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THE DARK SIDE OF INVESTMENT AGREEMENTS

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Signing international investment treaties, in the hope of attracting foreign investments, has been a central strategy for governments looking to improve economic development. The less known side of this story is that by signing investment treaties, governments are giving away the sovereign right to regulate in the interest of people and the environment. They also expose themselves to the risk of spending millions in law suits that could have been used to serve public needs. It's time that the dark side of investment is put under the spotlight.

The story we have all heard more than once

How many times have you heard politicians, economists, business men or journalists saying, if a country wants to develop, it just need three things: investment, investment and investment! This statement follows one of the basic premises of neoliberal economics: "Foreign Direct Investment (FDI) is a pre-condition for development". And the formula laid out was very simple:

To develop, you need growth > to grow, you need FDI > to attract FDI you need to protect investors > the only way to protect investors is by signing investment agreements.

Governments around the world adopted the recipe wholesale and Investment Treaties have mushroomed over the last 2 decades. While in 1989 there were only 385 Bilateral Investment Treaties (BITs); today 2807 BITs have been signed worldwide. The EU alone holds 1300 BITs, an incredible 46% of the total amount. In 2010, more than 3 investment treaties were concluded each week (UNCTAD, 2011).

Furthermore, since the signing of the North American Free Trade Agreement (NAFTA) in 1994, investment protection chapters have been key and integral parts of US bilateral and regional Free Trade Agreements (FTAs). Europe has recently jumped on the bandwagon. With the coming into force of the Lisbon Treaty on 1 December 2009, the European Commission (EC) has now the competence to negotiate investment protection1. This has led to the inclusion of investment protection chapters in the FTA negotiations with Canada, India, Singapore and Malaysia[2].

Uncovering the dark side

While governments have unquestioningly signed these investment treaties in the belief it will "attract" foreign capital[3], they seem to have failed or chose to ignore - the small print. The dark side of investment agreements has been long overlooked:

- Investment agreements allocate to one side (the governments) all the duties and obligations and to the other (the corporations) all the rights and protection.
- Investment agreements allow multinationals to sue governments at secretive international arbitration tribunals when these governments try to regulate in favour of the public interest. However, governments can not take any action at international level against multinationals if they commit human rights abuses or environmental damage, or simply fail to fulfil their commitments.
- Investment agreements grant corporations risk-free investments

Corporations and lawyers on the driving seat

Transnational corporations (TNCs) have been long-standing advocates of an international investment regime that is biased towards the investor. They have largely succeeded since the current rules of international investment grant immense privileges to investors while placing no binding obligations on them. On the other hand, these agreements force governments to bear all the risks if and when

[1] For more information on the changes brought by the Lisbon Treaty in relation to investment, see S2B Report "Reclaiming Public Interest in Europe's International Investment Policy" (October 2010): http://www.s2bnetwork.org/fileadmin/dateien/downloads/eu_investment_reader.pdf

[2] Leaked versions of the texts of the mandates for investment protection chapters in free trade agreements of the EU with Canada, India and Singapore: http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html

[3] Many studies have assessed whether there is a direct correlation between signing investment agreements and attraction of Foreign direct Investment. Evidence shows that "investment treaties are neither necessary not sufficient for attracting foreign investment" (Bernasconi,-Osterwalder et al, 2011: 12).

investments go wrong or if a government's policy decisions affect corporate profits in any way.

This pro-investors bias is a result of vigorous corporate lobbying. In Brussels, for example, major corporate lobby groups, such as the European employers' federation BusinessEurope and the European Services Forum (ESF) have been long time advocates of investment liberalisation and investor protection. They have been granted privileged access to the European Commission and have managed to shape the European Union (EU)'s trade agenda to serve their needs (Corporate Europe Observatory, 2009). When the European Commission acquired investment competences, it did not take long for these lobby groups to demand that the EU "secure the highest level of protection for its investors in key markets. Whether these negotiations form part of FTAs or stand alone". They also demanded that "BUSINESSEUROPE should be closely consulted on all aspects" (BusinessEurope, 2010). Both the European Commission and the European Parliament, a new target of lobby groups due to its newly acquired powers under the Lisbon Treaty, have been quick to concede to corporate demands. Member of the European Parliament (MEP) Carl Schlyter confirmed the influence that corporate lobbyists exerted during parliamentary debates on the new EU's investment policy (Corporate Europe Observatory, 2011 and 2011a).

Corporate investors have obvious interests in pushing for a regime in their favour. What has received less attention has been the role of corporate investment lawyers in promoting pro-investor treaties. The widespread view, up to now, has been that investment lawyers acting as arbitrators merely applied existing laws. However, on closer examination it becomes clear that they have played, in many cases, the role of policy makers. Arbitrator have not only argued in favour of an international arbitration system (as opposed to the use of national courts to resolve investment disputes)[4] and have strongly advocated to keep the language of rules in investment treaties as vaguely worded as possible to maximise opportunities for investment arbitration. In some cases, they have publicly criticised countries' decisions to limit the scope of rules in investor-state arbitration.[5]

Furthermore, Professor of Investment Law, Van Harten (2011) has discovered, based on a new set of data, that a "small core of 20 to 30 arbitrators seems to be driving expansive interpretation of the treaties". By interpreting the language in investment treaties in an overly expansive way, investment arbitrators have promoted a system that gives investors ample rights to sue governments in the widest possible range of circumstances.

If countries were to start reforming their model BITs to include more restrictive language, investors would have fewer chances to sue government, which in turn would lead to less cases for arbitrators. This situation has been well described by Van Harten and Loughlin (2006:148):
"Privately-appointed arbitrators are therefore more likely to favour the expansion of the scope and remedial power of investment arbitration, and will have commercial incentives to interpret the jurisdiction of investment tribunals expansively".

It is worth noting that 70% of the arbitrators appointed in the International Centre for Settlement of Investment Disputes (ICSID) cases are from Western Europe and North America (ICSID, 2011), which has led to the view that arbitrators are part of "a closed 'old boys' network, in which counsels and arbitrators are motivated to exchange favours" (Buxton, 2011:5).

Along with the ethical questions raised by the financial incentives investment lawyers have in perpetuating an unjust international investment regime, there are also accompanying concerns from the fact that arbitrators tend to wear multiple hats. It is fairly common for arbitrators to also act as counsel for companies (sometimes the same company that was the claimant in a case they had to judge on as arbitrator) or governments, and to have a life in academia where they give expert opinion. This has raised questions about their independence

[4] Prominent arbitrators have written defending the international arbitration system. See for example Jan Paulsson 'Denial of Justice in International Law'. Cambridge: Cambridge University Press, 2005.

[5] This was the case presented by William Park (a prominent arbitrator) who questioned the revisions in the 2004 United States BIT (Aguilar Alvarez and Park, 2003). Schwebel, (2011), another prominent arbitrator, criticised the US for incorporating a more restricted wording for the *fair and equitable treatment* clause, and he went as far as to call the new US Model BIT "an exercise in the regressive development of international law" (Schwebel, 2011: 161).

and impartiality (Waibel and Wu, 2011), but it also shows how by combining these different roles, they are influencing the international arbitration system. As experts, they advocate for wording on investment rules to remain as vaguely as possible, as arbitrators they apply an expansive interpretation of those vague rules therefore granting the corporations the right for compensation and finally, as counsels (usually part of big law firms) they charge millions to companies and governments for their services.

The ultimate beneficiaries are of course Transnational Corporations (TNCs), who have increasingly made use of the possibility to sue governments. In 1990, the total number of cases filed by TNCs against States under the International Tribunal of the World Bank (ICSID)[6] was just 26, but during the 1990s and particularly since 2000, the number of cases increased massively. Between 2000 and 2010, 262 cases were filed, making 331 the total number of cases filed by the end of 2010 (ICSID, 2011). Bilateral Investment Treaties have played a major role in this trend since 63% of all cases brought to ICSID invoked BITs as their main basis of consent (ICSID, 2011).

While there are other International Tribunals, such as the International Chamber of Commerce, the UN Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce, and the London Court of International Arbitration; ICSID (International Centre for Settlement of Investment Disputes), has been the preferred arbitration court of investors. According to the United Nations Conference on Trade and Development (UNCTAD, 2011), which keeps a database and statistics of all known cases under different international tribunals, 245 out of the 390 treaty-based cases by the end of 2010 were filed under ICSID rules.

When we explore which TNCs are behind the upsurge of law suits against states, it should come as no surprise that the majority of the corporations are based in Europe and North America. According to one public database including 249 cases, 45% were filed by US corporations and 31% by Western and Northern European corporations (IIAPP, 2011).

[6] Although International Centre for Settlement of Investment Disputes (ICSID) was founded in 1966, it was almost dormant for the first 30 years of its existence.

EMBLEMATIC CASES

Corporations vs the right to health (Philip Morris vs Uruguay)

When Uruguay tried to protect public health by applying restrictions on cigarette marketing, it got sued by Philip Morris. Philip Morris argued that Uruguay's proposal to include graphic images of the health consequences of smoking and health warnings covering 80% of the cigarette packages were "unreasonable" measures with no relationship to their public health objectives and an expropriation of Philip Morris's trademarks. (For the details of this case see: Montecino and Dreyfus, 2010; and Porterfield and Byrnes, 2011).

Corporations vs the right to respond to financial crisis (CMS and 40 other companies vs Argentina)

When Argentina took measures in response to its 2001–2002 financial crisis, such as freezing of utility rates (energy, water, etc) and devaluating its currency, it was hit by over 40 law suits by investors. Big Companies like CMS Energy (US), Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain) demanded multi-million compensations for revenue losses. (For details of the case see: Phillips, 2008)

Corporations vs right to protect the environment (Metalclad v. Mexico)

When Mexico denied the U.S.-based Corporation Metalclad the permit to operate a toxic waste site and instead declared the area a natural reserve to protect the environment, Metalclad retaliated by filing a lawsuit demanding $130 million in compensation for damages and loss of future earnings. (For details of the case see: Forum on Democracy and Trade; and Ripinsky and Williams, 2008)

Corporations vs right to water (Bechtel vs Bolivia)

When families living with only US$60 per month in Bolivia protested against an increase in water rates of more than 50%, Bolivia was sued by US-based Bechtel and Spanish Abengoa for $50 million because the protests forced the company to leave the country. The price increase equalled 25% of the income of Bolivian families who were being forced to choose between food and water. (For details of the case see: Democracy Center, 2006)

Suing governments has become a lucrative industry. The demands for compensation have been on the increase. In 1999 Methanex Corporation demanded $970 million in damages against the United States (UNCTAD, 2005). Only 7 years later, that request seemed small compared to new emerging demands from corporations. In 2006, Occidental Petroleum Corporation's demanded US$3 billion in compensation from Ecuador (Vis-Dunbar, Damon,

2008) and in 2007, Saba Fakes demanded US$19 billion in damages from Turkey (Ogilvie, Hannah, 2010).

Even if award damages ordered by Tribunals do not always reach the aspirations of corporations, it can still reach astronomic figures. Most of the award damages are not public, but some of the known-cases help to highlight the financial gains for corporations. In 2010, Ecuador was ordered to pay US$698.6 million in the dispute of Chevron v. Ecuador (American Lawyer, 2011). Other prominent awards include the case of Czech Republic ordered to pay Central European Media (CME) US$ 270 million (plus interest)[7] or Lebanon ordered to pay France Telecom US$ 266 million (plus interest)[8].

When governments and corporations decide to settle the disputes, the results are even less public. However, it is known that in 2010 Venezuela settled a dispute with corporation Holcim for US$650 million in compensation for its nationalisation of the cement operations (Goldhaber, 2011)

There seems to be a trend towards higher and higher demands and awards. The American Lawyer, which releases an annual Arbitration Scorecard, warns that "bringing a billion-dollar claim is no longer enough to stand out in a survey of international arbitration. Nor is it enough to win a measly $100 million" (Goldhaber, 2011).

Who is picking up the tab?

Clearly developing countries are losing out since they are mainly at the receiving end of law suits. In 2010, 51 cases were filed against developing countries vs 17 against developed countries. The country that tops the ranking of suits is Argentina with 51 cases (mostly due to economic reform programs that were implemented after the 2001 financial and economic crisis), followed by Mexico with 19, and Ecuador with 16 (UNCTAD, 2011). Developing countries are subjected to significantly more claims than their share of global BITs. For example, Argentina, which has 58 BITs, has been sued 51 times, while Germany, which has 136 BITs, has been sued only once.

[7] http://www.iiapp.org/case/cme-v-czech-republic
[8] http://www.iiapp.org/case/france-telecom-v-lebanon

The case of Argentina, while considered extreme, is still a reminder of the enormous economic burden that developing countries could face by signing investment treaties. Awards against Argentina have reached a total of US$ 912 million, equivalent to the annual average salary of 140,000 teachers or 75,000 public hospital doctors. Furthermore, the pending demands in ICSID against Argentina are estimated at US$ 20 billion (Fernández Moores, 2008), almost 6 times Argentina's current public budget for health (US$ 3.4 billion dollars) or almost 3 times Argentina's current public budget for education (US$ 7.4 billion dollars)[9].

Not only do developing countries have to pay millions in award damages, but they are also forced to pay millions more in arbitration costs and lawyers. While UNCTAD (2005) estimates that the average arbitration costs governments between US$ 1 million and US$ 2 million, many countries have had to pay much more. The case of German Fraport vs the Philippines is one example where the Philippines government has already spent US$58 million in public funds to pay its local and foreign lawyers in the arbitration case (House of Representatives Philippines, 2011). Compared with the 2012 Philippines budget, that is equal to the salaries of 12,500 teachers for 1 year, vaccination for 3.8 million children against diseases such as TB, diphtheria, tetanus, polio; or the building of 2 new airports (Aquino III, 2011).

Ultimately, it is the people who bear the double burden of corporate abuses on the one hand, and diversion of their taxes to pay corporations millions in law suits.

Time for a public debate about the "benefits" of investment treaties

The bottom line is that investment agreements give corporations guarantees of profits at the expense of the public good; they allow corporations to claim millions from governments when they do not like

[9] Calculations of the average salary of a doctor in Argentina based on: http://www.semanaprofesional.com/?nota=22581 ; public budget figures based on: http://www.mecon.gov.ar/onp/html/presutexto/proy2012/ley/pdf/anexo_estadistico/cuadros_comparativos/cap1cu02.pdf ; all accessed 2 November 2011.

their policies and they prevent governments from imposing any restrictions on corporations or to regulate in favour of the public interest.

It is about time we start asking: are our governments helping development or enabling corporate power when signing investment agreements? Shouldn't corporations be responsible for the business choices they make and bear the risks when things go wrong, like citizens have to? Shouldn't our governments be able to take decisions that improve our lives even if corporations profits are affected without the risk of being sued? These are some of the key questions that have long been kept out of public debate. It's our role to open up the discussion about the "benefits" of the current investment regime. Let's start uncovering the dark side of investment agreements.

BIBLIOGRAPHY

Aguilar Alvarez, Guillermo and Park, William W. (2003) New Face of Investment Arbitration: NAFTA Chapter 11, 28 Yale J. Int'l L. 365 Accesible at http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/yjil28&section=20 (accessed 14 December 2011)

Aquino III, Benigno S. (2011) President Aquino's 2012 Budget Message. Available at http://www.gov.ph/2011/07/26/president-aquinos-2012-budget-message/ (accessed 13 November 2011)

American Lawyer (2011) Arbitration Scorecard 2011: Ten Big Awards. Available at http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202498052041 (accessed 15 December 2011)

Bernasconi-Osterwalder, Nathalie et al (2011) "Investment Treaties & Why they matter to sustainable development: questions and answers", IISD.

BusinessEurope (2010) Priorities for external competitiveness 2010-2014 - Buiding on Global Europe. Available at http://www.businesseurope.eu/DocShareNoFrame/docs/4/KELPKDJCFCNGOMOENABCKMBPPDWD9DB1AW9LTE4Q/UNICE/docs/DLS/2010-00538-E.pdf (accessed 12 December 2011)

Buxton, Nick (2011) Legalised Profiteering? How corporate lawyers are fuelling an investment arbitration boom. TNI and Corporate Europe Observatory. Available at http://www.tni.org/sites/www.tni.org/files/download/legalised_profiteering-web.pdf (accessed on 4 December 2011)

Corporate Europe Observatory (2009) An Open Door Policy For Big Business. Available at: http://www.corporateeurope.org/publications/open-door-policy-big-business (accessed on 4 December 2011)

Corporate Europe Observatory (2011) "MEP:lobbyism main reason for bad policy". Available at: http://www.corporateeurope.org/blog/mep-lobbyism-main-reason-bad-policy (accessed 10 December 2011)

Corporate Europe Observatory (2011a) "Investment rights stifle democracy" Available at: http://www.corporateeurope.org/sites/defult/files/sites/default/files/files/resource/ivestment%20rights%20stifl%20democracy.pdf (accessed 10 December 2011)

Democracy Center (2006) Bechtel vs Bolivia: Details of the Case and the Campaign. Available at http://democracyctr.org/bolivia/investigations/bolivia-investigations-the-water-revolt/bechtel-vs-bolivia-details-of-the-case-and-the-campaign/ (accessed on 1 December 2011)

Fernández Moores, Lucio (2008) En los multimillonarios juicios ante el CIADI, Argentina va empatando. Diario Clarin. Available at http://edant.clarin.com/diario/2008/04/06/elpais/p-02201.htm (accessed 13 November 2011)

Forum on Democracy and Trade (n/a) Metalclad v. Mexico. Available at http://www.forumdemocracy.net/article.php?id=110 (accessed on 1 December 2011)

Goldhaber, Michael D. (2011) The 2011 Arbitration Scorecard: High Stakes, The American Lawyer. Available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202499018258 (accessed 10 December 2011)

House of Representatives Philippines (2011) Minutes from the Committee on Transportation. Available at http://www.congress.gov.ph/download/commdaily/CDB%20Vol%201%20No.%2089%20%2803.15.11%29.pdf (accessed 13 November 2011)

ICSID (2011) Caseload – Statistics Issue 2011-2. Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English21 (accessed on 30 November 2011)

IIAPP - Open Database International Investment Arbitration + Public Policy (2011) Claimant Nationality by Treaty Type. Available at: http://iiapp.org/media/uploads/report_of_claimant_nationality_by_treaty_type.pdf (accessed 16 December 2011)

Klàger, Roland (2011) 'Fair and Equitable Treatment' in International Investment Law. Cambridge University Press, Hul

Montecino, Juan Antonio and Dreyfus, Rebecca (2010) Philip Morris vs. Uruguay, Foreign Policy in Focus, March 4. Available at: http://www.fpif.org/articles/philip_morris_vs_uruguay (accessed on 1 December 2011)

Ogilvie, Hannah (2010) Saba Fakes v. Republic of Turkey - revisiting the definition of 'investment' under public international law, International Arbitration Newsletter. Available at http://www.dlapiper.com/saba-fakes-v-republic-of-turkey-revisiting-the-definition-of-investment-under-public-international-law/ (accessed 15 December 2011)

Phillips, Tony (2008) Argentina Versus the World Bank: Fair Play or Fixed Fight?, Center for International Policy (CIP). Available at http://www.cipamericas.org/archives/1434 (accessed on 1 December 2011)

Porterfield, Matthew C. and Byrnes, Christopher R. (2011) Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?, Investment Treaty News, July 12. Available at: http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/ (accessed on 1 December 2011)

Ripinsky, Sergey and Williams, Kevin (2008) Case Summary Metalclad Corporation v. Mexico. Available at: http://www.biicl.org/files/3929_2000_metalclad_v_mexico.pdf (accessed on 1 December 2011)

Schwebel, Stephen M. (2011) Justice in International Law: Further Selected Writings. Cambridge University Press

UNCTAD - United Nations Conference on Trade and Development (2005) Investor-State Disputes arising from Investment Treaties: a Review. Available at: http://www.unctad.org/en/docs/iteiit20054_en.pdf (accessed on 3 December 2011)

UNCTAD - United Nations Conference on Trade and Development (2011) World Invest Report Non-Equity Modes of International Production and Development. Available at: http://www.unctad.org/en/docs/wir2011_embargoed_en.pdf (accessed on 12 November 2011)

Van Harten, Gus and Loughlin, Martin (2006) Investment Treaty Arbitration as a Species of Global Administrative Law, The European Journal of International Law Vol. 17(1): 121-150.

Van Harten, Gus (2007) Investment Treaty Arbitration and Public Law. Oxford, New York: Oxford University Press

Van Harten, Gus (2011) Observations about Investor-state arbitration. Presentation at public forum on international investment treaties (5 November, Brussels). Available at: www.s2bnetwork.org/fileadmin/dateien/downloads/Van_Harten_Observations_about_Ivestor_State_Arbitration_WoA_day_1.pdf (accessed 13 December 2011)

Vis-Dunbar, Damon (2008) Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador: US oil company passes jurisdictional hurdle in arbitration with Ecuador, Investment Treaty News. Available at: http://www.iisd.org/itn/2008/09/22/occidental-petroleum-corporation-and-occidental-exploration-and-production-company-v-the-republic-of-ecuador-us-oil-company-passes-jurisdictional-hurdle-in-arbitration-with-ecuador/ (accessed 13 December 2011)

Waibel, Michael and Wu, Yanhui (2011) Are arbitrators political? Available at: http://www.asil.org/midyearmeeting/pdfs/papers/November_5_2pm/Are%20Arbitrators%20Political.pdf (accessed 6 December 2011)