CONFEDERATION SYNDICAT EUROPEAEN TRADE UNION

ETUC Resolution on EU Investment Policy

Adopted at the Executive Committee Meeting of 5-6 March 2013

Foreign direct investment (FDI) can play a positive role by creating decent jobs, improving productivity, investing in skills and technology transfer, supporting economic diversification and the development of local firms and aiding with a just transition to a green economy, all key goals of the Europe 2020 strategy. However, FDI can also undermine decent work, sustainability, distribution and general well-being especially where host states are unable to enact or enforce appropriate laws and policies.

Foreign direct investment into and out of Europe should respect the fundamental principles of the EU. Specifically, the Lisbon Treaty sets out the fundamental principles on which EU external action should be based, namely democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity. These should be guaranteed in relation to both European and national policies on investment.

With adoption of the Lisbon Treaty the European Commission has been given an extended competence to negotiate investment agreements with 3rd countries. As a result, the EU has launched and/or is preparing negotiations on comprehensive investment chapters within its bilateral trade negotiations, as well as negotiations for bilateral investment treaties (notably with China).

While investors should enjoy appropriate protections for their investments under bilateral investment treaties or the investment chapters of trade agreements, such protection should not be at the expense of the host states' right to regulate, or civil society or domestic firms. States need domestic policy space to meet important public policy objectives, including labour rights, environmental protection, the provision of public goods (health, education and social security) as well as the development of coherent industrial policies.

As former UN Special Representative on Business and Human Rights, John Ruggie said: "...investor protections have expanded with little regard to States' duties to protect [human rights], skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration." .

As the ILO MNE Declaration states: "Multinational enterprises, particularly when operating in developing countries, should endeavour to increase employment opportunities and standards, taking into account the employment policies and objectives of the governments, as well as security of employment and the long-term development of the enterprise".

The EU has indicated that it will not develop a "model text" for investment treaties, however it is nevertheless using a de facto text. The ETUC demands that the EU enter into proper consultations with trade unions and civil society on these texts. The EU should ensure that it guarantees transparency and coherence in its policy formulation in this area.

European states have typically concluded investment treaties that provide extensive protection for foreign investors. Yet the increasing use of such protections by foreign investors to sue host governments, has strengthened calls to protect and safeguard the rights of states to regulate under such treaties. While the European Parliament has

acknowledged such concerns, the EU's negotiating mandate for current negotiations on investment with Canada, India and Singapore fails to address such concerns .

The ETUC is concerned that investors have challenged states in international tribunals in numerous cases for enacting or carrying out public interest laws and regulations. This has included cases of investors suing EU member states, as well as EU-based investors suing developing country governments. For example, French multinational Veolia is currently attempting to sue the Egyptian government, among other things, over recent increases in the minimum wage. And earlier in June 2012, Vattenfall filed a case against the German government for restricting the use of nuclear power. In this way, multinational companies are using investor protection rules and investor-state dispute settlement as a means of achieving corporate aims, increasing the cost to the taxpayer of defending public policy and rules.

The ETUC welcomes the new UNCTAD position (2012 Global Investment Report) on sustainable development and investment policies . We also acknowledge the nascent debate in DG Trade on sustainable development, although the ETUC is concerned that the Commission's approach remains orthodox in this regard and ignores the reality on the ground of challenges to worker rights, especially core labour standards, and public policy prerogatives.

As the Commission is developing its mandate in investment policy and various negotiations are on-going and a new raft are in preparation, the ETUC has developed this position to ensure a clear trade union position on the matter, and benchmark EU negotiating positions and agreements according to set of detailed recommendations (Annex 1), covering the rights and obligations of states and investors, the promotion of human rights (including labour rights) and environmental protection, and provisions on dispute settlement. The ETUC urges that the EU adopt investment policies that fully address the well-founded concerns expressed in the Annex attached.11. On the basis of this resolution, the ETUC will:

- Develop a model investment chapter in a participatory process to engage affiliates on the importance of investment policy frameworks for trade unions;
- Undertake a range of activities to influence the EU in the development of its new investment policy;
- Coordinate and cooperate actively with the ITUC and TUAC to better address the EU's position in international and OECD negotiations on investment and dispute settlement rules, and strengthen coordination around the new OECD Multinational Guidelines, as well as ILO standards;
- Develop strategies to hold multinationals accountable for their own commitments to social and environmental responsibility, notably the ETUC encourages greater engagement of national affiliates with OECD contact points in their countries.

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.