



Friends of the Earth International
Remarks made during the 35th session of UNCITRAL Working Group III
with regards to A/CN.9/WG.III/WP.142, Section D, Paragraphs 45-57

Thank you, Chair.

We would like to comment on a few of the points mentioned under Section D, many of which in our view do not refer to “mere perceptions” but often to well substantiated facts, and raise a couple of additional issues:

First, we note that the *raison d’être* and merits of the investment treaty regime are alluded to in this section of the Working Paper and we would like to highlight three points in this respect.

1. Attracting FDI

The reason given most frequently for concluding investment agreements which was also mentioned during this session is to attract foreign direct investment.

In this context we would like to point to a study by the OECD, which is the most recent and comprehensive review of the evidence that I am aware of. It states that:

“the several dozen econometric studies that have tested whether there is a correlation between the existence of IIAs and FDI inflows to developing countries show diverse and at time contradicting results. Some studies found positive correlation, at least in certain configurations, some found a very weak, no, or even negative correlation with IIAs and some studies found correlation between IIAs and greater inflows, but not necessarily from the States with which a treaty has been concluded.” (1)

Furthermore new research by the US consumer organisation Public Citizen shows no decrease and in many cases even an increase in FDI, after countries decided to terminate their BITs.

2. Depoliticisation

WP 142 points to depoliticisation as one of the merits of the current system.

We would like to highlight a new study, the first one of its kind that we are aware of, that tries to find empirical evidence for the claim that investment treaties depoliticise investment disputes. Due to the available evidence, it was limited to disputes where the

mobilize resist transform

claimant was from the United States. I quote:

“We find no evidence for the de-politicization hypothesis: diplomatic engagement remains important for investor-state dispute settlement, and the US government is just as likely to intervene in developing countries that have ratified investment treaties with the US as those that have not.” (2)

3. Protection of foreign investors against discrimination, especially in jurisdictions with a weak rule of law.

Again, available research does not point to systematic problems that would justify the existence of such a powerful mechanism like ISDS. A study found that:

“foreign firms’ experiences at the hands of host governments tend to be as good, or better, than those reported by their domestic counterparts. Even when foreign firms are exposed to significant political risks in the developing world, domestic firms remain even worse off on average.” (3)

In our view, the lack of evidence that justifies the existence of the investment treaty regime makes it look like a solution in search of a problem and contributes significantly and rightfully to the high levels of public concerns we are witnessing.

We sincerely hope that the Working Group will consider these fundamental questions and concerns that should, in our view, form the basis for considerations of a reform of ISDS and the investment treaty regime.

Secondly, we wanted to refer to an issues that has not been mentioned in WP 142: regulatory chill.

As an organisation that works on many pressing environmental issues whose solution often requires far reaching changes to the regulatory environment, the effects of regulatory chill are of particular concern for us.

While evidence can be very difficult to come by, we would like to point to a recent testimony given by a high level official in the US Congress, in which he said:

“we’ve had situations where real regulation which should be in place which is bipartisan, in everybody’s interest, has not been put in place because of fears of ISDS.” (4)

We are deeply concerned that if the United States, arguably the world’s most powerful regulator and certainly a country capable of defending itself in an ISDS tribunal, refrained from

mobilize resist transform

undertaking regulatory actions in the public interest because of the threat of ISDS claims, the practice may be much more wide-spread than it is currently known and affect other countries even more seriously.

Lastly, we would like to highlight another element that has contributed significantly to the public concern around ISDS and is noted in paragraph 46: ISDS is only available to foreign investors. Victims of human rights violations, whether committed by states or non-state actors, do not have recourse to international courts unless domestic remedies have been exhausted.

As our organisations has experienced, it can be extremely difficult to hold internationally operating companies accountable for human rights violations or environmental pollution, while those same actors enjoy the far reaching rights granted by investment treaties. Rights without responsibilities for some of the world's most powerful actors is something that we think is deeply unfair.

As the G77 and China have noted, “any dispute settlement regime should appropriately address the rights and responsibilities of foreign investors.” (5) We sincerely hope that the latter part will not be forgotten and would like to highlight the importance and urgency of the work of the open ended inter-governmental Working Group for the elaboration of a legally binding treaty on transnational corporations and other business enterprises with respect to human rights that is taking place at the UN Human Rights Council. The success of these negotiations will show if there is a serious commitment to address investor responsibilities.

As before we would be happy to make the sources used available to the Secretariat and any interested delegations.

Thank you very much.

Contact information

Friends of the Earth Europe: Fabian Flues – fabian.flues@foeeurope.org

Friends of the Earth International: Sam Cossar-Gilbert – sam.cossargilbert@foe.org.au

mobilize resist transform

Sources cited

(1) Pohl, J. (2018), “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence”, OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris.

Available at: <http://dx.doi.org/10.1787/e5f85c3d-en>

(2) Gertz, J., Jandhyala, S., Poulsen, L. (2018) “Legalization, diplomacy, and development: Do investment treaties de-politicize investment disputes?”, World Development, Volume 107, 2018, Pages 239-252.

Available at: <https://doi.org/10.1016/j.worlddev.2018.02.023>

(3) Aisbett, E., Poulsen, L. (2016), “Relative Treatment of Aliens: Firm-level Evidence from Developing Countries”, Oxford University Global Economic Governance Working Paper 122.

Available at: <http://www.geg.ox.ac.uk/geg-wp-2016122-relative-treatment-aliens-firm-level-evidence-developing-countries>

(4) Discussion between US Trade Representative Robert Lighthizer and Chairman of the Ways and Means Committee Kevin Brady on 21 March 2018.

Available at: <https://www.c-span.org/video/?c4719932/brady-lighthizer-isds-discussion&start=1516>

(5) Statement on behalf of the Group of 77 and China by H.E. Mr. Mohamed Edrees, Permanent Representative of Egypt to the United Nations, at UNCITRAL Working Group II Meeting on the Investor-State Dispute Settlement Reform (New York, 23 April 2018)

Available at: <http://www.g77.org/statement/getstatement.php?id=180423>

mobilize resist transform