

Towards a Repository of Policy Options for IIA Reform

Research Project

International Investment Agreements Under Scrutiny – Bilateral Investment Treaties, EU Investment Policy and International Development ¹ⁱ

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This research report was managed by Traidcraft Exchange on behalf of a European civil society coalitionⁱⁱ examining the reform trends of EU investment policy and in particular the EU reform related to International Investment Agreements and the Investor-to-State Dispute Settlement Mechanism (ISDS).

The main findings of this report are that reform IIAs is not sufficient and ISDS is an inappropriate mechanism because:

- **It allows investors to sue governments for public policy decisions**
- **IIA/ISDS are not determinants for FDI inflow**
- **More appropriate. i.e. less risky, alternatives for investment protection exist.**

More specifically,

- The vague IIA rules provide arbitrators with **interpretative leeway** enabling them to challenge a broad range of public interest regulation. As IIAs delegate treaty interpretations to arbitrators, tribunals are effectively taking over state functions.
- **States cannot bring claims against companies**, and pay heavily (\$50 billion highest award yet) to defend themselves.
- The profit-driven **arbitration market** plays to the advantage of a small number of law firms and puts cash-strapped developing countries at a systematic disadvantage.
- **Limited reforms** in the EU, USA and Canada do not yet reflect the **growing public concern** (e.g. 97% of respondents to a recent European Commission consultation [150.000 respondents] rejected ISDS) nor global reform trends (Ecuador, Venezuela, Bolivia, South Africa and Indonesia have terminated several IIAs; Bolivia, Ecuador and Venezuela have withdrawn from ICSID; India has issued a model BIT restricting the use of ISDS).

Therefore, we ask to:

- **Refrain from pressuring developing countries to negotiate or sign IIAs.**
- Drop ISDS from all trade and investment agreements and **explore alternative dispute resolution mechanisms:**
 - Using **domestic legal remedies** should become the norm where possible.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

- Appropriate **multilateral state-state dispute mechanisms** could be created, **guaranteeing transparency, broad stakeholder participation, and the right to regulate.**
- Such mechanisms should be composed of **independent and impartial judges** free from conflicts of interest.
- **Initiate participatory reviews** of their investment agreements, carry out **Human Rights Impact Assessments of all IIAs, eliminate any inconsistencies of these treaties with international human rights obligations and include binding investor obligations** in all investment agreements.

ⁱ Weblink: the report is under embargo until 4 March after which it will be published here:

<http://www.s2bnetwork.org/cat/issues/eu-investment-policy/>

ⁱⁱ The partners of the research project include: TNI-Netherlands; Traidcraft-UK; SOMO-Netherlands; Powershift-Germany; FAL-France; Ecologistas en Accion-Spain; AK-Austria; 11.11.11-Belgium; ReCommon-Italy; Vedegylet Egyesulet-Hungary; IGO-Poland; AfrikaKontakt-Denmark.