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24 August 2015

Ms Joanmariae Fubbs
Chairperson Portfolio Committee on Trade and Industry
90 Plein Street
Parliament RSA
Cape Town
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RE: PROMOTION AND PROTECTION OF INVESTMENT BILL [B18 -2015]

Dear Ms Fubbs

The National Union of Metalworkers of South Africa (NUMSA) acknowledges receipt of the notice from the PC Trade and Industry inviting the public to submit written comments on the Promotion and Protection of Investment Bill [B18-2015]. The union welcomes this opportunity and our comments are attached to this letter.

Yours sincerely

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NUMSA Submission on the Promotion and Protection of Investment Bill [B18-2015]

Introduction

According to several sources reaction to the Promotion and Protection of Investment Bill [B18-2015] has been mixed. Woolfrey (2013) and more recently Mossallam (2015) argue that South Africa's exiting from Bilateral Investment Treaties (BITs) has aroused strong emotions – both writers have cited Nobel laureate Joseph Stiglitz's approval of South Africa's intent to terminate BITs and overhaul the regulatory framework for foreign investment, while some European officials felt very uneasy about South Africa's unilateral cancellation of BITs and saw this as an act of 'bad policy' (Woolfrey, 2013)

The other side of BITs

Some commentators (Masamba, 2014; Lang, n.d.; Isaack, 2014) have pointed out that BITs as a model to attract Foreign Direct Investment (FDI) in developing countries (*host* state) allowed for developed countries (usually referred to as the *home* state) to have more leverage on a broad range of issues than initially intended through such investments:

- Shifted power relations and undermined the policy space of sovereign states
- Provided guarantees against expropriation and nationalization of its investments
- Allowed for repatriation of capital invested and returns (profits, dividends, interest, fees and income from investments)
- most favoured nation treatment, which entails treatment no less favourable than that accorded to other foreign investors in like circumstances
- national treatment, being treatment no less favourable in similar circumstances compared to treatment of nationals of the home state
- settlement of disputes through international arbitration

Isaack (2014: 2) went on to say:

We are aware that historically, Bilateral Investment Treaties (BITs) between developed and developing countries have been concluded against the backdrop of unbalanced power relations. Countries which host foreign investors (host countries), often developing countries, have been required to maintain policy frameworks that favour foreign investors. The result has been that some BITs do not further the interests of an impoverished population. This has had the effect of an uneven creation of wealth, where the prime beneficiaries are external to the majority of the citizens of a state.

In his paper Masamba (2014) draws a distinction between old generation BITs and new generation BITs. While the former promoted an '*anti-communist, post-decolonisation protection agenda of the 1960's*', the emergence of new generation BITs more suited to meet the '*development and investment needs*' of host countries (e.g. Benin-Canada Bilateral Investment Treaty) paved the way for some reform (Masamba, 2014). However, the South African Department of Trade and Industry, in its review of BITs June 2009 argues that:

BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development. (RSA Government Position Paper BIT Policy Framework Review June 2009: 11)

Under BITs the settlement of disputes through international arbitration - International Centre for Settlement of Investment Disputes (ICSID) under the World Bank effectively excluded courts in the host country from adjudicating disputes. Citing Eberhardt, Isaack (2014:2) points out that:

the ICSID "tribunals violate important constitutional principles: the independence of the arbitrators is not guaranteed; their meetings are generally closed to the public... investors only have rights and feature as plaintiffs and states only have obligations and hence are always the defendants.

This has had the effect of "privatizing" certain aspects of policy. ICSID, which firstly is run by the World Bank, the centre of capitalism can ignore domestic policy considerations. It is yet another way that imperialism supports the present economic system worldwide at the expense of poor countries. Countries may develop only if they play the capitalist game.

NUMSA's Comments on the *Bill*

Understandably there is sound logic by the Department of Trade and Industry to cancel BITs and subject all investment (both foreign and local) to domestic law. In this context the tabling before parliament of the *Promotion and Protection of Investment Bill* must be welcomed. However, there are several areas that require more clarity:

1. Settlement of Disputes

While the *Bill* provides for several mechanisms (mediation, courts, independent tribunal, statutory body) to settle disputes arising from investments, the use of international arbitration is still permissible - but only after all domestic remedies have been exhausted. However, Woolfrey (2013) raises an interesting point:

Interestingly, the draft *Bill* does not address the fact that the Finance and Investment Protocol (FIP) of the Southern African Development Community (SADC), an agreement to which South Africa is party, allows foreign investors who have invested in the SADC region (including South Africa) to take investment-related disputes against a party to the agreement to international arbitration. In practice, this might mean that South Africa's cancellation of its BITs has not actually foreclosed the possibility of foreign investors taking South Africa to international arbitration.

Given that such a loophole exists, then the provisions of the *Bill* to settle investment disputes internally through domestic remedies could well be redundant since foreign investors can still have recourse to international arbitration by simply exercising their rights afforded in the FIP agreement.

NUMSA would propose that all disputes are resolved in the legal process available in South Africa. It is not clear what "after all domestic remedies have been exhausted" means. It appears to mean that an investor must go through the processes available in South Africa but can then simply not accept outcomes and then revert to International Arbitration. In essence the investor just has to sit out a process to achieve what they wanted in the first place.

2. Section 1.2 of the Memorandum on the Objects of the Promotion and Protection of Investment Bill:

The *Bill* confirms a commitment by the Republic of South Africa ("Republic") to protect all investments irrespective of their origin. The underlying philosophy of the *Bill* is to clarify the protection that an investor may expect in the Republic, and to promote all types of investments by creating a predictable business environment that is readily understandable to an investor.

How is it possible to reconcile this commitment *to protect all investments* with investments that originate from countries that are notorious for human rights abuses (including acts of racism, gender inequality and anti-worker rights)? South Africa cannot find itself in a position where it is protecting the assets of countries without question which have no trade union rights, where gays and lesbians may face life sentences or death or who use their imperialist power to oppress other countries. We have for many years had a position of support for Cuba for instance but have protected and promoted investment from the US.

3. Transitional Arrangements

According to Lang (n.d.) the transitional arrangements do not adequately explain how BITS will coexist with the *Bill* (Act once it is ratified and comes into effect)? In his view ‘transitional arrangements under most treaties continue to provide treaty protection for investments made before termination of the treaty for periods of typically 10 - 20 years. So, from a treaty perspective, existing foreign investors will continue to receive the benefit of treaty protection for some time to come ...’ (Lang, n.d. : 4)

While NUMSA supports government’s intention to cancel BIT’s, it appears from Lang’s (n.d.) argument that these BIT’s will be around for a considerable number of years. NUMSA is of the view that BITS should not only be cancelled, but that they must be declared null and void. The argument that the country is bound by agreement to let BITS run their course, and that any action to the contrary will lead to capital flight and discourage investors has to be reviewed in the following context:

South Africa is experiencing a net outflow of foreign direct investments for years. The table from World Bank shows Foreign Direct Investment net sum (i.e. the difference between the inflows and the outflows) since 2009. It clearly shows that more and more money is leaving South Africa:

FDI net balance, USD	2009	2010	2011	2012	2013
South Africa	-6,313,190,334	-3,854,564,952	-4,292,687,424	-1, 727,159,492	-2,576,571,309

Data Source: World Bank Database, 2009-2014

If we transfer USD to Rands, then in 2013 R21 billion was taken out of the country in foreign direct investment according to the Treasury.

Conclusion

In conclusion NUMSA welcomes the government's intention to cancel BITs and subject all investment to domestic law. The union believes that the country must be in a position to leverage its own resources and maximize development - socio-economic and otherwise for the benefit of all South Africans and not just a privileged few. Apart from the power that BITs places in the hands of foreign investors, it is also becoming common practice for credit rating agencies and a host of international finance agencies to hold South Africa to ransom if the country fails to implement macroeconomic policies that favour their own interests – i.e. *laissez faire!* At some point the country has to take stock of all trade related matters and take steps to ensure that they meet our own developmental agenda and not those who seek to exploit our resources in the name of national development. NUMSA also believes that all supplementary legislation should be tightened so that there are no legal loopholes or ambiguities that investors could use to advance their selfish motives while billions are sucked out of the country through illicit capital flows, transfer pricing and the like. The country still has many issues to resolve (land redistribution, housing, health, education, transport, employment, etc.) and unless there is a serious attempt to address poverty, unemployment and inequality, class conflict remains inevitable.

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