ISDS LOSES GROUND: COMMUNITY CAMPAIGNING PAYS OFF

We reported in the last issue of the Bulletin (Vol. 8-4, July) that the European Union (EU) – Australia trade agreement currently being negotiated will not include provisions for Investor-State Dispute Settlements (ISDS). These provisions were strongly challenged by a number of member countries and their citizens and, in 2017, the European Court of Justice determined that ISDS encroached on national sovereignty.

Now we hear that the revised North American Free Trade Agreement (NAFTA) between the USA, Mexico and Canada will phase out ISDS between the USA and Canada altogether over three years and will limit the scope of ISDS cases between Mexico and the USA to those involving a direct government takeover of assets. The new NAFTA, by the way, has had a change of name: it is now called the United States-Mexico-Canada Agreement (USMCA). Strong community campaigning against ISDS in trade agreements over many years is now gaining support from state governments and legal experts.

In February 2016, the bipartisan National Conference of State Legislatures declared that it ‘will not support investment chapters that provide greater substantive or procedural rights to foreign companies than US companies enjoy under the US Constitution’. In October 2017, more than 200 prominent law professors and economists signed an open letter arguing that ISDS undermines the rule of law and urging the USA government to oppose ISDS in its renegotiation of NAFTA.

On March 21, 2018, US Trade representative Robert Lighthizer confirmed that the USA was seeking to remove ISDS from NAFTA, saying that it was not the job of the US government to provide a risk insurance policy for investors.

It is ironic that the Australian government is agreeing to ISDS in the Trans-Pacific Partnership (TPP) agreement when the USA is moving away from it.

Tanzania suffers under ISDS

As reported in The East African, Tanzania has rejected the undemocratic and non-transparent practices of international arbitration as a method for resolving investor-state disputes. On September 17, Tanzania’s National Assembly passed legislation that, instead of inter-national arbitration, Local Courts shall be used to resolve disputes arising out of contracts with investors in public-private projects (PPPs).

The decision comes in the wake of community pressure and several cases which have proved damaging to Tanzania’s economy and civil society. These include three cases in which the Tanzanian public power company, Tanesco, had to defend itself against the United Kingdom’s Hong Kong branch of Standard Chartered Bank. There are also other claims against Tanzania from international companies. Barrick Gold, for example, claims that it has lost profit as a result of law reforms in the country’s mining sector.

Attorney General Kilangi is reported as explaining that there is no neutrality in international arbitration, as it favours international companies over countries. "As policy has harmed their investment."
Land lies at the heart of African social, political and economic systems, where agriculture for food, access to natural resources and other land-based activities are fundamental to livelihoods. Land also continues to have major historical and spiritual significance for Africa’s peoples.

Owning no land is synonymous with being nobody in the community. Access to land is the ultimate form of social security and identity for many people in Africa. At one time land seemed like an almost inexhaustible asset in Africa, but population growth and market developments are mounting pressure and competition for land resources, especially those close to towns and cities and in productive, high value areas. As a result, land is now at the heart of long-running and frequent conflicts between communities and even between brothers and sisters in the same family. To be deprived of access to land or expelled from it for an African means much more than loss of a property.

Contemporary land grabbing is the capturing of control of relatively vast tracts of land for agri-businesses; and access to other natural resources through a variety of mechanisms and forms. Land grabbing comes with a story of development and jobs for the rural communities, but the repercussions on the human rights of the inhabitants are enormous. Land grabbing often results in the eviction of people from their land. Populations dependent on the land and natural resources lose their source of sustenance.

When people are expelled from their land without other alternatives for their survival, their most basic human rights are violated: the right to adequate food and nutrition, the right to water and sanitation, the right to housing, the right to work, the right not to be deprived of one’s means of subsistence, the right to participate in cultural life, the right to an adequate standard of living, the right to health, the right to constant improvement of one’s living conditions.

The right to adequate food is a human right recognised by international law. It protects the right of every person to eat with dignity, whether by producing his/her own food or buying it. To produce one’s own food, one needs access to land, seeds, water and other resources; and buying it requires money and access to the market. The right to food therefore implies that States must create a framework that enables people to use their full potential to produce or obtain adequate food for them-selves and their families. For those who depend mainly on land for their survival, land rights are crucial to ensuring access to productive resources.

Large-scale investments in farmland in Africa by some foreign corporations have been violations of people’s human rights. The cases of Neumann Kaffee Gruppe in Uganda and Feronia in the Democratic Republic of Congo (Congo DR), to name just two, make the heart bleed endlessly.

The Neumann Kaffee Gruppe (NKG), a German-based company, negotiated with the Ugandan government for the lease of 2,524 hectares of land to establish a coffee plantation. On August 2011, approximately 4,000 people from four villages in the Mubende District were violently evicted from their land on which they had been living for years, without their consent or compensation. In the process, many people died, others were wounded, homes were destroyed and crops devastated.

Feronia Inc., a Canadian company in the palm oil industry, has been in the sights of civil society over years because of their human rights violations in their operations in Congo DR where, by fraudulent means, it acquired more than 100,000 hectares of land and since then exploited the people and violently
enforced harsh and oppressive working conditions on their workers.

But what beats me is that Feronia is supported financially by so-called development finance institutions in Europe and the USA even while the European Union (EU) presents itself as a champion for the protection of human rights. Nothing could be further from the truth.

Source: Odile Ntakirutimana, AEFJN Echoes 50 Oct 3, 2018, Africa Europe Faith and Justice Network, aefjnnews@aefjn.org

SUSTAINABLE DEVELOPMENT GOALS: THE ROAD TO 2030
PART 11
Reclaiming the Public Policy Space

The International Financial Institutions (IFIs) admit that most development spending happens at the national level, financed by public resources, but they want a bigger piece of the action. They stress that the private for-profit businesses have the largest potential for raising additional funds to finance investment. Led by the World Bank and its allies, they want a steady increase from billions to trillions of dollars from each country and the global community to finance the transformative vision of the Sustainable Development Goals (SDGs). This would be a paradigm shift in financing.

Jans Martins argues against this. He states that, fundamentally different course of action is necessary. The discourse of partnerships between inherently unequal partners and ‘multi-stakeholderism’ is misleading. He opposes any further promoting of it. He claims that to turn the vision of the transformation of our world - the title of the 2030 agenda - into reality, we have to reclaim the public policy space as follows:

1. Strengthen public finance at all levels

Governments must formulate sustainable development budgets in order to implement the SDGs. This can be done with changes on the revenue (tax policy) side and on the expenditure (budget policy) side. Proactive taxation on the extraction and consumption of non-renewable resources can assist in achieving environmental and social policy goals; and simultaneously fulfill human rights obligations. Taxes can be levied on luxuries; corporate tax incentives such as tax holidays in export pro-cessing zones can be eliminated; and harmful subsidies phased out. By properly defining priorities, fiscal policies (policies related to government revenue and expenditure) can become a powerful instrument in reducing social inequalities, eliminating discrimination and promoting the transition to sustainable production and consumption. Strengthening public finances is necessary from the municipal level to the United Nations as much as is required to fulfil their mandates. Governments need to reverse the trend towards voluntary, ear-marked contributions to non-core projects. They also need to act against harmful tax competition and various schemes of tax avoidance and evasion.

2. Strengthen public policies instead of investors’ rights

A new generation of free trade and investment agreements risks a further reduction in the freedom of governments to implement sound social, environmental and developmental policies. These agreements give extra power to investors and big corporations, and weaken the role of the State and its ability to promote human rights and sustainability. Governments need to:

- fundamentally rethink their approach to trade and investment legalisation;
- take into account the demands of civil society organisations (CSOs), trade unions, indigenous peoples, human rights experts and many others;

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2 This Bulletin has carried many reports over the years of the Investor-State Disputes Settlement (ISDS) clauses in trade agreements ever since their introduction into the North American Free Trade Agreement (NAFTA) in 1994.
place human rights and the principles of sustainable development at the core of all trade and investment agreements; and
implement active industrial policies to enable the rise of a strong domestic enterprise sector in countries of the global South.

3. **Reject public-private partnerships (PPPs)**
Businesses and corporate Think Tanks promote PPPs as the primary model for sourcing the global funds needed for infrastructure investment. PPPs involve enormous risks and costs to the public sector. They exacerbate inequalities and decrease equitable access to essential services. Alternative ways of funding public infrastructure need to be found.

4. **Create binding rules on business, human rights and UN business interactions**
There is a need for a legally binding instrument (or treaty) to regulate international human rights laws, the activities of transnational corporations and other business enterprises. The Human Rights Council took a milestone decision by establishing an intergovernmental working group to elaborate such an instrument. Governments and CSOs should take this treaty process seriously and engage actively in it. In this way governments can demonstrate that they put human rights above the interests of big business – a critical prerequisite for implementing the 2030 Agenda. The goals of the treaty need to ensure sustainable consumption and production patterns and prevent undue corporate influence on UN policies. Companies that violate internationally agreed environmental, social and human rights standards or otherwise violate UN principles (by corruption, breaking UN sanctions, lobbying against UN global agreements, evading taxes, etc.) must be excluded from UN events and from UN procurement. Regular monitoring by an impartial UN office will be necessary together with a policy of mandatory disclosure of any conflict of interest and public disclosure of all interactions with non-State actors.

5. **Dismantle corporate power and ‘too big to fail’ entities**
The deregulation and privatisation policies of the last decades have enabled increasing market concentration so that a relatively small number of corporations and individuals have accumulated great wealth and economic power. This affects achieving of the SDGs, directly and indirectly. The role of the state needs to be strengthened to ensure the provision of public services; and issues of common interest in societies should be decided democratically.

6. **Changing the mindset – reclaiming the public space**
The measures listed above are essential to counteract the growing unmonitored influence of corporate interests in implementing the 2030 Agenda and beyond. Corporations’ primary interest – enshrined in their fiduciary duty – is to satisfy the interests of their owners, creditors and shareholders. Civil society has to reclaim the public space.

Source: Submitted by Mary Boyd

*We are not rich by what we possess but by what we can do without.*
- Immanuel Kant

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3 i.e., fewer companies operating within a given industry.

4 The word ‘fiduciary’ is based in the Latin word ‘fiducia’ meaning ‘trust’.