



## ITUC Briefing note on Bilateral Investment Treaties

### Introduction

The number of Bilateral Investment Treaties (BITs) stands at over 2,600 and is continuing to grow rapidly each year. This briefing note provides a description of the key elements of BITs with particular attention to their dispute settlement provisions, and examines four disputes concerning Argentina, Tanzania, Bolivia and South Africa in greater detail. It looks at the extent to which social and labour components are included in BITs and concludes with some considerations for trade union discussion. It is envisaged that following any amendment, this note could be sent out for information and guidance to all affiliates.

### What is a Bilateral Investment Treaty?

Bilateral Investment Treaties (BITs) are agreements between two countries that protect and promote investments of investors of one contracting party in the territory of the other contracting party. Most BITs contain a number of standard provisions<sup>1</sup>:

1. *National Treatment*: This ensures treatment of foreign investors that is equivalent or comparable to the treatment received by domestic investors.
2. *Most Favoured Nation (MFN) Treatment*: This ensures the same treatment of all foreign investors, regardless of country of origin.
3. *Fair and Equitable Treatment*: This protection offers some minimum or specific level of protection, in contrast to other forms of protection which take as their reference point the treatment accorded to nationals or other foreign investors.
4. *Restrictions on Expropriation and Indirect Expropriation*: This provides protection in the event of direct or indirect expropriation. Generally, this includes a requirement that the host state pay full compensation for any investment subjected to such treatment.
5. *Free Transfer of Funds*: This allows for the repatriation of investment-related funds (profits, interest, fees, and other earnings).

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<sup>1</sup> Luke Eric Peterson, *The Global Governance of Foreign Direct Investment: Madly off in all directions*, FES Occasional Papers Geneva, No. 19, May 2005.

## **Which countries have signed Bilateral Investment Treaties?**

Most countries have signed one or more BITs. The number of BITs had increased to more than 2,600 in 2006<sup>2</sup> and is still growing with some 70 new treaties signed every year. In the absence of a multilateral investment treaty, the bilateral treaties have grown in number enormously, with the effect that a wide range of often highly imbalanced treaties exist of which few people are aware. The danger exists that any future multilateralisation of the provisions in such agreements will lead to a severely flawed multilateral treaty.

## **Why are Bilateral Investment Treaties problematic?**

First of all, the treaties' main aim is to create a stable investment climate in a country, as well as to increase investment into countries. They aim at taking away a number of uncertainties that investors are confronted with when investing in another country. However, the protections given to foreign investors and the way these protections can be enforced mean that developmental or public interests, or interests of national investors, are made secondary to foreign investor interests.

Secondly, although the investment treaties are signed between two governments, the investors of one state can challenge the other state's government if their interests are at stake. In general, governments might tend to be rather reluctant and to think twice before bringing another country to dispute settlement, but experience shows that investors clearly do not.

Thirdly, a balance between rights and obligations of investors is absent. The treaties provide protection of investors' interests and rights, but do not enter into commitments on obligations of investors, for example in terms of their contribution to sustainable development, respect for local laws and regulations, workers' rights and so forth. For example, the Chad-Cameroon pipeline investment project contract included clauses barring interference in the pipeline which could also be used to prohibit activities such as interrupting work in order to contact a labour inspector because of a concern about health and safety.<sup>3</sup>

And fourthly, in the case of disputes, most of these treaties refer to international dispute settlement mechanisms whose record demonstrates a bias towards the interests of foreign investors. The dispute mechanisms available are all non-transparent, secretive, and arrive at decisions that do not take into account their developmental impact. Moreover, the costs involved and payments in case of loss are often soaring and could drain government budgets, including for social spending, health and education.

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<sup>2</sup> UNCTAD.

<sup>3</sup> *Contracting out of human rights, The Chad-Cameroon pipeline project*, Amnesty International UK, 2005.

## Dispute settlement provisions

Most BITs contain a provision on dispute settlement bodies in which the agreement provides for a specific body to be used in the event of a dispute. It is argued that an independent dispute body can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

Although several different bodies exist, most are subject to similar criticisms. Probably the most commonly used dispute settlement body is the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank body set up in 1966 to mediate investment disputes between corporations and sovereign states. It has some connections to the International Chamber of Commerce and other business associations, for example at the International Court of Arbitration in Paris<sup>4</sup>. As of March 2008, 155 states had signed the ICSID Convention. The handling of disputes is characterised by non-transparency and is based purely on economic considerations, without taking into account sustainable development issues.

Another dispute body is the UN Commission on International Trade Law (UNCITRAL), a UN body that drafts international commercial rules and legislation which may be used or adopted by parties to disputes. However, arbitrations occurring under the UNCITRAL rules are not supervised by the UNCITRAL Secretariat nor are cases disclosed publicly.

The cumulative number of treaty-based cases had risen to at least 219 by November 2005, with 132 brought before ICSID (including ICSID's Additional Facility) and 87 before other arbitration forums. At least 61 governments – 37 of them in the developing world, 14 in developed countries and 10 in South-East Europe and the Commonwealth of Independent States – have faced investment treaty arbitration. Forty-two claims have been lodged against Argentina, 39 of which relate at least in part to that country's financial crisis earlier in the decade.

According to a study by the Institute for Policy Studies and Food and Water Watch<sup>5</sup> most of the cases at ICSID have been filed against developing countries. Of the total, 74% were filed against middle-income developing countries, 19% against low-income developing countries and only 1.4% against G8 countries. One third of the pending ICSID cases (32 out of 109) were filed against Argentina. Of all ICSID cases 36% of the rulings were in favour of investors while 34% of cases were settled out of court with compensation to the investor. Many disputes were over public services and natural resources. 42% of cases involved public services including water, electricity, telecoms and waste management while 29% of cases involved oil, gas and mining.

<sup>4</sup> Global Policy Forum, [http://www.roma1.infn.it/~mirabel/Quaderni/Archivio/World\\_Bank.html](http://www.roma1.infn.it/~mirabel/Quaderni/Archivio/World_Bank.html)

<sup>5</sup> Institute for Policy Studies and Food and Water Watch, *Challenging corporate investor rule*, April 2007.

The disputes have been costly, especially for developing country governments. Information about the level of damages being sought by investors tends to be sporadic and unreliable. However, some claims certainly involve large sums. The largest sum paid to date was US\$877 million which the Slovak Republic paid to the Czech bank CSOB.

Under several arbitration systems the existence of a dispute, its documents and pleadings, and often its decisions, are not made public; indeed according to UNCTAD, most investor-to-state proceedings have not been conducted in public. There is thus complete non-transparency even though cases can affect whole economies. While some degree of confidentiality might be justified, greater transparency of investor-to-state proceedings would help to ensure that public interests would be respected. There are no penalties for claimants filing claims on the basis of unreliable information.

There is a need for more detailed analysis of the degree of impartiality of dispute bodies such as ICSID. Furthermore, the dimension of the losses of domestic investors as a direct or indirect result of ICSID activities in the host countries requires greater consideration.

### **The Water cases – Argentina and Tanzania**

Some BIT cases have received particular attention due to the developmental impacts they have had. Two examples are the water cases in Argentina and Tanzania.

Concerning Argentina, there is an investment dispute before an ICSID tribunal between the Argentine government and a consortium of transnational water companies including Suez (France), Vivendi Universal (France), AWG Group (United Kingdom), and Sociedad General de Aguas de Barcelona (Spain)<sup>6 7</sup>. The dispute concerns the provision of water and sanitation in the city of Buenos Aires and 17 districts of the province of Buenos Aires, in relation to emergency tariff-freezing measures adopted by Argentina during its economic and social crisis of 2001. Although as noted above, ICSID's rules allow solely for the use of economic criteria, an amicus curiae brief was submitted in 2007 by four Argentinian human rights organisations<sup>8</sup> together with the Centre for International Environmental Law (CIEL) which emphasises that human rights law recognises the right to water and its close linkages with several other human rights, including the right to life, health, housing, and an adequate standard of living. The brief states that human rights law requires that Argentina adopt measures to ensure access to water to the population, including physical and economic access. Under this light, the freezing of the

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<sup>6</sup> CIEL

<sup>7</sup> PSIRU report on *Water privatisation and restructuring in Latin America*, 2007: <http://www.psiru.org/reports/2007-09-W-Latam.doc>

<sup>8</sup> The Centro de Estudios Legales y Sociales (CELS), the Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and the Unión de Usuarios y Consumidores.

tariff levels amidst an economic crisis allowed the population to have access to water and sanitation, and thus the measures complied with Argentina's requirements under human rights law. ICSID's decision on whether to accept the amicus curiae brief is still pending.

In 2005 the government of Tanzania cancelled a water privatisation contract with the British company Biwater<sup>9</sup> because the company had neglected contractual obligations such as the installation of pipes to households, making required investments and ensuring adequate water quality. The company filed claims with ICSID and with the British High Court for expropriation, making claims of between US\$20 and 25 million of future lost profits. The British High Court ruled in January 2008 that Biwater had failed in its contractual obligations and that the government of Tanzania's decision to cancel the contract was justified. The panel ordered the company to pay the Tanzanian water authority to pay \$8 million dollars. However, the claim filed at ICSID is still pending.

### **Withdrawal from ICSID: Bolivia**

Bolivia withdrew from ICSID in May 2007, following the proper procedures for withdrawal in accordance with the ICSID convention. They provided several reasons: because ICSID is an unbalanced arbitration tribunal used mainly by multinationals to challenge states; because it meets behind closed doors, is non-transparent and decisions cannot be challenged; as defending cases is very expensive for governments and the damages that are sought by multinationals involve millions of dollars; because most cases are ruled in favour of multinationals; and due to the World Bank playing a dubious role as it is often both the judge and the jury in the ICSID process.

In the meantime however a dispute arose between the Bolivian government and ETI, a telecom company. In 1996, the Bolivian government had privatised the state telecom company Entel by selling 50% of its shares to ETI. In April 2007 the Bolivian government asked ETI to sell its 50% stake in Entel back to the state, based on violations of the terms of its privatisation contract by not investing sufficiently and by owing taxes, and set up a commission to examine the company's results and make recommendations. In October, claiming damage to its investment interests, ETI filed a claim with ICSID against Bolivia in the framework of the Netherlands-Bolivia bilateral investment treaty and the ICSID tribunal seems ready to take up this dispute, despite the withdrawal of Bolivia from ICSID.

### **The Italian investors versus South Africa case<sup>10</sup>**

The BIT between Italy and South Africa has caused concern recently due to a dispute referred to ICSID in January 2007. This case challenges the South

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<sup>9</sup> Food and Water Watch

<sup>10</sup> Based on a Treatment Action Campaign (TAC) briefing on the case.

African Constitution and the Black Economic Empowerment programme that is at the basis of redressing inequalities in South Africa.

On 8 January 2007 a group of Italian businesses with substantial investments in South Africa's mining sector filed a claim for arbitration with ICSID. The claimants are the owners of two granite mining operations that together control an estimated 80% of South Africa's granite exports: RED Graniti Spa and Finstone Ltd SA, a foreign mining company based in Luxembourg, which is a holding company in control of three South African granite producing operations.

The investors argue that the South African Black Economic Empowerment (BEE) programme is in violation of the BITs signed with South Africa by both Luxembourg and Italy.

The issue at dispute is the Mineral and Petroleum Resources Development Act (the MPRD Act), which came into effect in 2004, and effectively transferred all mineral rights in South Africa to the state. This means that land can be owned privately but mining activities on that property require permission from the state. The state's objective is to ensure that minerals extracted benefit the country as a national resource. In order to continue their operations, the Act requires all mining companies to convert their former holdings into "new order rights" which are issued under licence from government. All applications for these new licences must be received by 2009 after which point only licensed firms will be allowed to conduct business in South Africa. The issuance of exploration/mining licences is however not guaranteed. The licensing depends on whether mining firms fulfil a number of objective conditions laid down in the Act and in the broad-based socio-economic empowerment Mining Charter.

One of the primary objectives of the Act and the Mining Charter is to facilitate the transfer of 26% of shares in the mining sector into the hands of black investors by 2014. Companies are further mandated by the Act and the Charter to increase the percentage of historically disadvantaged South Africans in management positions to 40% by 2009. New mining licences will only be issued to firms that comply with these BEE codes and preference will be given to companies that are black owned.

RED Graniti Spa and Finstone Sarl argue that the Act contravenes the 1997 Italy-South Africa BIT. They claim that by giving preference to BEE companies the South African government is in breach of Articles 2(3) and 3(1) of the Italy-SA BIT. Under article 2(3) the South African government is obliged to ensure 'fair and just' treatment of Italian investors. Article 3(1) stipulates that South Africa must offer Italian financiers 'no less favourable treatment than investments of its own investors'.

The claimants argue that the Minerals and Petroleum Resources Development Act implemented in May 2004 by the government effectively led to expropriation of their mineral rights without providing sufficient compensation in terms of the protection contained in the bilateral investment

agreement. The allegation further holds that the South African government is effectively discriminating against these claimants.

The MPRD Act does have provisions for compensation to parties who can prove that their property has been expropriated and lays out a procedure for filing claims for compensation with the Director-General of the Department of Minerals and Energy. But instead of using South African legal procedures the claimants have chosen international dispute settlement outside the system.

The allegation of expropriation and the claim for compensation could set an international precedent that could result in a heavy financial burden for South Africa. It is highly likely that, should the claim succeed, other firms whose parent countries have signed BITs with the South African government would also apply to international courts of arbitration on similar grounds.

After the dispute was registered in January 2007, an ICSID Tribunal was constituted in September 2007 and a first session held in December 2007. It was then decided that the Seat of the Tribunal would be in The Hague. The claimant must file its memorial no later than 30 April 2008 and the defendant has to submit its counter-memorial no later than 30 September 2008.

### **Labour components in Investment Agreements**

An OECD paper<sup>11</sup> on international investment agreements provides an overview of the inclusion of labour, environmental and anti-corruption issues in investment agreements. The paper focuses on 39 countries (consisting of all 30 OECD countries as well as Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia) and 291 international investment agreements or investment chapters in trade agreements. Of these 39 countries, fifteen had included labour, environmental and to a lesser extent anti-corruption language in one or more agreements<sup>12</sup>, while 24 had not included such language in any of their agreements. The inclusion of language was found mainly in the investment components of FTAs rather than in BITs as such.

Of the 15 countries that include such language, 10 have included language in more than one agreement, sometimes using a model with similar language in various agreements. There are substantial differences among the countries however. Some have included language since at least the early 1990s while others have started only recently; some use language in all their agreements while others do not; and the provisions on labour and environment that are included in general differ substantially from one agreement to another. Some agreements only include language in the Preamble whereas others include a whole chapter on the issues or include a side agreement.

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<sup>11</sup> OECD, *International Investment Agreements: Survey of Environmental, Labour and Anti-corruption issues*, 27 February 2007, DAF/INV/WP/WD(2007)2

<sup>12</sup> The 15 countries are Australia, Belgium, Canada, Finland, Japan, Korea, Luxemburg, Mexico, Netherlands, Poland, Sweden, Switzerland, United States, Chile and Latvia.

The labour language that is most often found include a “not lowering standards” provision, a “right to regulate” provision, the clarification of the meaning of indirect expropriation, and the promotion of internationally agreed standards. However, the ILO labour standards referred to in agreements are not always the same ones. Some include all eight core labour standards, others include only six of them and leave out the core conventions on discrimination, and others add provisions on health and safety, minimum wages, working hours or the promotion of cooperative relationships between labour and management.

To date, there have been no arbitration cases on the basis of labour provisions, although there have been cases concerning the environmental and anti-corruption provisions.

The trend in new treaties is towards greater inclusion of labour and environmental provisions, but there has been little renegotiation of older treaties where labour provisions were more often absent.

### **What can trade unions do?**

1. Identify with which countries your government has signed BITs.
2. Most BITs are negotiated for a certain period only and are renewed after that period. BITs should be identified that are to expire shortly. Trade unions should insist on building in adequate safeguards for developmental and public interests including labour rights as a condition for the renewal of BITs.
3. New BITs should be signed only if they provide adequate balance between the rights and obligations of investors.
4. Alternative dispute mechanisms to those such as ICSID, in view of its bias towards investors and lack of transparency or social criteria, should be referred to in new BITs.
5. New BITs must contain strong clauses referring to respect for the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
6. New BITs need to include a provision that governments will protect, enhance and enforce basic workers' rights.
7. Dispute cases like the ones described above against South Africa and Bolivia need to receive international solidarity action, first of all to raise international public awareness to bring pressure on the investor to withdraw the case and secondly to prevent investors from taking up future cases that ignore and undermine the public, labour and developmental interests of countries.

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