TRADE UNION ADVISORY COMMITTEE
TO THE ORGANISATION FOR ECONOMIC
COOPERATION AND DEVELOPMENT
COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES

TUAC Submission to the Investment Committee
4 December 2013

1. Introduction

1. TUAC welcomes this opportunity to make a submission to the Investment Committee. TUAC's overall policy objective is to ensure that international investment policies support sustainable development and inclusive growth, strengthen respect for workers' rights and decent work and safeguard the public interest. In particular there should be policy coherence across all parts of the Investment Committee's work, including its work on responsible business conduct and specifically the OECD Guidelines for Multinational Enterprise.

2. TUAC welcomes the proposed update of the Policy Framework for Investment and the adoption of an inclusive approach, which should include BIAC, TUAC and OECD Watch. We also support the commitment made in the last paragraph that "*particular attention should also be given to recent developments with regard to Responsible Business Conduct in line with the 2011 update of the OECD Guidelines for Multinational Enterprises*" (para.23). We consider that there has been insufficient focus on this in past Investment Policy Reviews of the past – one recent example is Mozambique (2013) where there is no chapter on responsible business conduct, nor any recommendations made in the Executive Summary on RBC.

3. On investment policy one of the major areas of trade union concerns dispute settlement and **investor–State dispute settlement (ISDS)** procedures. Trade unions are opposed to the inclusion of such ISDS provisions in investment treaties. The other key concern is to balance the rights and obligations of investors and **promote human rights, labour rights and environmental standards** through commitments to comply with ILO core labour standards and other human rights under the ILO MNE Declaration, the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises.

4. TUAC already made a submission on ISDS in response to the public consultation in 2012 on the future work programme of the Freedom of Investment (FOI) Roundtable. This submission is attached. In addition, the European Trade Union Confederation has developed its recommendations on EU investment chapters and agreements, which are also provided as an Annex to this submission. This covers ISDS as well as other areas of trade union concern.

TRADE UNION ADVISORY COMMITTEE
TO THE ORGANISATION FOR ECONOMIC
COOPERATION AND DEVELOPMENT
COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES

Freedom of Investment Roundtable
Investor-State Dispute Settlement
OECD Public Consultation (May-July 2012)

1. Introduction

1. TUAC welcomes this opportunity to respond to the public consultation on investor-State dispute settlement (ISDS) and provide input to the future work programme of the Freedom of Investment (FOI) Roundtable. TUAC's policy objective is to ensure that international investment policies support sustainable development and inclusive growth, strengthen respect for workers' rights and decent work and safeguard the public interest.

2. The OECD Secretariat's survey and consultation paper show that the majority (93%) of the 1,600 sample bilateral and other investment treaties include provisions on ISDS. The papers also underline the unique strength of ISDS, which affords investors a level of protection unparalleled in international law. UNCTAD reports that in 2011 the number of known investor–State dispute settlement (ISDS) cases grew to a record level, with some recent cases involving challenges to "*…core public policies that had allegedly negatively affected…business prospects"*.[1]

3. While the OECD consultation paper examines a number of public interest issues surrounding ISDS, it does not place the discussion in the context of the widely held (and widely documented[2]) concern that the rules of international investment are skewed in favour of the protection of international investors and their investments and against the rights of States, their citizens and workers, and that there is a need to re-balance the rights and obligations of States and investors.

4. Also absent from the paper is any discussion of policy coherence as regards: the State duty to protect human rights at home and abroad, including against human rights abuses by business enterprises; the development agenda, including the Millennium Development Goals (MDGs); commitments made by FOI Roundtable member governments that have signed the OECD Investment Declaration[3] to encourage the positive contribution that MNCs make to sustainable development; and the corporate responsibility to respect human rights.[4][5]

5. This submission does not respond to the questions posed in the three parts of the consultation paper. Rather, it first addresses the overall context and the need for international

[1] World Investment Report 2012, UNCTAD. p.20.
[2] The IISD Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006, is a key reference in this regard. There is a host of other civil society and trade union material. Most recently, UNCTAD in its 'Investment Policy Framework for Sustainable Development' has identified, and sought to address, the imbalance between the rights and obligations of States and investors.
[3] 44 out of 50 FOI Roundtable members have adhered to the OECD Guidelines for Multinational Enterprises: Indonesia, PR China, Russia, Serbia and South Africa have not.
[4] UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework, 2011.
[5] OECD Guidelines for Multinational Enterprises, 1976 (updated 2011).

investment policies to contribute to sustainable development, before turning to specific recommendations on investor-State dispute settlement and related issues:

- *Section 2:* Rebalancing the rights and obligations of States and investors;
- *Section 3*: Alternatives to investor-State dispute settlement;
- *Section 4*: Reforming investor-State dispute settlement;
- *Section 5*: Other issues.

2. Re-balancing the rights and obligations of States and investors

6. TUAC considers that the future work programme of the FOI Roundtable should focus on re-balancing the rights of international investors and their investments with their obligations, and the rights of States, their citizens and workers, so as to ensure that international investment contributes to sustainable development and inclusive growth, and supports workers' rights and decent work. While reforming ISDS is a necessary part of that agenda, it is by no means sufficient. There is an urgent need to overhaul the content of international investment treaties.

7. UNCTAD's 'Investment Policy Framework for Sustainable Development' represents a significant step forward in this regard. It describes a "new generation" of investment policies, which "*systematically integrate sustainable development and operationalise it in concrete measures and mechanisms at the national and international levels, and at the level of policy making and implementation*", and defines the overarching objective of investment policymaking as sustainable growth and sustainable development.[6]

8. TUAC urges the FOI Roundtable to take up this agenda:

- **Recommendation**: As a first step the 'Freedom of Investment' Roundtable should change its name to the 'Investment for Sustainable Development' Roundtable. This would signal its intention to support the "new generation" of investment policies.

3. Alternatives to investor-State dispute settlement

9. There is a number of problems associated with investor-State Dispute Settlement (ISDS): accessible to investors and their investments but not to States Parties; restricts the right to regulate of host States; lack of transparency; conflicts of interest of arbitrators; inconsistent treaty interpretations; high and spiralling costs; increasing timescales for settlements; and high compensation claims.

10. Additionally, as noted by UNCTAD,[7] there are overall legitimacy concerns arising from the special nature of ISDS that allows investors and their investments to challenge the public policy acts and measures taken in the public interest by a sovereign State, before an international tribunal, because they impact negatively on the private interests of investors and their investments.

11. The OECD Secretariat's consultation paper (*paragraph 3*) starts with the statement that it would be useful to draw on the experience of Australia, which has ceased to include ISDS

[6] UNCTAD, Investment Policy Framework for Sustainable Development, 2012.
[7] UNCTAD, World Investment Report 2012.

provisions in its international investment treaties, and Brazil, which to date has not agreed to any such clauses, in that the experience of these two countries "*could contribute to international dialogue both by explaining their reservations and by describing their experience using alternative approaches to dispute resolution*". However, this recommendation is not followed up in the main part of the text.

12. Alternative approaches to ISDS were discussed at the 16th FOI Roundtable (March 2012), including a recent UNCTAD report[8] that found that alternative dispute resolution (ADR) and dispute prevention policies (DPPs) hold considerable potential to address many of the problems associated with ISDS.

13. TUAC considers that the multiple disadvantages of ISDS provide strong reason to examine alternatives to, rather than reforms of, ISDS and that this should be the primary avenue of enquiry in the future work programme of the FOI Roundtable:

- **Recommendation**: examine the alternatives to investor-State dispute settlement, including State-to-State dispute resolution, as well as alternative dispute resolution and dispute prevention policies with a view to omitting ISDS from investment treaties.

4. Reforming investor-State dispute settlement

14. In the event that ISDS *is* to continue then the FOI Roundtable should focus on identifying reforms to ISDS that would contribute to the objective of re-balancing the rights and obligations of States and investors and their investments. These reforms should include:

- Providing States Parties and non-disputing parties with recourse to ISDS;
- Prioritising alternative means of dispute resolution;
- Exhausting domestic remedies;
- Omitting umbrella clauses;
- Using ISDS to strengthen investor and investment compliance with obligations;
- Maintaining the right to regulate and adequate domestic policy space;
- Selection, qualification and impartiality of arbitrators;
- Strengthening transparency;

4.1 Providing States Parties and non-disputing parties with recourse to ISDS

15. The first imbalance to be addressed is that only investors and investments have recourse to ISDS to file claims against host States. It is not possible for States Parties to file claims against investors or investments that fail to comply with their obligations.

- **Recommendation**: Explore options for enabling States Parties and non-disputing partiers to have recourse to ISDS.

[8] UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration, 2012.

4.2 Alternative Means of Dispute Resolution

16. Escalating international arbitration claims combined with legitimacy concerns over investors having the right to challenge measures of sovereign States to protect the public interest before international tribunals, provide strong reason to restrict the ability of investors and their investments to by-pass the domestic legal system and go straight to international arbitration.

17. TUAC considers that, in the first instance, in line with recommendations made by both the International Institute for Sustainable Development (IISD)[9] and UNCTAD,[10] investors and their investments should be required to have first attempted alternative, amicable means of dispute settlement before having recourse to ISDS:

- **Recommendation**: Explore the options for requiring investors first to attempt alternative, amicable means of dispute settlement.

4.3 Exhaustion of Domestic Remedies

18. Where alternative means of dispute resolution fail, then investors and their investments should be required to have exhausted effective and adequate domestic remedies within the host State, before being able to file a claim under ISDS. This would strike an appropriate balance between giving States the right to address claims through their domestic legal systems, and the interests of foreign investors in having recourse to an international forum when they are denied justice in domestic courts.

19. While UNCTAD does not address this avenue in its report on alternatives to ISDS[11], it refers to 'exhausting local remedies' as the "*obvious way to sort out a dispute against a State*" and signals that after over fifty years of international arbitration a review may be overdue:

> "Finally, it may be worth noting what this study does not do. It does not look into the most obvious way to sort a dispute against a State, i.e. the recourse to national courts of the host country. The requirement to exhaust local remedies before going to arbitration or the exclusive jurisdiction of local courts has given rise to numerous decisions by international courts and to doctrine and has been gradually abandoned in IIAs. The mistrust of investors in national courts and their ability to make a fair and quick decision, and the perception of bias and/or lack of competence in issues of international economic law would**, however, warrant being looked at with a fresh view. This could indeed be done after over 50 years of generalizing international arbitration as the safest avenue for foreigners**[12]…".[13]

- **Recommendation**: Explore the advantages and options for requiring investors to have exhausted domestic remedies before being able to file a claim under ISDS.

[9] IISD Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.
[10] UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration, 2010.
[11] UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration, 2010.
[12] Emphasis added.
[13] UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration, 2010; p.8.

4.4 Umbrella Clauses

20. Another major concern is that jurisdiction of ISDS is being expanded through *inter alia* umbrella clauses. An umbrella clause basically provides that: "*Each Contracting Party shall observe any obligation it may have with regard to investments*".[14] Umbrella clauses impose on the host State a duty to observe all commitments with foreign investors thus having the effect of bringing breach of contract by host States – which would normally fall under the jurisdiction of the domestic forum – under the investment treaty, and therefore subject to ISDS.

- **Recommendation**: Ensure that recourse to ISDS is strictly limited to breaches of the treaty, not breaches of contract, including by omitting umbrella clauses from international investment agreements.

4.5 The Right to Regulate and Domestic Policy Space

21. A major trade union concern is the impact of international investment treaties and ISDS on the host State's right to regulate to protect the public interest and the need to maintain domestic policy space. The OECD's consultation paper touches on this issue in its introduction, referring to '*important public policy issues*', resulting from ISDS claims including those involving "*health-motivated regulation of cigarette marketing brought against Australia and Uruguay*".

22. Such cases are by no means the exception. For example, in June 2012 the Swedish company Vattenfall requested the initiation of arbitration proceedings between it and Germany over alleged damages arising from Germany's decision to accelerate its exit from nuclear power.[15] Famously, in 2006, Italian investors, together with their Luxembourg holding company, filed an international arbitration claim against South Africa that its Black Economic Empowerment mining regime violated the terms of BITs concluded with Italy and Luxembourg, and specifically the provisions on expropriation, fair and equitable treatment and national treatment claims.[16] UNCTAD's 2012 World Investment Report confirms that the record number of cases filed in 2011, include cases that challenge the public policy measures of host States.[17]

23. There is also concern that stabilisation clauses, which appear mainly in investment contracts, could become subject to ISDS due to the umbrella clause (as discussed above (*Section 4.4.)),* the fair and equitable treatment clause, or the expropriations clause. Stabilisation clauses, which seek to insulate investors from changes in law or governmental decisions taken after the effective date of the agreement, fall into three categories[18]: a *freezing* clause, which freezes the law of the host State for the life of the investment; *economic equilibrium* clause, which provides that the investor comply with new laws but be compensated for doing so; and *hybrid* clauses, which require the investor to be returned to its position prior to the enactment of the new law, and to be exempted from such new laws.

[14] Weissenfels, A., Umbrella Clauses; Seminar on International Investment Protection.
[15] Wall Street Journal: http://online.wsj.com/article/BT-CO-20120605-707606.html.
[16] Food and Water Watch and Institute for Policy Studies: Challenging Corporate Investor Rule, April 2007.
[17] World Investment Report 2012, Towards a New Generation of Investment Policies, UNCATAD, 2012: http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf.
[18] Stabilization Clauses and Human Rights, International Finance Corporation, March 11, 2008.

24. TUAC is concerned that legislation enacted to support workers' rights or strengthens health and safety, for example, could be potential targets of such a clause. While there is no jurisprudence to date, in the past arbitrators have noted that the absence of a stabilisation clause was a relevant factor. Also, TUAC notes that in July 2012, Veolia launched a claim at ICSID against Egypt involving, *inter alia*, labour wage stabilisation promises.[19]

25. The risk posed to the right to regulate by international investment treaties is widely recognised. The UN Guiding Principles on Business and Human Rights Principle 10 instructs States to "*maintain adequate domestic policy space to meet their human rights obligations"*.[20] The European Parliament has called on the European Commission to ensure that its new international investment policy protects the public capacity to regulate.[21] UNCTAD has included the right to regulate as one of its ten core principles in its new Investment Policy Framework for Sustainable Development.

26. TUAC considers that the FOI Roundtable should review investment treaty provisions, including those concerning ISDS, from the perspective of retaining the right to regulate in area of public interest such as labour and the environment:

- **Recommendation**: Explore possible avenues including:

    - Diplomatic screen: providing a "screen" that allows States Parties to prevent claims that are inappropriate, without merit, or would cause serious public harm. This mechanism has been used by the US Government in some areas of public policy areas such as tax and financial regulation;
    - Expropriation: ensuring that the definition of indirect expropriation makes it clear that, regulatory measures taken by governments in pursuit of legitimate public policy objectives (labour, health, safety, environment) is not considered indirect expropriation;[22]
    - National treatment and most favoured nation clauses: the right to regulate should be included in national treatment and most favoured nation clauses;
    - Guidance for arbitrators: developing interpretation rules for arbitrators so as to underline the right to regulate and reduce arbitrator discretion in this regard.

4.6 Investor and Investment Compliance with Obligations

27. TUAC considers that the FOI Roundtable should examine how to re-balance the rights and obligations of investors and their investments in investment treaties and to reform ISDS to strengthen compliance with these obligations.

28. UNCTAD has included balancing rights and obligations of investors (*Core Principle 5*) and promoting best international practices of corporate social responsibility (*Core Principle 10*) in its Investment Policy Framework for Sustainable Development. The European

[19] http://www.iareporter.com/articles/20120627_1. TUAC does not have any further information on the claim.
[20] UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework, 2011.
[21] European Parliament Resolution on the Future European International Investment Policy (2010/2203(INI)), 6 April 2011.
[22] ISSD, Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.

Parliament has highlighted the need for the new EU investment policy to promote investments that respect the environment and encourage good quality working conditions and has called for all future EU investment agreements to make reference to the updated OECD Guidelines for Multinational Enterprises.

- **Recommendation**: the FOI Roundtable should examine the following options:

    - Inclusion of labour and environmental (sustainability) clauses in investment treaties that include reference to key international standards including the ILO Declaration on Fundamental Principles and Rights of Work (1998), the UN Guiding Principles on Business and Human Rights (2011), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977 (updated in 2006), the OECD Guidelines for Multinational Enterprises (1976 (updated 2011));
    - Making sustainability clauses subject to dispute settlement;
    - Denying access to ISDS in the case of breaches of certain obligations (e.g., national law, certain international standards including contributing to significant adverse human rights impacts in line with the UN Guiding Principles on Business and Human Rights (2011);
    - Allowing host States to file counter claims based on breaches of sustainability clauses or failure to conduct adequate social and environmental impacts in dispute settlement;
    - Allowing for the filing and consideration of *amicus curiae* submissions from a non-disputing party (citizens, civil society organisations, experts).

4.7 *Selection, Qualification and Impartiality of Arbitrators*

29. The OECD's consultation paper identifies a series of concerns surrounding arbitrators. TUAC considers that the FOI Roundtable should examine how to ensure that arbitrators make high quality and consistent decision, which are free from conflicts of interest:

- **Recommendation**: Explore improvements to the arbitration system including:

    - Selection: identifying alternatives to the practice of parties appointing the arbitrators, including the creation of a standing panel;
    - Qualifications: ensuring that the panellists include arbitrators with expertise in human rights, labour rights and environment;
    - Transparency: providing for greater transparency;
    - Appeals: introducing an appellate panel to help address problems of quality and consistency;
    - Conflicts of interest: introducing rules on independence as suggested by the IISD[23].

[23] ISSD, Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.

4.8 Transparency of ISDS

30. ISDS is widely criticised for being highly opaque. TUAC considers that the FOI Roundtable should examine how to maximise transparency of the system:

- **Recommendation**: examine options for improving transparency, including of ISDS claims, providing for public access to procedures and outcomes.

5. Other Issues

5.1 Definition of Investment and Investor

31. The definition of "investment" and "investor" adopted in many investment treaties has become increasingly expansive – including a broad concept of property covering economic interests not contemplated by the laws of many countries. IISD, in its model international investment agreement, refers to the problem of arbitrations that have identified market share or very minimal investment as sufficient to qualify as an investment. There are also concerns over so-called "mailbox" companies, which establish a minimal presence in a third country in order to enjoy protection under investment treaties.

32. The European Parliament has called on the Commission to review whether the broad definition of foreign investor has led to abusive practices.[24] It has also called it to exclude speculative forms of investment from the scope of protection of future investments. UNCTAD has proposed a definition that suggests excluding portfolio investment from the definition. IISD has proposed that the definition of "investment" cover "*investments that are physically present and operating in the host country, not just empty shells or one form or another or minimal level investments…*".[25] IISD considers that portfolio investment, intellectual property rights *per se* and market share should be excluded from the definition of "investment".

- **Recommendation**: Identify past abuses arising from a broad definition of "investment", with a view to identifying the kind of property and interests that are appropriately protected and define the rules for selecting the home State in order to address the problem of "mailbox" companies.

5.2 Full Protection and Security Standard

33. A significant number of international investment treaties contain full protection and security standards (FPS). They raise two key concerns.[26] First, the boundaries of this obligation are unclear and could be interpreted as imposing a high level of liability on States. According to IISD: "*Investment treaties formulate the standard of full protection and security in a broad manner, and tribunals have taken this at face value, thus interpreting the obligation as imposing a duty upon states to prevent harm to the investment from the acts of government and non-government*

---

[24] European Parliament Resolution on the Future European International Investment Policy (2010/2203(INI)), 6 April 2011.

[25] ISSD, Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.

[26] IISD, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?; November 2011.

actors".[27] Secondly, there is uncertainty over whether the standard extends beyond physical protection to include security from other forms of harassment. Some arbitrators have held that the "*protection and security standard includes not only the physical protection of foreign-owned investments, but also security from other forms of "harassment" which pose no physical threat to assets or threat of violence*" (See *BOX 1* below). This requirement can put States in a difficult situation – legally bound to protect foreign investments (to a legally ambiguous degree) *and* respecting the rights of citizens to express rights they enjoy under national and/or international law, on the other. In recent years, investors have sued States, so far unsuccessfully, for failure to provide "full protection and security" for their investments in the event of labour unrest (see *BOXES 2* and *3 overleaf)*.

34. TUAC is concerned that it would be possible for States to incur liability for citizens and workers exercising their rights under national/international law and that this risk could result in governments limiting or clamping down on, for example, the right to assembly or protest.

- **Recommendation**: Review the options for revising the FPS Standard to make it clear that the standard relates to physical protection only, as suggested by UNCTAD and examine the conditions for omitting the FPS Standard altogether.[28]

BOX 1: ARBITRATORS EXTENDING FPS BEYOND PHYSICAL PROTECTION

In its report on FPS, IISD cites this example of a tribunal rejecting the argument that the protection and security standard was limited to physical interference (Dolzer & Stevens, 1995, p. 61).

Compañia de Aguas and Vivendi v. Argentina (2007)

> "If the parties to the BIT had intended to limit the obligation to "physical interferences," they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized. (par. 7.4.12)"[29]

BOX 2 : NOBLE VENTURES INC. V. ROMANIA

In *Noble Ventures Inc. v. Romania* the US foreign investor sued Romania under the US-Romania BIT claiming, *inter alia*, that the government had failed to quell frequent strikes and demonstrations by the employees of the claimant's investment, Combinatul Siderurgic Resita, and thus breached its obligation to provide full protection and security. On this point, the tribunal denied the investor's claim, holding: "[I]t seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State.[30]" The tribunal further concluded that the government had not failed to exercise due diligence and, even if it had, the claimant could not prove that its alleged injuries and losses could have been prevented if due diligence had been exercised.

---

[27] IISD, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?; November 2011.

[28] A recent IISD report on Full Protection and Security states that the Common Market for Eastern and Southern Africa (COMESA, 2007) and Southern African Development Community investment treaties (SADC, 2006) have excluded clauses on Full Protection and Security Standards. *IISD, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration*?, November 2011.

[29] This example is quoted in and taken from: [29] IISD, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?; November 2011.

[30] http://arbitrationlaw.com/files/free_pdfs/Noble%20Ventures%20v%20Romania%20-%20Award.pdf.

BOX 3: PLAMA CONSORTIUM LIMITED V. REPUBLIC OF BULGARIA[31]

In *Plama Consortium Limited v. Republic of Bulgaria*, the foreign investor argued that workers were incited by the bankruptcy trustee to go on strike and to riot unlawfully at the refinery premises, forcing the factory to close. They further argued that police had failed to adequately protect the refinery or the management. The government of Bulgaria argued, to the contrary, that the demonstrations, which were over the non-payment of wages, were peaceful and did not amount to a riot, that police were present at the refinery, and that in any case the demonstrations were not the cause of the refinery shut-down. The tribunal was eventually unable to determine which of the contradictory set of facts were true and dismissed the claim given that the claimant failed to meet its burden of proof.

[31] http://italaw.com/documents/PlamaBulgariaAward.pdf.

Annex 1: Detailed ETUC Recommendations on EU investment chapters and agreements

I. Rights and Obligations of States

The European Parliament, Commission and Council have all indicated support for investment treaties that do not restrict the ability of member states to take measures necessary to pursue legitimate public policy objectives. However, most clauses under investment treaties, if drafted too broadly, can restrict the right of host states to regulate in the public interest. We therefore urge the EU to ensure that the following issues are addressed in any future agreement:

- **National Treatment (NT)**: In some cases, BITs include expansive liberalization commitments by providing for pre-establishment rights, which limits the state's discretion to regulate the entry of foreign investors. National treatment clauses should not apply to the pre-establishment phases of foreign investment. Further, the non-discrimination principle can be interpreted by tribunals as prohibiting regulatory actions that result in "de facto" discrimination, even when there is no facial or intentional discrimination. Thus, this principle should be limited to regulatory measures enacted primarily for a discriminatory purpose.
- **Most Favoured Nation (MFN)**: Recently, some arbitrators have ruled that MFN clauses may allow investors to invoke greater investor protections found in third-party agreements – allowing the agreement between the home and host states of the investor to be (selectively) circumvented. This must not be permitted. The EU should make it clear that any MFN clause cannot be used to cherry-pick protections in third-party agreements. Worryingly for the ETUC, the Council has called for "unqualified most favoured national treatment" to be secured in negotiations with India, Singapore and Canada.
- **Protecting key public policy tools from NT and MFN obligations**: we recommend specific carve-outs from these obligations for policy measures or policy areas, such as subsidies, procurement, tax, essential public services, and specific industries and regulatory measures.
- **Expropriation**: Broad definitions of expropriation, and in particular indirect expropriation, have allowed investors to challenge a range of host state actions taken in the public interest on the dubious grounds that these actions constitute forms of "indirect expropriation". The EU must distinguish clearly between expropriatory acts and legitimate regulation. A definition of indirect expropriation should be limited to the situation in which a host state appropriates an investment for its own use, or the use of a third party. Regulatory measures that may adversely affect the value of an investment, but do not transfer ownership should not constitute indirect expropriation.
- **Fair and Equitable Treatment**: Arbitrators have also given wide-ranging interpretations of fair and equitable treatment, imposing on states any number of unforeseen limitations on state regulatory power. For example, an investor used the Fair and Equitable Treatment (FET) Clause to challenge South Africa's Black Economic Empowerment programme, a set of policies meant to help historically disadvantaged South Africans through affirmative action in employment, preferential access to procurement contracts and divestment requirements. The claim was dropped only after years of litigation. The EU must ensure that FET is not extended beyond its limited interpretation in customary international law (CIL). The BIT should clearly set forth the proper standard for establishing CIL, as arbitrators are frequently look to the decisions of other arbitrators rather than the practice of states in order to ascertain the existence of a custom.

- **Full protection and security (FPS)**: The boundaries of this obligation are not entirely clear; however, international arbitrators have found that it requires that states provide at least a baseline of police protection for foreign-owned projects. This requires a certain level of due diligence by the host country. Some arbitrators have also held that this includes not only the physical protection of foreign-owned investments, but also security from other forms of harassment which pose no physical threat to assets or threat of violence. This legal uncertainty puts states in a difficult position. Indeed, FPS has been used by investors to sue government when workers have gone on strike against a company or in cases of mass demonstrations. The EU must make clear that the FPS clause is limited only to physical protection, and that non-violent demonstrations or strikes are part of freedom of association, as the ILO MNE Declaration states: "Where governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers' freedom of association or the right to organize and bargain collectively"**..**
- **Definitions**: The definitions of “investor” and “investment” should only protect lasting or significant interests in a foreign enterprise rather than questionable forms of investment such as financial speculation. A clear definition of investment should be adopted that excludes: risky financial instruments such as futures, options and derivatives; sovereign debt (to ensure that debt restructuring is not subject to investor claims); any investment that fails to comply with the laws of the host state, or causes or contributes to serious adverse human and labour rights impacts; intellectual property rights that might inhibit public goods; and so-called “mailbox companies” which establish a minimal presence in a country to enjoy protection under investment treaties.
- **Umbrella Clauses**: Investment treaties should not contain clauses which import investors’ contractual rights into the treaties, giving it far stronger protection. A common issue arising in this context is a contractual stabilization clause, which attempts to insulate investors from changes in law or governmental decisions taken after the effective date of the agreement. Of course, EU investment policy should never itself include a stabilisation clause.
- **Transfers**: investment treaties usually allow investors to freely transfer funds abroad. However, states may have legitimate reasons to limit or temporarily suspend such transfers, especially in the case of balance of payment problems. EU investment policy should not prevent the use of capital controls to address balance of payments and external financial difficulties or threats, or restrict transfers where an investor has broken a domestic law.

II. Rights and Obligations of Investors

Despite the global rise in business-related human rights and environmental abuses (widely documented by the former UN Special Representative on Business and Human Rights, NCPs in the framework of OECD Guidelines, EU documents, etc,), most investment agreements provide protections for investors but only impose obligations on states. Investment agreements need to ensure at the very least that investors respect the laws of the host state when establishing and operating an investment. Where they fail to do so they should be denied the protections afforded by the treaty.

Where investment is included within a Free Trade Agreement, it should be subject to the responsibilities set out in the sustainable development chapter.

Fundamentally, investors should comply with relevant international guidelines and standards, including the responsibility to respect the ILO core labour standards and other human rights under the ILO MNE Declaration, the UN Guiding Principles on

Business and Human Rights, and the OECD Guidelines for Multinational Enterprises as called for by the European Parliament. There are various ways to ensure this. One way would be to foreclose access to ISDS if investors cause or contribute to serious adverse human rights impacts in the host state or commit a serious breach of the OECD Guidelines. Host states should be able to rely on this argument as a defence to a claim, with the question determined by appropriately qualified arbitrators.

III. Promotion of human rights, labour rights and environmental standards.

Exclusion: Any EU investment must make clear that any regulatory actions by a Party that is designed and applied to protect legitimate public welfare objectives, such as public health, safety, human rights, labour and the environment, do not constitute a violation of the agreement/expropriation.

Promotion: At the same time, the investment agreement should explicitly promote these rights. For example, there must be strong and unambiguous references to the requirement that both parties commit themselves to the ratification and effective implementation of ILO core labour standards and other basic decent work components . Both parties should submit regular reports on the implementation of these commitments.

Sanctions: Failure to effectively implement these conventions in practice should be subject to an appropriate dispute settlement mechanism, including a means for non-state actors (such as trade unions) to submit evidence, and with the possibility for withdrawal of benefits where the state fails to comply with its obligations. If investors do not comply with the ILO Standards it should be possible to use the general dispute settlement mechanism to solve the conflict. If a solution cannot be reached, sanctions in the form of substantial fines should be imposed after the general dispute resolution mechanisms have been exhausted.

Non-Derogation: Both parties must include a non-derogation clause committing to not lower labour or environmental standards (or offer to do so) in order to attract foreign investment. Such an obligation must specify that it extends to all parts of their territories, so as to prevent the agreement resulting in an expansion of production in export processing zones (EPZs).

Impact assessments: Both parties must commit to undertake human rights impact assessments and take action based on their findings. These impact assessments should consider all relevant aspects of the social and environment impact of agreements including access to quality public services, and the use of differing policies to achieve industrial development. The EU should be guided by the jurisprudence of the ILO and its supervisory mechanism, the work of Olivier de Schutter, and the UN Guiding Principles on human rights impact assessments of trade and investment agreements.

IV. Dispute Settlement

Investment treaties typically have “investor-state” dispute settlement (ISDS) procedures that allow investors to by-pass domestic legal systems of host states to seek enforcement of their rights under international arbitration bodies. ISDS has been rightly criticized as a powerful tool which has been abused to challenge measures meant to promote the public interest and thus interfering with legitimate policies and policymaking. Indeed, UNCTAD reports that states have faced claims of up to $114 billion and awards of up to $867 million. This does not include the costs of legal defence and related costs.

To rebalance this situation, the ETUC calls for:

a) **State-to-state dispute resolution only**: This would guarantee the crucial role of governments in determining and protecting the public interest.
b) **Exhaustion of domestic remedies**: If the EU continues to support ISDS, then investors should be required, where appropriate, to exhaust domestic remedies within the host state before being able to file a claim under ISDS unless futility is demonstrated. This would ensure the sovereign right of host states to address claims through their domestic legal systems. In countries with weaker legal systems, this would assist with their strengthening, without needing to deny investors possible recourse to ISDS. This would partly rebalance the rights that foreign investors have over domestic business, as well as trade union, environment and human rights organisations.
c) **Investor Screen**: the EU should adopt a “screen” that allows the governments to prevent claims that are inappropriate, without merit, or would cause serious public harm. The US government have introduced this for some public policy areas such as tax and financial regulation. The EU should include it for all areas in the public interest.
d) **Reforming ISDS Procedures**: ISDS mechanisms must be transparent in all regards, and allow for the filing of Amicus Curiae submissions, as the Commission and the Parliament have noted. To ensure that arbitrators make high quality and consistent decisions, free of conflicts of interest, the ISDS should contain appellate mechanisms, and appropriate criteria for selection of arbitrators to prevent conflicts of interest.
e) **Scope of investor-state provisions**: where investor-state provisions are included their scope must be clearly delimited to give adequate public policy space and ensure the integrity of human rights, public interest objectives (including fundamental labour rights, protection of public, health, security, rights of employees, social legislation, human, rights, financial market regulation, industrial, policy and tax policy and environmental protection) have to be exempted from the scope of the investment protection chapter.