions via unjust mass dismissals was made particularly evident in the case of the agro-foods company CAMPOSOL when, in December 2007, 385 workers, 80 per cent of whom were unionised, were dismissed. Evidence was also presented against: Telefónica of Chile for violation of trade union freedoms, and violation of the fundamental right to work and to decent working conditions; Pescanova for violation of labour rights in Nicaragua, such as subjecting its workers to days of over 12 hours, deducting taxes from their overtime pay and limiting or prohibiting the workers' right to unions; Hanes Brands for violation of the rights of women workers in Honduras; Louis Dreyfus for cases of slave labour in Brazil; and Proactiva Medioambiente and Union Fenosa for massive layoffs of workers in Ecuador and Central America.

b) Attacks on physical integrity:

Evidence of the use of military, police, paramilitary and private security companies was presented in cases such as Impregilo in the river Sogamoso (Colombia), Cerrejón in la Guajira Colombia, Monterrico in Peru, BP in Colombia and ThyssenKrupp in Rio de Janeiro, Brazil. The Tribunal also heard cases of kidnappings (Holcim and Monterrico), murder of social and community leaders (Union Fenosa and Holcim in Guatemala and Colombia), and forced disappearance of persons. The criminalization of communities opposed to the exploitation of natural resources (mining, cement, energy) in the case of Holcim and Gold Corp. (Guatemala) was also heard. The cases of Union Fenosa, Pluspetrol in Peru and BP in Colombia gave evidence of instances where governments imposed a "state of siege", suspending rights and undertaking arbitrary arrests. In the specific case of Nestlé, the complaint related to strategies of intimidation and, through the use of infiltrators, control of social organizations in Europe.

c) Destruction of the environment and vital resources:

Although they are not the only polluters, the mining and oil industries in particular continue to contaminate water supplies and cause soil degradation, deforestation and in some cases even desertification, with an enormous and irreversible impact on biodiversity in many of the regions in which they operate. A typical case is the environmental damage caused by the Mining Company MAJAZ, which, if it continues to expand, would be seriously detrimental to the Amazon Basin.

Many cases have also dramatically documented the impact of environmental crimes on food security, access to water, and the forced displacement of rural and indigenous communities from their homes and land. The case of the German company THYSSEN KRUPP in Brazil is a clear example: the installations of the company in the Bahia de Sepetiba are causing the environmental destruction of the bay and having grave impacts on traditional fishing.

Cases of environmental destruction of vital resources have also been documented, particularly related to aquifer overexploitation (Aguas de Barcelona in Mexico), the construction of hydroelectric dams on rivers in Brazil (GDF-Suez, Banif-Santander) and Chile (Endesa / Enel), and plans to build a dam on the river Sogamoso (Impregilo in Colombia). Environmental destruction was also evident in the cases of Canal de Isabel II in Colombia, Holcim in Colombia, Mexico and Guatemala, Pluspetrol and Perenco in Peru, Repsol in Argentina, and Louis Dreyfus, whose activities resulted in deforestation and pollution through pesticide spraying. In the case of Pescanova's activities in Nicaragua the fishing exploitation of the Spanish multinational is seriously damaging the Nicaraguan mangrove swamps. These ecosystems are the source of elementary security and subsistence for thousands of families in the area of Estero, Nicaragua. Its activities are provoking irreparable environmental damage as well as affecting the economic and social development of the zone's populations.

d) Violations of the rights of communities, peoples and indigenous nations and African descendents

The Tribunal heard allegations of cultural aggression and invasion of indigenous territories, as well as the destruction of the environment and traditional ways of life of indigenous people. The evidence presented showed the expulsion of communities from their lands, often accompanied by violence on the part of the army, the police or unregulated armed groups. In a number of cases abuse of authority was also proved, and even the indifference, inaction and sometimes complicity of certain judicial bodies. Cases of buying off people's consciences and co-opting individuals or communities were also found in a number of the testimonies, such as those presented in the case of UNION FENOSA operating in Colombia, Guatemala, Mexico and Nicaragua, which did not honour the commitment it had made to compensate displaced indigenous, peasant farmer and African descendent populations. In the case of SHELL, this Dutch-British company turned to illegal repression of Brazilian and Argentinean communities in Loma de la Lata and in Neuquen; REPSOL were pointed out as being responsible for the failure to respect the rights of the Paynemil and Kaxipayin Mapuches of Argentina, Bolivia and Ecuador. SHELL was also accused of requesting that the same repressive practices be used against communities defending their environmental rights in a European country (Ireland).

In the specific case of transnational corporations such as Perenco and Repsol in Peru, business activities threaten the survival of indigenous peoples in voluntary isolation. Such activities have been facilitated by the complicity of the Peruvian government, which failed to apply the law. Similar violations were observed in the case of Endesa/Enel in Chile, Repsol in Argentina, Pluspetrol in Peru, and Agrenco and Louis Dreyfus in Brazil in the fields of energy, oil exploration and expansion of biofuel monocultures.

e) Violations of the right to food sovereignty:

The case of SYNGENTA, presented to the PPT by Via Campesina and Terra de Direitos, clearly documented how the mechanisms of massive contamination, violent repression by paramilitary forces and criminalisation of opponents were consistently utilised in the absence of the State's protection, or even with its complicity.

f) Damage to peoples' health:

The Tribunal has received convincing evidence of direct damage caused by contamination of aquifers and poisoning by insecticides. Two cases are particularly notable: a) the poisoning of 44 children from the Tauccamarca community by the German company Bayers Paration, and the resulting deaths of 24 indigenous children; b) the poisoning caused by the pesticide Nemagon, widely distributed by the Shell Oil Company, particularly in Honduras and Nicaragua, with dramatic consequences including illness and deaths. The Tribunal also heard accusations against ROCHE for their conduct in Brazil.

Furthermore, the Tribunal considered cases where generic medicines, in transit to Latin American countries, were confiscated in European harbours, under the accusation of violating European patents. These cases (including Aventis, Novartis, Pfizer, Warner Lambert y DuPont) violated the human rights to health and access to generic medicines used for the treatment of several illnesses in the affected countries.

Lastly, evidence was presented of how the privatisation of water (Proactiva Medioambiente, Ecuador) has led to reduced flow and a loss of water quality, resulting in negative impacts on public health. The PPT has also received complaints about the impact of hydroelectric dams on the River Madeira, Brazil, affecting public health (through water pollution by heavy metals and water system destruction).

g) Privatisation of public services:

Evidence was presented of the non-transparent privatization of public services, particularly in the sectors of water and energy (Aguas de Barcelona in Mexico, Canal de Isabel II in Barranquilla, Santa Marta, Colombia and Union Fenosa in Nicaragua, Colombia, Mexico and Guatemala), with rate increases, penalties for reconnection and electricity supply cuts.

h) Promotion of corruption:

This has become an almost common mode of operation in all these processes, in which the different actors are implicated through the granting of exploration and production concessions to the extractive industries and the privatisations imposed on countries by the international financial institutions as a requirement in the agreements they sign. Particularly clear examples can be found in the cases of UNIÓN FENOSA, in their process of privatisation of energy distribution in Nicaragua (a law was modified to allow for a public tendering process with only one offer, which in the end was made by the UNION FENOSA), and of the Swedish construction company SKANSKA, accused of being involved in acts of corruption and the payment of surcharges in Peru, in the plan to widen the Camisea Gas Pipeline.

1 This article is a summary of the report Enlazando Alternativas (2009) *European Union and Transnational Corporations Trading Corporate Profits for Peoples' Rights*. Available online at http://www.enlazandoalternativas.org/spip.php?article522; and the Verdict of the Permanent People's Tribunal Session in Madrid. Available online at: http://www.enlazandoalternativas.org/spip.php?article731

2 The Transnational Institute (TNI) is a founding member of the network Enlazando Alternativas and has been involved in the conceptualisation and organisation of the Sessions of the Permanent People's Tribunals in Vienna (2006), Lima (2008) and Madrid (2010).

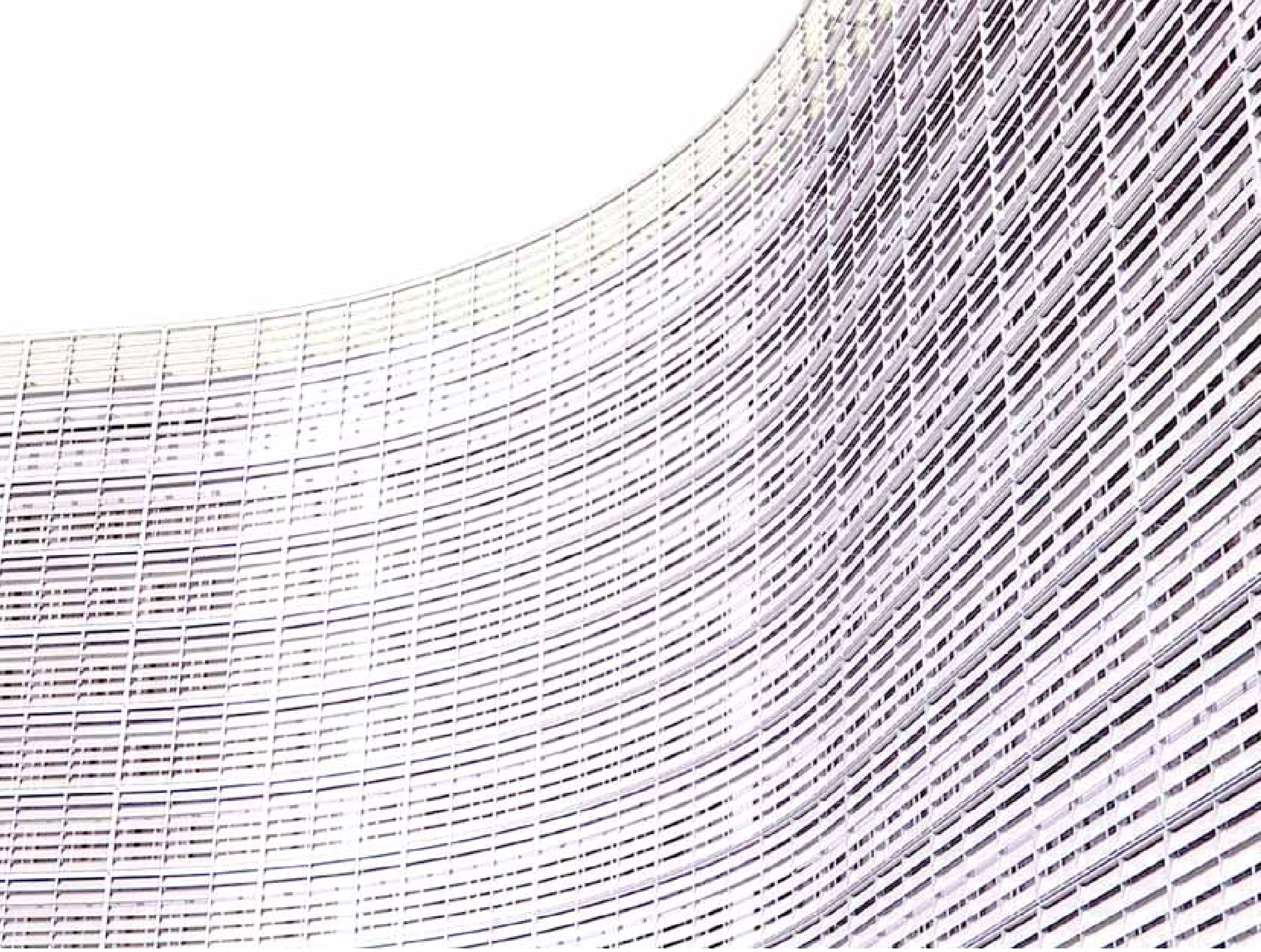
3 The PPT is an international "opinion tribunal" independent of State authorities. It succeeded the tribunal for crimes against humanity committed by the United States in the war against the Vietnamese people (the Russell Tribunals). Inspired by the Italian senator Lelio Basso, one of the leaders of the anti-fascist resistance in Italy. From the Russell Tribunals were born various organisms that took on the struggle for human rights for peoples amongst which is the Permanent Peoples Tribunal (PPT) that has become a permanent structure. The PPT is made up of nearly 130 members, named by the council of the Lelio Basso International Foundation for the Rights and Liberation of Peoples (http://www.internazionaleleliobasso.it).

4 http://www.enlazandoalternativas.org/spip.php?article382

5 http://www.enlazandoalternativas.org/spip.php?article341

6 http://www.enlazandoalternativas.org/spip.php?article653

7 Verdict PPT Lima: http://www.enlazandoalternativas.org/spip.php?article199. Verdict PPT Madrid: http://www.tni.org/sites/www.tni.org/files/TPP_MADRID_2010_ES.pdf



Section 3 Resistance and alternatives to the current EU's investment paradigm

13. Belgian regional governments suspend ratification of Colombia BIT

Marc Maes, 11.11.11

On 3 March 2010 the minister-president of the Flemish regional government announced they would no longer pursue the ratification of a BIT agreement that Belgian and Luxemburg had signed with Colombia on 4 February 2009. A few weeks later the Walloon government followed suit, suspending the ratification process of the Colombia BIT[1].

The decisions by the two regional governments came in response to heavy pressure from the Belgian Decent Work Campaign. This campaign was launched as part of the International Decent Work Campaign which in itself aims to promote the Decent Work Agenda of the International Labour Organisation (ILO)[2].

The Belgian Decent Work Campaign was launched in 2008 by the Christian-democrat, socialist and liberal trade unions together with a large number of NGOs including the two umbrella organisations 11.11.11 and CNCD[3]. The campaigning partners collectively created a list of concrete demands and an elaborate lobby and campaigning plan, with an insistence on prioritising Decent Work in international trade and investment policies. Within that framework, and owing to the serious violation of trade union rights and wide spread violence against trade union activists in the country, the Belgian Decent Work Campaign actively supported the call of the Colombian Trade Unions to resist EU plans to conclude a Free Trade Agreement with Colombia. However, during this process, it became known that Belgium and Luxemburg had quietly concluded and signed a BIT with Colombia.

It is typical for BIT negotiations to take place in absolute discretion with only insiders, like the business associations, being kept informed or allowed to indirectly contribute. Even parliaments only learn about BITs when the signed agreements are presented to them for approval. In the case of Belgium, BITs are negotiated together with Luxemburg in the framework of the Belgium-Luxemburg Economic Union (better known as BLUE Agreements). In the case of the federal kingdom of Belgium BLUE Agreements have to be approved by the two chambers of the federal parliament and by the three regional parliaments of Flanders, Wallonia and Brussels. The BLUE Agreement with Colombia became public when the Flemish government asked the advice of the SARIV (Flemish Strategic Advisory Council for Foreign Affairs), a council composed of employers, trade unions, academics and NGO's.

Within the SARIV, trade unions and NGO's made it clear from the beginning that they would not give their approval to any BIT or BLUE Agreement with Colombia, on the grounds that the BIT Model used is unbalanced and does not include sufficient social and environmental standards. Furthermore, SARIV stated no agreements should be signed with Colombia until the violence against trade unions is stopped.

During the discussion in the SARIV, unions and NGOs used the general critique of BITs, outlined by both UNCTAD and IISD, to argue that Belgium should seriously revise its Model treaty[4]. Since then IISD, at the request of Oxfam Belgium, has produced a more in-depth analysis[5]. They found the BIT model "*lacks many important provisions and refinements that are important for promoting sustainable development and preserving policy space*." According to the study, specifications that should be included are, "*among others, provisions explicitly stating that regulatory measures taken to further public policy goals do not constitute expropriations; provisions narrowing the scope of the fair and equitable treatment requirement; flexibilities with respect to the free transfer of funds; and provisions providing for transparency in investor-state dispute settlement*".

However, there is one aspect in which the Belgian-Luxemburg BIT model has shown progress, namely social and environmental clauses. Since 2002 such clauses have been incorporated in to the BLUE standard approach, but, depending on the acceptance of such clauses by the partner country, the final outcome can often turn out to be quite weak. In the case of Colombia where, given the circumstances, a strong stance should have been taken, Belgium and Luxemburg were willing to accept a watered down version of its standard formulation.

Since the June 2009 regional elections, both new coalition governments of the Flemish and Walloon region have declared, in response to the Decent Work Campaign, that they would make the incorporation of enforceable provisions on international labour standards and environmental agreements a condition of accepting international trade and investment agreements. Confronted with critique on the watered-down Colombia BIT signed by their predecessors, both new governments stood by their formal declarations and suspended the ratification procedure.

In his letter of 3 March 2010 the Flemish minister-president mentioned three considerations that had led to his decision: first, the coalition government declaration of June 2009; second, the negative advice of the SARIV; and third, the fact that the Lisbon Treaty had shifted competence on Foreign Direct Investment to the EU-level so that a re-negotiation of the

BLUE Colombia BIT would no longer be possible. In the same breath the minister-president promised he would work for the inclusion of enforceable labour and environmental provisions in European investment agreements.

In the meantime, it has become clear that the European Commission will soon present a draft regulation to the Council and the Parliament that would allow the European Member States to continue to negotiate BITs. This means that the Belgian Decent Work Campaign must remain vigilant; especially in light of the weak resistance of Belgium and Luxemburg to the initialling, on the fringes of the EU-Latin America and Caribbean Summit, of a Free Trade Agreement between the EU and Colombia on 18 May 2010[6].

1 Reply by Minister President R.Demotte to an oral question by MP L.Thibergien in the Walloon parliament on 22 March 2010, http://nautilus.parlement-wallon.be/Archives/2009_2010/CRIC/cric96.pdf

2 www.decentwork.org; http://www.ituc-csi.org/-decent-work-.html?lang=en; http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork/lang--en/index.htm

3 www.waardigwerk.be; www.travaildecent.be;

4 See the notes in the advice (which itself is only available in Dutch) :

http://www.sariv.be/web/images/uploads/public/6466155903_20090629_BLEU_web.pdf

5 N.Bernasconi-Osterwalder and L.Johnson, 'Belgium's Model Bilateral Investment Treaty: A Commentary'. Brussels-Geneva, IISD-Oxfam Solidarity, March 2010. http://www.s2bnetwork.org/s2bnetwork/download/Belgian%20Model%20BIT%20Commentary%208%20March%202010%20FINAL.pdf?id=372

6 http://trade.ec.europa.eu/doclib/press/index.cfm?id=573

14. Civil society protests prevent Norway from joining the BITs race

Marc Maes, 11.11.11

Up until the mid 1980s, Norway had only signed three BITs (with Madagascar in 1966, and with China and Sri Lanka in 1984 and 1985). However, from the early 1990s, it quickly joined the scramble for the former communist economies of Central and Eastern Europe by concluding dozens of BIT agreements[1].

By 1996, questions had begun to emerge about the constitutionality of the investor-to-state dispute settlement and the possible effects of rights affecting the policy space of the Norwegian government being given to investors. Soon after, the controversy around the Multilateral Agreement on Investment (MAI) began – highlighting the issue of investor protection versus public interests.

The social, including union, mobilization against the MAI in Norway resulted in strong and lasting civil society alliances; consolidated through the creation of the "Network Against MAI", the "Network Against Market Power and for Democratic governance", the "Globalization conference – Norway Social Forum" (which even had its first conference before the first WSF), and the "Norwegian Trade Campaign".

In July 2007, when an initiative by Ministry of Trade and Business to silently reintroduce a BITs policy was leaked, the reaction from sectors within the coalition government and civil society quickly led to a broader and more inclusive process. An inter-ministerial committee was formed to assess the advantages and disadvantages of investment protection agreements and a report, together with a proposal for a new BIT-model, was presented for consultation to the public in January 2008[2].

Besides the protection of Norwegian investors, the report outlined the promotion of sustainable development as an important goal of the proposed BIT model. Consequently, civil organisations invited colleagues from the South to contribute comments as well. Responses were received from Via Campesina, Third World Network, as well as UNCTAD and the South Centre[3]. The two minor government coalition parties, the Socialist Left and the Centre Party, also made the government send common invites for an open seminar in Parliament on 7 April 2008.

This seminar, together with the responses to the public consultation, intensive lobbying and public campaigning made it difficult for the government to proceed with its proposed BIT model. Even if the proposed model contained interesting innovations, for instance regarding objectives and transparency[4], civil society had convinced many that the model was still unbalanced. Business groups also rejected the model, arguing it did not offer enough investor protection[5]. In June 2009, facing objections from both sides, the government conceded it would not use the model.

1 See: http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1

2 Oral information from Helen Banks and Aksel Nærstad of The Development Fund, Norway; Government of Norway, Model for investment agreements – general review. Letter to business and civil society organisations, Ref. 200704830-2/MIR, 7 January 2008, http://www.regjeringen.no/nb/dep/nhd/dok/Horinger/Horingsdokumenter/2008/Horing---Modell-for-investeringsavtaler/-4.html?id=496026.

3 http://www.regjeringen.no/nb/dep/nhd/dok/horinger/horingsdokumenter/2008/horing---modell-for-investeringsavtaler/horingsuttalelser.html?id=496023

4 See the response of G. Van Harten to the consultation, who applauded the that draft would *"enhance transparency in the arbitration process, provide for greater precision in the definition of substantive standards, provide for check against forum-shopping, and ensure that investors undertake reasonable efforts to pursue domestic remedies before filing a treaty claim"*. See also L.E. Peterson in IISD's *Investment Treaty News*, 27 March 2008, http://www.investmenttreatynews.org.

5 Vis-Dunbar, D., 2009, *Norway shelves its draft model bilateral investment treaty*, Investment Treaty News, 8 June.

15. Alternatives to the BIT Framework

Ross Eventon, TNI

Corporations are principally accountable to their shareholders and legally entitled to seek profit. They are undemocratic institutions, largely unaccountable to workers, consumers, suppliers or affected communities. Without legislation or government intervention, there will be a fundamental and inevitable failure to restrain corporations and, when necessary, secure justice for affected individuals and communities. In such situations, victims must look to their elected governments to protect them from the 'externalities', to use the technical economic terminology, of unrestrained profit-seeking behaviour by transnational corporations (TNCs). BIT agreements deal exclusively with the rights of TNCs operating on foreign territory, but it is clear from objective analyses of the corporation as an institution, as well as the failure of voluntarism, inherent in the concept of 'Corporate Social Responsibility' (CSR), that legally enforceable binding rules and agreements, which clearly outline the explicit obligations of corporations, are necessary to prevent abuses.

In the past, there have been a number of initiatives, created by international organisations, proposing amendments to current legislation. A United Nations expert working group outlined principles for a fair agreement on investment[1], which would allow for the discrimination of investment based on its contribution to development aims. Similarly, the UNCTAD 'Rules for Control of Restrictive Business Practices' and OECD 'Guidelines on Multinational Enterprises' deal with the potential abuse of market power by international corporations. However, these measures do not empower individuals affected by corporate activity; they are principals, not obligations. The much vaunted 'Ruggie Framework' proposals contain similar limitations. These were the result of then UN secretary General Kofi Annan's decision to appoint John Ruggie, in 2005, as UN Special Representative to study the issue of TNCs. Ruggie's resulting proposals remain exactly that, proposals of standards for companies with no binding obligations. Moreover, Ruggie, as well as representatives of the European Union in the Human Rights Council, have opposed authorizing the Special Representative to receive complaints on violations committed by TNCs. Therefore, the framework is based on the same principle as CSR: the voluntarism of corporate CEOs.

Outside of these initiatives from international institutions, various governments and civil society groups have put forward a range of proposals for a fairer system of international investment agreements. The Bolivian government has created guidelines for a *"fair and productive cooperation treaty with the United States"* that includes a willingness to accept international trade and investment, provided it does not undermine the national government's authority to pursue its own development agenda. Key to this alternative model is a provision granting governments the right to maintain programs that assist the development of local producers. The model also rejects international arbitration, favouring domestic processes, and requires investors to actively contribute to the local economy by transferring technology and utilising local labour and inputs. The Venezuelan government has similarly developed the Bolivarian Alternative for Latin America and the Caribbean (ALBA) as an alternative to the proposed Free Trade Area of the Americas. Notably, this places performance requirements on foreign investment and prevents corporations from undermining regulations enforced in the public interest.

An influential set of investment rules outlined by the International Institute for Sustainable Development (IISD) require investors to abide by various internationally recognized labor, environmental and human rights standards, as well as perform environmental and social impact assessments of their potential investments. However, the model has been criticised by civil society organisations for its willingness to maintain the investor-state dispute mechanism and not grant private citizens any significant new powers. U.S. environmental groups have also outlined recommendations for investment rules, in particular arguing that private citizens be given the same rights for enforcement and remedies as corporations. Regarding the current form of arbitration process, there have been numerous calls from civil society for greater transparency and participation, the creation of an appeals process and the removal of ICSID from the World Bank system to become an independent body.

The Ecuadorian government has been active in this regard, drafting a proposal for an alternative dispute settlement mechanism within the UNASUR (Union of South American Nations) bloc[2]. This new mechanism would be based on *"consent as the basis of the activation of arbitration"* and *"respect for Human Rights"*. Developing countries would benefit from an *"access to defense"*, including the creation of a legal advice centre to assist poor countries, as well as a limit on the amount of fees charged during the arbitration process.

The draft outline acknowledges the current conflict of interest inherent in the ICSID court - being totally dependent on the world bank, which is managed by the five largest shareholders, which in turn host the headquarters of the majority of corporations benefiting from ICSID tribunals – and advocates a series of alternatives: related arbitration processes should be accumulated and enforced, so as to avoid conflicting decisions (a significant issue under ICSID); the creation of a Permanent Court; a process for appeal; the allowance of third party involvement (similar to the International Court of Justice in the Hague); and the need to exhaust administrative and judicial routes before moving a case to the court. Lastly, in contrast to ICSID, the proposal calls for transparency in court procedures, with information on cases being made public and not handled in secret.

It is clear there are a wealth of alternatives to the current framework of BITs and the arbitration process they entail. Crucially, governments must be allowed to maintain the flexibility to effectively regulate FDI at the national level. Corporations must be obligated to respect international and domestic law, and be held accountable when they are found in violation. Furthermore, investment rules should not favour private over public interests and economic over social, developmental and environmental concerns. At the most fundamental level, the rights of human beings must be primary. That is to say, International Human Rights Law and national constitutions must take precedence over the desires of private corporations.

1 UNCTAD Commission on Investment, Technology and Related Financial Issues, 1997, *Criteria for the development friendliness of principles investment frameworks*, Geneva.

2 Government of Ecuador, *Configuracion del mecanismo de solucion de controversias en materia de inversiones en el seno de la UNASUR*

16. Bi-regional proposals for regulation of TNCs: towards an International Tribunal on Economic Crimes[1]

Compiled by Cecilia Olivet, TNI[2]

During the last 6 years, social movements and organisations from Latin America and Europe, connected through the Europe-Latin America bi-regional network Enlazando Alternativas, have repeatedly exposed how voluntary codes of conduct, which form part of the Corporate Social Responsibility (CSR) approach, have failed to tackle human rights and environmental abuses of Transnational Corporations (TNCs). These movements denounce the current system of legislastion, where the rights of TNCs "are guaranteed by the judicial fortress of the *Lex Mercatoria*", but responsibilities and obligations are unmentioned, left to the good will of corporations. So far, TNCs have successfully resisted any binding international code that includes obligations.

Such movements have not only questioned the legitimacy of the operations of European TNCs for their systematic violations of human rights, but have also developed proposals for regulation and control of corporations. These regulations would aim to address the imbalance created by the *new Lex Mercatoria*[3] by establishing a system where corporations are accountable, do not hold more power than states, can no longer define for themselves their responsibilities and where their profits are not being prioritised over the well-being of the people and the environment. In this way, they have joined the growing international movements calling for binding obligations on TNCs to force them to submit to international norms.

Over the last 2 years, the Enlazando Alternativas network, in conjunction with the Permanent People's Tribunal, has identified some proposals for regulating the investment activities of TNCs.

The need for an International legal binding code

Based on the failure of voluntary mechanisms of conduct for TNCs, the bi-regional network has identified the need for an international normative code, which would define the limits of corporations' legal responsibilities for the consequences of their activities. This binding legal framework must be of a coercive, sanctioning and binding nature. The content of this code should be the result of a synthesis of the *ad hoc* codes of the ILO, the OECD and the proposals for binding codes discussed at the UN in the 1970s. Other criteria should include the extension of the parent company's responsibilities to its subsidiaries, suppliers, contractors and sub-contractors. TNCs priorities should be subordinated to Host States' sovereignty in ways that are coherent with the right to development and the civil and penal responsibility of its owners and directors. In any case, a central premise requires doing away with the notion of voluntarism.

The concept of economic crimes

Whilst a wide range of instruments and rules have been adopted - and international bodies created - to judge perpetrators of war crimes and human rights violations, international law has no jurisdiction over economic crimes. In actual fact, the concept of economic crime has no international legal definition. Therefore, most crimes committed by TNCs go unpunished.

There is no doubt that TNCs are a source of economic and environmental crime across the entire planet; a fact established by the substantive evidence presented to the Permanent People's Tribunals sessions on Transnational Corportations[4]. In light of this, the *Enlazando Alternativas* network advocates that economic and environmental crimes committed by TNCs should be categorised as "crimes against humanity".

A Tribunal on Economic Crimes

A new legal framework will require the creation of an International Economic Tribunal that can judge transnational companies, be responsible for defending the fundamental rights of people affected by TNC's activities and impose appropriate sanctions.

A Tribunal with these characteristics is both feasible and necessary. Some proposals have already been made in this direction. For instance, UN Rapporteurs have made a proposal for the creation of an International Court on human rights with the power to judge multinationals; although the proposal was made in the context of a project that did not belong to the UN, called the "Swiss Initiative". Proposals also have been made on broadening the jurisdiction of the current International Criminal Court to include legal persons (such as corporations) and violations of economic, social and environmental rights.

Other proposals advanced by the network include: a) the creation of a Centre on Transnationals Coporations as part of the UN system, which would audit TNCs practices and investigate their failure to comply; b) advocacy for the extraterritoriality of the responsibility of TNCs; c) denouncing the Free Trade Agreements (FTAs), Bilateral Investment

Treaties (BITs) and the practices of the International Centre for Settlement of Investment Disputes (ICSID); d) re-establishing, following the Calvo doctrine, the competence of national tribunals over international ones; e) banning states from financially supporting their TNC's projects that violate human rights.

These proposals are still in a development stage. The *Enlazando Alternativas* network is committed to further work on the conceptualisation as well as the campaigning of these proposals, which are understood as being part of a broader social and political strategy to dismantle the power of the TNCs as a way of protecting the peoples and the planet on which we live. A campaign to impose binding mechanisms of regulation on TNCs and an International Tribunal that punishes corporate violations will require the crucial support of social movements and trade unions worldwide in order to succeed.

1 This article is a summary of the report Enlazando Alternativas (2009) *European Union and Transnational Corporations Trading Corporate Profits for Peoples' Rights*. Available online at http://www.enlazandoalternativas.org/spip.php?article522; and the proposals that emerged from the verdict of the Permanent People's Tribunal Session in Madrid (Section VI). Available online at: http://www.enlazandoalternativas.org/spip.php?article731

2 The Transnational Institute (TNI) is a founding member of the network Enlazando Alternativas and has been involved in the conceptualisation and organisation of the Sessions of the Permanent People's Tribunals in Vienna (2006), Lima (2008) and Madrid (2010).

3 The *new Lex Mercatoria* can be defined as the body of norms and rules that have created the legal, economic and financial framework that protects TNCs and allows them to violate human rights with impunity. The core of the Lex Mercatoria is constituted by the WTO agreements, Bilateral Free Trade and Investment Agreements, the International Monetary Fund (IMF), and the World Bank (WB), together with multinationals' investment and exploration contracts and decisions from dispute-settlement processes. For an extensive analysis of the issue see: Juan Hernández Zubizarreta (2009) Las Empresas Transnacionales frente a los Derechos Humanos: Historia de una asimetría normativa. Hegoa y OMAL. Available online at: http://www.hegoa.ehu.es/file/434/las_empresas_transnacionales_juan_hernandez.pdf .

4 See full cases presented to the PPT at: http://www.enlazandoalternativas.org/spip.php?article382 (Tribunal Vienna, 2006); http://www.enlazandoalternativas.org/spip.php?article341 (Tribunal Lima, 2008) and http://www.enlazandoalternativas.org/spip.php?article653 (Tribunal Madrid, 2010).

Reclaiming public interest in Europe's international investment policy

Civil society statement on the future of Europe's international investment policy

July 2010

Putting on hold and rethinking existing agreements

Since the Lisbon Treaty entered into force on 1st of December 2009, the competence to negotiate international agreements concerning Foreign Direct Investments (FDI) has shifted from individual Member States to the EU.

Trade justice campaigners working together in the "Seattle to Brussels Network"[1] believe that EU Member States' current bilateral investment treaties (BITs) are inappropriate, unbalanced and outdated and should not serve as blueprints for the EU's future investment treaty model.

They therefore advocate that:

all Member States' BIT negotiations should be put on hold, while the new and improved EU investment policy framework is being defined

a **sunset clause** is set on all existing Member States' BITs, under which they would expire at a certain date unless they were reviewed to achieve a greater balance between the protection of public and private interests and of economic, social, environmental and developmental interests;

the European Commission undertakes **a thorough assessment** of the Member States BITs and the functioning of international investor-to-state arbitration regarding their impact on the policy space of governments to further sustainable development, gender justice and social equity and to implement their obligations under international conventions and treaties on human, women's and labour rights, the environment and climate change

broad public consultations are held before any decision on an EU investment policy is taken.

Europe needs to critically examine the developments over the past decade in the area of international investment law, policy, practices and experiences, and ensure that it does not repeat the mistakes of EU Member States when crafting its investment treaties and investment chapters in future trade agreements. Now is the time to think out of the box and develop an investment treaty model that truly promotes long-term socially and environmentally sustainable investment and transforms Europe's complex web of bilateral investment treaties into a more transparent, predictable and balanced system.

A major opportunity to foster policy coherence

Since the Lisbon Treaty entered into force, the European Commission is preparing a new European policy regarding Foreign Direct Investments (FDI). So far, the European Commission seems to be prioritising consistency with existing EU law and "*legal certainty and maximum protection for EU Investors*"[2]. It does not seem concerned about overcoming the lack of transparency in investment arbitration or interested in assessing or preventing possible negative development, social, environmental and human rights impacts resulting from existing from EU Member States' existing BITs.

S2B members believe that rather than moving to an EU investment treaty approach that simply mirrors member state models, the EU should critically assess the international investment framework, fix its deficiencies and develop a foreign investment policy that balances investors' rights with investors' duties and fosters positive investor behaviour by promoting long-term socially and environmentally sustainable investment as well as the objectives of the European Union with regard to development, social, environmental, human and women's rights.

This new approach should comply with new provisions on policy coherence within the overall EU external policy under the Lisbon Treaty, Art. 208 TFEU, which defines the achievement of the MDGs and poverty reduction as over-arching foreign policy goals for the whole Union. Similarly, as recently highlighted by the UN Special Rapporteur on business and human rights, investment treaties should balance investor rights on the one hand and the host states' policy space on the other hand, in order to allow protection and promotion of human rights – another horizontal objective for the European external policy.

The EU has also subscribed the ILO's Decent Work agenda. Investment treaties should contribute to the creation of decent work and the effective implementation of core labour standards and other basic decent work components.

The G20 has recognised the need to tackle global imbalances in the world economy. Investment can play a crucial role in doing this. Liberalisation and protection of portfolio investment in particular has exacerbated volatility in the financial markets, as well as related speculation and shadow banking, thus contributing to the financial crisis. Given that the Lisbon Treaty adds foreign direct investment to the EU competences (which has not previously included portfolio investment, for instance), but does not provide a clear definition of FDI, a careful approach needs to be followed in order to link investments to the productive economy and to allow for these impacts to be monitored.

Why existing BITs undermine development and public interest policies

We believe that several elements of the approach currently applied by EU Member States require rethinking.

EU Member State investment treaties typically provide broad protection for investors and to do so impose far-reaching obligations on the state receiving the investment (the host state). This potentially undermines countries' long-term economic and social development, as well as the rights of local communities. This focus on investment protection which dominates the current investment treaty model must be questioned and reviewed. The literature about the impact of foreign investment on (sustainable) development shows a mixed picture and points to the need for more than an overall investment protection policy to benefit from foreign investment. Why should investment treaties only provide rights to investors and impose obligations on host states? Why should investment treaties only be about investment protection and not also about the promotion of socially and environmentally sustainable investment? We believe it is time to ensure that home states and investors are also held responsible through investment treaties. They need to foster positive investor behaviour and long-term socially and environmentally sustainable investment in the host state.

Investment definitions in current BITs often include portfolio investment, which allows European private financial firms to have their purely financial operations, investments and speculation in host countries covered by protection clauses. BITs also grant the right to the free movement of capital, even though this could lead to speculation, tax-evasion and tax avoidance, favouring capital flight from developing countries instead of supporting investments into the productive economy. This focus on the free movement of capital is also a threat to local and international financial stability and should be strictly constrained. The European Court of Justice has already condemned some of the provisions in investment treaties, notably those relating to the free transfer of capital, as incompatible with European law. Therefore a limited and clear definition of FDI should be included in the new EU international investment policy.

The impact of certain provisions, such as most-favoured nation treatment (MFN), must be reassessed in the light of the decisions made by international arbitration tribunals in recent years, which have allowed investors to "import" commitments that host states made in other agreements. These developments limit policy space in host countries – including in Europe – and do not provide host states with sufficient benefits to compensate for their loss of regulatory freedom.

Another cause of concern is the unspecified language used in the agreements that is vulnerable to far-reaching and uncertain interpretation, specifically with regard to expropriation provisions and "catch all" clauses that guarantee the "fair and equitable" treatment of foreign investors. They have allowed investors to challenge a wide range of regulatory measures, including measures with a clear public purpose.

The duration of bilateral investment treaties is also problematic. While they often have to be reviewed after 5 or 10 years, and in some cases must be ratified again, protection provisions remain in place for decades after the expiry of investment treaties for investments that began when the treaty was still in force. This represents a barrier to renegotiating more balanced agreements.

One of the most important and distinctive characteristic of the current BITs, however, is the built-in investor-state dispute settlement process. This allows investors to challenge host state actions and measures directly through international tribunals, without first having to use administrative and judicial channels in the host state. States and citizens on the other hand cannot bring foreign investors to those international tribunals. Moreover, the treaties offer these protections and rights to foreign investors irrespective of whether the investors actually contribute in any meaningful or positive way to the host state's development. This arbitration practice lacks transparency which is in violation of the EU's access to information policies. There is also a reluctance to open procedures to third party testimonies and submissions and a lack of adequate independence among the arbitrators who tend to cover different roles in different cases. This has contributed to excessively expansive and often contradictory interpretations of investor's rights. Therefore we believe that any future European investments agreements must not contain international investor-state dispute settlement.

1 The Seattle to Brussels (S2B) Network (www.s2bnetwork.org) is a pan-European network of more than 70 organisations from 16 countries campaigning to promote a sustainable, socially and democratically accountable system of trade. It includes development, environment, human rights, women and farmers organisations, trade unions, social movements as well as research institutes. The S2B Network is part of the global coalition "Our World is Not for Sale" (www.ourworldisnotforsale.org).

2 Quoted from the public part of the highly censored EU document [5667/10 WTO 25] : Outcome of proceedings of the Trade Policy Committee (Full Members) meeting on 22 January 2010, available at: http://register.consilium.europa.eu/pdf/en/10/st05/st05667.en10.pdf

The S2B network was formed in the aftermath of the WTO's 1999 Seattle Ministerial to challenge the corporate-driven agenda of the European Union and other European governments for continued global trade and investment liberalisation. It has also developed as a response to the increasing need for European coordination among civil society organisations. The S2B network includes development, environment, human rights, women and farmers organisations, trade unions, social movements as well as research institutes. The overall goal is to open the EU corporate-driven trade agenda to economic alternatives and heterodox policy options with the aim of transforming it into a truly sustainable, gender just development agenda.

The Transnational Institute (TNI) was established in 1974 as an international network of research activists committed to critical analyses of the global problems of today and tomorrow, with a view to providing relevant research and ideas to those movements concerned to steer the world in a democratic, equitable and environmentally sustainable direction. TNI engages in a broad range of research, policy advocacy and civil society networking activities. TNI's Alternative Regionalism Programme aims to address the question of alternative development from the perspectives of social movements and regional coalitions of civil society organisations in Africa, Asia and Latin-America and seeks to effectively influence the shape and substance of regional governance in the South, and of the EU's trade and investment policies towards the South.

Both ENDS strives for a more sustainable and fairer world by supporting organisations from developing countries to fight poverty and to work towards sustainable environmental management. Both ENDS supports organisations in Africa, Asia, Latin America and countries in Central- and Eastern Europe through direct support via its service desk, strategic cooperation and policy development.

M.A.I.S. (Movement for self-development, interexchange and solidarity) is an Italian Ngo based in Turin. Its work, mainly focused on international cooperation and local development, has recently been including the campaigning and advocacy work on trade and investment issues. It is part of the European Consortium "Creating Coherence on Trade and Development".

Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy making. CEO works in close alliance with public interest groups and social movements in and outside Europe to develop alternatives to the dominance of corporate power in order to truly address global problems including poverty, climate change, social injustice, hunger and environmental degradation.

WEED is a think tank and advocacy NGO based in Berlin, Germany. It was founded in 1990 and has been working in national, European and international networks for a transformation of the existing international economic, development and environmental order.

Campagna per la Riforma della Banca Mondiale (CRBM) has for the last 15 years worked on financial and investment issues, in Italy and within European and global civil society networks, in close solidarity with affected communities in the global South. CRBM has focused its actions on exposing the responsibilities of Italian corporations and public and private financial institutions, as well as the participation of the Italian government in promoting socially and environmentally unsustainable investment in the global South, which undermines the possibility for developing countries to undertake a more just development path.

11.11.11 (Coalition of the Flemish North-South Movement) combines the efforts of 70 NGOs, unions, movements and solidarity groups and 340 local committees of volunteers who work together for a fairer world free from poverty.

SOMO is a Dutch non-profit research and advisory bureau. SOMO investigates the consequences of internationalisation of business and of MNC policies, particularly where developing countries are concerned. SOMO's activities and research on corporations have an international context and focus on sustainable economic and social development and on the structural eradication of poverty, exploitation, and inequality.

Stop the EU's corporate trade agenda

Seattle to Brussels Network, part of Our World is Not For Sale http://www.s2bnetwork.org