Paper on the Investment Governance Policy Advocated by the Sustainable Europe Research Institute (SERI), Vienna, Austria

Summary

Based on our research work and intensive discussions with partners around the world, SERI proposes two main changes to the EU's agenda for the WTO's Doha Round ministerial meeting in Hong Kong. They are:

I. Foreign Direct Investment (FDI) could be an important tool for advancing sustainable development. However the 1987 attempt at the OECD to govern investment multilaterally was unsatisfactory. Offers involving investment in services are continually updated as "Mode 3" of the GATS negotiations at the WTO. We at SERI want to see any future negotiations on the combination of investment, trade and development kept *outside* the OECD and the WTO.

II. As for the question in what jurisdiction investment negotiations and disputes involving nation-states should be handled, if not at the OECD or WTO, we at SERI concur with the International Institute for Sustainable Development (IISD) that the **agenda** comes first and then the venue.[1] Therefore we advocate the development of a new agenda based on the Model Investment Agreement and Negotiators' Handbook, http://www.iisd.org/investment.asp and ultimately the establishment of a new intergovernmental organization with a new tribunal devoted exclusively to the adjudication of cases involving foreign direct investment.

III. The European Commission should promote the addition of a clause that takes into account the need to improve resource productivity in host countries, as currently suggested in the Model Investment Agreement, Appendix F, Corporate Responsibility.

Reasons related to Item I above:

1a. Throughout the Nineties of the last century the amount of FDI grew to six times the amount of Official Development Aid (ODA). During the same time many developing countries changed from strategies of Import Substitution to Export-Led Growth, which made them more dependent on finding Foreign Direct Investors.

1b. Currently Foreign Direct Investors engage in negotiations with host countries over development projects, and have often become embroiled in controversies that pitted their interests against those of host nation-states. This state of affairs has been institutionalized, for example, in the now notorious "Chapter 11" provisions of the North American FTA, which should not be used to threaten the sovereignty of nation-states that prove weaker than footloose investors from the private sector.

[1] International Institute for Sustainable Development (IISD, 2003): Investment, Doha and the WTO, Background Paper to the Chatham House Meeting convened by Royal Institute of International Affairs (RIIA) and IISD, Trade and Sustainable Development Priorities Post-Doha, London, April 7 – 8, 2003, http://www.iisd.org/pdf/2003/investment_riia_iisd.pdf

1c. The number of Bilateral Investment Treaties in effect now exceeds 2000. Developing countries, taken singly, are often the weaker negotiating partners in such agreements; they could otherwise benefit from showing more solidarity among themselves. The heated competition for the desired Foreign Direct Investors however divides them more than they otherwise would be.

Investment treaties and the position currently taken by the European Commission

2a. Basically we agree with the expression of EU support for the establishment of a multilateral framework on investment," http://europa.eu.int/comm/trade/issues/sectoral/investment/index_en.htm.

2b. However after the bad experience with the Multilateral Agreement on Investment (MAI) at the OECD, many scholars such as the late Konrad von Moltke became distrustful of the approach taken there and wanted to see any future negotiations on the combination of investment, trade and development kept *outside* the OECD and the WTO; see Ruddy 2005.[2]

2c. Together with Howard Mann, Aaron Cosbey and Luke Peterson at the International Institute for Sustainable Development, von Moltke worked out a model treaty: "Investment, Doha and the WTO", April 2005, which looked at "the efforts to include investment as a negotiation topic in the WTO's current round of negotiations, and makes a strong case against doing so." It is accompanied by a Negotiators' Handbook, http://www.iisd.org/investment/model_agreement.asp

2d. After von Moltke's recent untimely death, Howard Mann is continuing his work together with others. Luke Peterson, for example, advises: "since Cancun, the European Commission (EC) – which negotiates on behalf of the United Kingdom (UK) and the other European Union (EU) member-states at the WTO - has retracted its demand that investment need form part of the Doha round of negotiations; however, the EC continues to champion optional investment negotiations on a plurilateral basis, amongst a sub-group of willing WTO members," http://www.riia.org/pdf/research/sdp/BinvestFeb04.pdf More on that is available here. [3]

2e. We will continue to monitor offers involving investment in services that are made as "Mode 3" of the GATS negotiations at the WTO, especially ones made by the ACP countries emerging from the Cotonou Agreement with the EU.

2f. SERI supports the model agreement drafted by Howard Mann of the International Institute for Sustainable Development and its proposal of a new intergovernmental organization with a new tribunal devoted exclusively to the adjudication of cases involving foreign direct investment.

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[2] Ruddy, T.F. (2005): 'Europe's global responsibility to govern trade and investment sustainably: climate, capital, CAP and Cotonou', *Int. J. Sustainable Development*, Vol. 8, Nos. 1/2, pp.97–112.

[3] Peterson and the International Institute for Sustainable Development (IISD) are based in Canada, working with the Royal Institute of International Affairs (RIIA) in the UK. It seems that Canada's experience with NAFTA has raised red flags with many Canadians, who like others in the UK are advocating keeping negotiations outside the WTO (Peterson 2005a, p.25, and IISD 2003, p.1. On this question, the UK is more conscious of the risks than the rest of the EU is, as Luke Peterson has pointed out).

Reasons related to Item II above: Venues currently involved in investment governance

2g. Currently there are over 2000 Bilateral Investment Treaties (BIT) in effect. Negotiation proposals exist to bring the governance of foreign direct investment (FDI) to the multilateral level at the WTO as a new or "Singapore" issue, and perhaps also to settle disputes under the DSM there. Disputes currently settled according to the commercial arbitration model are often administered at the International Centre for Settlement of Investment Disputes (ICSID), an organization created at the World Bank by an international treaty in 1966. Another major international treaty from the same year on arbitration is the New York Treaty administered at the United Nations Commission on International Trade Law (UNCITRAL), an organization which however does not administer disputes itself.

2h. **We are concerned over the current lack of transparency at both the WTO and ICSID.** A more transparent dispute settlement process should have, for example: public access to all documents, to the hearings, to the decisions; and the role of amicus curiae. The process should also feature rules against conflicts of interest; standing bodies of arbitrators who do not also act as lawyers in the same kind of cases could help to reverse the conflict of interest in the system today. Furthermore, an appeals process should be provided for.

2i. A good overview of the information sources involved in the commercial arbitration model is provided in ASIL 2005.[4]

Reasons related to Item III above:

3a. Currently a provision on resource productivity is only suggested in the Model Investment Agreement, Appendix F, Corporate Responsibility. However the need to improve resource productivity in host countries is urgent, as described in SERI's paper entitled "Europe's Global Responsibility".[5] We at SERI welcome actions for implementing the indicator "Total Material Consumption (TMC)" as a core sustainable development indicator as proposed in a communication issued by the European Economic and Social Committee.[6]

Bibliography

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Peterson, Luke Eric (editor, 2005b): INVEST-SD: Investment Law and Policy News Bulletin, published by the International Institute for Sustainable Development, http://www.iisd.org/investment/invest-sd/

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4 American Society of International Law (ASIL, 2005): Guide to Electronic Resources for International Law, compiled by Gloria Miccioli, http://www.asil.org/resource/arb1.htm

5 SERI: "Europe's Global Responsibility", http://www.seri.at/Data/personendaten/sg/egv.htm

6 On page 14 of the Communication from Mr. Almunia to the Member of the Commission: Sustainable Development Indicators to monitor the implementation of the EU Sustainable Development Strategy, 2005, SEC(2005) 161 final, http://www.esc.eu.int/sustainable_development/forum_14_04_2005/Indicators_SEC_2005_0161_F_EN.pdf