

Americas Trade and Sustainable Development Forum

INVESTMENT TENT

Convened By

The Center for International Environmental Law (CIEL)
The International Institute for Sustainable Development (IISD)

Synthesis of Major Concerns

On the Economics of Foreign Investment:

- Foreign direct investment (FDI) has the *potential* to increase well-being by fostering economic development through transfer of technology and know-how, increased employment and increased aggregate incomes.
- However, according to World Bank and UNCTAD studies, there is no evidence that investment agreements help to attract FDI.
- Rather, existing evidence indicates that *investment agreements do not attract FDI*. In fact, decisions on FDI are influenced by issues such as proximity to the home state, macroeconomic stability, size of domestic markets, physical infrastructure, qualified labour and other variables.
- In any case, what is important for sustainable development is not the quantity of investment, but its *quality*. Much of Latin America's investment over the past decade has in fact simply displaced domestic investment, has reduced domestic capacity to innovate and has had serious environmental side effects.

On Investment Rules:

- Investment disciplines have clear public interest implications, which distinguish these issues from private commercial transactions.
- Investment disciplines have the potential to undermine legitimate laws and regulations protecting health, safety, the environment and other issues crucial to making development sustainable. And in fact, investors are increasingly utilizing investment rules to challenge such public interest regulatory frameworks.
- The special protection regime for foreign investment discriminates against local investors by affording foreign investors greater rights and a preferential competitive advantage.
- Investment rules are uni-directional and unbalanced because they only establish rights for investors, but no corresponding obligations requiring responsible conduct to ensure sustainable development.

On Investor-State Arbitration:

- Investment arbitration imposes huge transaction costs on respondent governments. A typical case costs in excess of a million dollars, and some governments have already spent millions of dollars defending their cases.
- Investment arbitration imposes huge potential liability on respondent governments. For example, Argentina is facing a potential of \$17 billion in liability after its emergency economic measures, and the United States is facing a one billion dollar claim in just one case. In fact, the Czech Republic has been ordered to pay 1/3 billion dollars in a recent award.
- The fact that investment disputes are decided not by a standing and impartial court, but by practicing commercial lawyers whose independence is not guaranteed, undermines the legitimacy of the proceedings and decisions. As well, a mechanism for reviewing arbitration awards would improve their quality and reduce the potential for contradictory decisions (as were rendered in the Czech case mentioned above).
- Greater transparency in dispute settlement is required in light of the public interest nature of the issues adjudicated in these investment arbitrations. Open hearings and the opportunity to present amicus curiae briefs as a matter of right are a step in this direction, as exemplified by the Chile-U.S. FTA, but are not sufficient.
- Investment arbitration has the potential to undermine the institutional development of the local judiciary, as investors are allowed to deviate from the rule requiring exhaustion of local remedies.

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