



Corporate Europe Observatory, July 2010

The Battle to Protect Corporate Investment Rights

Commission tempers its new powers in response to business lobby

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

European Services Forum to Commission President Barroso, November 2009

New investment powers, granted to the EU Commission under the Lisbon Treaty, will still allow multinational companies to claim compensation when national laws designed to protect the environment or public health damage their profits, according to proposals put forward by the EU Commission this month.

The draft legislation on the protection of international investment – an area previously governed by member states – was an opportunity to change the current system under which national agreements frequently give companies investing overseas excessive protection from legislation in the host country. But following an intense lobby campaign from industry and EU member states led by Germany and the UK, the Commission has opted to protect the status quo. The Commission’s proposals will now be considered by the EU Parliament and the Council.

The Commission's new investment powers under the Lisbon Treaty

Before the Lisbon Treaty entered into force on 1 December 2009, the Commission could use trade negotiations to break down barriers for European investors abroad, abolishing all kinds of conditions and regulations to their investments in third countries, for example. But it did not have the power to negotiate provisions to protect investments abroad against expropriation for example. But this changes under the Lisbon Treaty, which grants full investment powers to the EU.

This new competence raises questions as to how will the Commission use its new powers? And what will happen to the 1200 or so EU member states’ bilateral investment treaties (BITs)?

BITs give sweeping powers to foreign investors, including the right to directly challenge governments at international tribunals in case of a loss of predicted profits. Across the world, big business has used this to claim dizzying sums in compensation when democratically made environmental, health, and other public interest laws seen to affect company profits. Developing countries have been hit hardest by rulings against them, but the EU is not immune to investor

lawsuits. In April 2009 the Swedish energy multinational Vattenfall initiated litigation against the German government, seeking €1.4 billion as compensation for environmental restrictions imposed on a coal-fired power plant in the city of Hamburg¹. BITs do not impose any obligations on corporations and cannot be used for complaints against investors violating the rights of workers, communities or causing environmental destruction.

The Lisbon Treaty created a formal opportunity to terminate these one-sided BITs and initiate a u-turn in the EU's international investment policy. But this opportunity has not been taken.

Don't touch the BITs!

Industry has lobbied hard on the Commission's new investment powers. Industry federations from member states with a large number of BITs, such as Germany, the UK or France, and the European employers' federation BusinessEurope mingled with DG Trade. Conferences on investment protection mushroomed, packed with law firms thriving on the lucrative business of BITs arbitration. In an internal report obtained by Corporate Europe Observatory through access to information requests, DG Trade recognised that this “community of the converted on investment protection and investor-to-state arbitration” was dominated by “vested interests” of “those that make money from investor-to-state arbitration” and wasted “few thoughts” on “how these mechanisms resonate in... society at large”².

The number one demand from business that emerged from these gatherings was the legal security of the existing BITs. As EU member states have lost their power to negotiate and implement these deals, there is now a risk that an arbitration panel could question their legality. This, BusinessEurope warned “would leave the EU company concerned with no legal defence of its rights”³. No wonder corporate lobby groups want to see existing BITs integrated into EU law – ideally “without prior time-consuming examinations” of their content, which the German government demanded, echoing German business demands⁴. Such examinations could raise uncomfortable questions, for example, about the lack of environmental and labour clauses in BITs.

To back this 'don't touch our BITs' agenda, the German industry federation (BDI) together with the German government conducted a study of German firms' experience of BITs. The study praised the current system, warned of the danger of weaker standards and reduced attention to corporate needs as possible consequences of Brussels' new powers, and called for joint action to secure the high German standard of investment protection BITs⁵.

But business wanted more than just to secure the status quo. Legalising existing BITs will be of little benefit to corporations from EU countries which do not have many of these treaties, such as Ireland and Malta. And it would take too long for a fully fledged EU level investment policy to fill that vacuum. So industry wanted legislation introduced that not only 'grandfathered' existing treaties, but also enabled member states to update them and negotiate new ones⁶.

The Commission's proposed regulation on the future of the BITs follows exactly that line, making it “100% clear that the benefits and rights available under BITs cannot be denied”⁷. All existing BITs remain in force and the Commission will even authorise member states to alter existing and negotiate new agreements as long as they don't conflict with EU law⁸.

Member states led by Germany and the UK had intervened via their Commissioners to axe a provision in DG Trade's initial proposal that would have put an expiry date on existing BITs. The regulation now only provides for a “review”, leaving member states' BITs secure.

Corporate investment wish-list copy-pasted into Commission proposal

“The most important goal for the EU should now be to push access for and protection of its own investments abroad.”

BusinessEurope to EU Trade Commissioner, Karel de Gucht, May 2010

The Commission's proposal for the EU's international investment policy similarly parrots corporate Europe's demands. It affirms that “no European investor would be worse off than he would be under Member State's Bilateral Investment Treaties” and that “the EU will follow the best available practices as developed by Member States”⁹. European businesses will be very satisfied with this position – they had campaigned for a European investment policy that included “at least as many investment rights as currently provided by member state BITs”¹⁰.

These rights are enshrined in a number of harmless-sounding, neo-liberal principles, which the Commission copied from member states' BITs into its proposal, for example:

- non-discrimination, which forces governments to treat foreign and domestic investors alike, making it impossible to give extra-support to their own small and medium enterprises or to those from marginalised regions to reduce social and economic inequality;
- restrictions on the expropriation of foreign companies, which have been widely used to challenge public interest laws which are seen as damaging to their profits as 'indirect expropriations';
- fair and equitable treatment for foreign investors, a vague catch-all clause, which arbitration tribunals have interpreted to the benefit of corporations and the disadvantage of governments, forced to introduce burdensome bureaucratic standards to facilitate the operation of foreign investors. Countries such as India and Singapore have as a result started to omit references to fair and equitable treatment from their investment agreements;
- the unfettered repatriation of profits from foreign subsidiaries, irrespective of any potential balance of payment problems and the nature of the companies' contribution to the host state economy.

The Commission wants to see these principles enforced through an investor-to-state dispute settlement, which grants corporations the exclusive right to bypass domestic courts and sue governments directly at international tribunals. Investor-to-state arbitration has been harshly criticised for its secrecy and heavy bias in favour of corporate interests¹¹, but is one of the key demands of the business community. The Commission now sides with the latter, but tries to conceal the political controversy around investor-to-state dispute settlement by arguing that it “is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others”¹².

Echoing business demands, the Commission's proposal promises “a more activist approach” in international investment because the EU “cannot take a backseat in the global competition to attract and promote investment from and to all parts of the world”¹³. As a first step, the Commission plans to integrate investment chapters into ongoing trade negotiations with Canada, India, Singapore and the Mercosur countries. It also wants to negotiate stand-alone investment agreements with China and Russia because “the Union should go where its investors would like to go”. In other words: “markets with significant economic growth or growth prospects”¹⁴. Again, this mirrors demands by BusinessEurope to focus on “partners with economic growth potential, such as China or Russia”¹⁵.

The lobby battles ahead

A few passages in the Commission's proposals, however, seem not to entirely reflect the corporate vision for investment. There are references to the need for consistency in the EU's investment

policy with public policy objectives; mentions of human rights and sustainable development as guiding policy objectives; references to the OECD's Guidelines for Multinational Enterprises and to transparency in investment arbitration – a 'no go' in the current world of investment disputes – and the need for more independent arbitrators.

Some of these proposals have already come under fire from the corporate investment lobby and member states acting on their behalf. The French industry association MEDEF, for example, attacked the Commission's line on transparency in arbitration proceedings¹⁶. Member states led by Germany that lobbied hard against phasing out existing BITs are likewise expected to mobilise against any meaningful transparency in investment arbitration and binding language on obligations for corporations. They have organised a "friends of investment" group¹⁷ among EU member states, which will make sure that the slightest attempts to change the balance of international investment policies in favour of citizens and the environment will not take place.

In the end, a lot will depend on the European Parliament. It has to approve the proposed legislation on the future of the BITs and give its opinion on the plans for the EU's investment policy. And it might get involved in the future mandates for the EU's investment negotiations.

Member states will do everything to prevent this from leading to what they would consider to be a "dilution" of their hard-core investment agenda¹⁸. The corporate lobby is likewise prepared to get involved in the parliamentary debates. Perhaps MEPs will not succumb to their pressure for a renewed push to handcuff states and societies through a new corporate investment regime. Because in the end, they would be handcuffing themselves.

Notes

- ¹ Bernasconi, Nathalie (2009): Background Paper on Vattenfall v. Germany Arbitration, IISD.
- ² European Commission (2009): Mission Report. 50 years of Bilateral Investment Treaties Conference – Frankfurt 1-3 December 2009. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- ³ BusinessEurope Information Note: Foreign Direct Investment under the Lisbon Treaty, 12 January 2010, http://www.spcr.cz/files/bjakubcova/information_note_FDI_Lisbon_Treaty.doc
- ⁴ BmWi press release, Bundeswirtschaftsminister Brüderle trifft EU-Handelskommissar De Gucht, 15 April 2010,
- ⁵ BMWi/BDI/PriceWaterhouseCoopers (2010): Unternehmensbefragung zum Thema: Investitionsschutz nach Lissabon, http://www.agaportal.de/pdf/dia_ufk/presse/dia_unternehmensbefragung_lissabon.pdf
- ⁶ Interview with Pascal Kerneis, Managing Director of the European Services Forum, Brussels, 25 March 2010; letter from BusinessEurope to EU Trade Commissioner Karel de Gucht, 4 May 2010.
- ⁷ European Commission (2010): Q&A. Commission launches comprehensive European international investment policy, 7 July, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=590&serie=354&langId=en>
- ⁸ European Commission (2010): Proposal for a regulation of the European Parliament and of the Council establishing transitional agreements for bilateral investment agreements between Member States and third countries, COM(2010)344:final, 7 July.
- ⁹ European Commission (2010): Q&A. Commission launches comprehensive European international investment policy, 7 July, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=590&serie=354&langId=en>
- ¹⁰ BusinessEurope Note: The Lisbon Treaty and EU External Trade Policy, 26 November 2009, http://www.ierc.bia-bg.com/language/en/uploads/files/news_0/news_f30757785447e374762be51ed5de97ae.doc
- ¹¹ For a selection of egregious cases see, for example, Food and Water Watch/Institute for Policy Studies (2007): Challenging Corporate Investor Rule. How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It, <http://www.ips-dc.org/reports/070430-challengingcorporateinvestorrule.pdf>; Institute for Policy Studies (2010): Mining for Profits in International Tribunals. How Transnational Corporations Use Trade and Investment Treaties as Powerful Tools in Disputes Over Oil, Mining, and Gas. The websites of the Network for Global Justice in Investment (<http://justinvestment.org/>) and the International Institute for Sustainable Development (IISD, <http://www.iisd.org/investment/>) also provide valuable resources on investor-to-state dispute settlement.
- ¹² European Commission (2010): Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European international investment policy, COM(2010)343 final, 7 July, p. 10.
- ¹³ Ibid., p. 4.
- ¹⁴ Ibid., p.6.
- ¹⁵ Letter from BusinessEurope's Philippe de Buck to EU Trade Commissioner Karel de Gucht, 4 May 2010. See also European Commission, Report from the meeting with BusinessEurope on investment – 06/01/2010, dated 8 January 2010. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- ¹⁶ European Commission (2010): Meeting Report. Meeting with MEDEF on 2 March 2010, 4 March 2010. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.
- ¹⁷ The group is comprised of Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Romania, Slovenia, Slovakia, Sweden and Portugal.
- ¹⁸ European Commission (2009): Mission Report. 50 years of Bilateral Investment Treaties Conference – Frankfurt 1-3 December 2009.