

**ADVOCACY INVITING TOGOLESE GOVERNMENT TO TAKE
MEASURES WITHIN THE FRAMEWORK OF THE NEGOTIATIONS ON
THE INVESTOR-STATE DISPUTE SETTLEMENT AIMED AT
PROTECTING THE POPULATION DURING AND AFTER THE COVID-19**

The Investor-state dispute settlement (abbreviated to ISDS) mechanism is an instrument found in many free trade agreements that allows companies to challenge a state before an international arbitral tribunal.

Investor-State dispute settlement operates as an *ad hoc* tribunal composed of non-permanent arbitrators chosen by the parties to the dispute. The ethical obligations of tribunal members are sometimes deficient because the procedural rules are determined by the parties and the system of remuneration for judges is most often an incentive for arbitrators, which may therefore give rise to legitimate concerns about disinterestedness and impartiality. Similarly, the lack of an appeal mechanism is a source of legal insecurity. The shortcomings of this *classic* ISDS system have been exploited by investors, leading to an unprecedented increase in the number of investor-state disputes and a significant inflation in the amounts claimed by investors.

Hence, ISDS has increasingly become "the most toxic acronym in Europe" in the words of European Commissioner Malmström, and is rightly the subject of much criticism from civil society, trade unions, governments and academics.

Several countries around the world are parties to this unfair and iniquitous agreement. In these exceptional times that the international community is experiencing as a result of the COVID-19 pandemic, the issue of ISDS should be examined in a different way.

Indeed, the coronavirus pandemic has caused the greatest health and economic crisis of any generation. While States have taken exceptional measures to deal with this disease, the mechanism for settling disputes between investors and States, which appears in many trade agreements, is still in a mercantilist posture. The promoters of this mechanism put pressure on the governments concerned to cancel these public interest measures, or to pay the multinationals millions in compensation for non-compliance with contractual clauses. In concrete terms, this mechanism allows foreign investors - and only foreign investors - to sue governments in secret tribunals outside the national legal system to obtain much higher amounts than would be available in national courts.

In addition, in a document entitled "*Open Letter from Organizations on the Investor-State Dispute Settlement (ISDS) Mechanism and COVID-19*", with an annex on "*How to implement the proposals of the open letter on ISDS and COVID-19?*" to which Les Amis de la Terre-Togo is a co-signatory along with 629 other civil society organizations around the world, do they call for action by governments.

In their message, the organizations call on governments to take the lead in ensuring that countries around the world do not face a wave of investor-state dispute settlement lawsuits

as a result of measures taken to combat the COVID-19 pandemic and the associated economic crisis.

The authors of this letter base their argument on the fact that governments around the world are taking actions to save lives, fight the pandemic, protect jobs, combat economic disasters and ensure that people's basic needs are met. The scale of these measures is unprecedented in modern times and the need for these actions is clear. However, the very broad scope of the ISDS mechanism could expose these critical government measures to multi-million dollar claims from foreign investors. The number of such claims could also be unprecedented and could impose significant financial burdens on governments already overwhelmed by devastating health and economic crises.

United Nations agencies and human rights experts have already predicted an imminent wave of prosecutions under the ISDS mechanism.

Civil society organizations link this to past crises, such as the financial crisis in Argentina or the Arab Spring, which led to numerous lawsuits because states had difficulty meeting their commitments due to exceptional conditions.

In support of their position, the co-signatories of the open letter indicate that the reparations that would result from the wave of lawsuits on ISDS related to COVID-19 could be enormous. As an illustration, of the 1,023 known ISDS prosecutions, they indicate that thirteen have resulted in over \$1 billion in compensation or settlements, including loss of future profits. By the end of 2018, countries have been ordered or have agreed to pay investors in publicly known ISDS cases the sum of US\$88 billion. Some developing countries have billions of dollars outstanding on these deals.

According to these organizations, at a time when public resources are being mobilized to the maximum extent possible to respond to the crisis, public funds should not be diverted from saving lives, jobs and livelihoods to pay for reparations or legal fees for a claim.

They argue that the fight against COVID-19 will continue, so a wave of lawsuits could lead to a "regulatory chill" effect, in which governments would dilute, postpone or withdraw pandemic measures of fear of these payments, a potentially deadly situation.

In order to avoid this situation, they call on governments to take the following measures immediately and urgently, before the first lawsuits are filed. These proposals are legally founded and fall within the full prerogative of the sovereignty of governments to implement them:

- Restrict permanently the use of all forms of ISDS for complaints that the state claims to be related to COVID-19 measures;
- Suspend all ISDS disputes concerning any action against any government while this government is dealing with COVID-19 crisis and its capabilities are to be focused on the pandemic response;
- Ensure that public funds are not spent to pay companies compensation related to the ISDS during the pandemic;
- Stop negotiating, signing and/or ratifying any new agreements providing for an ISDS mechanism;
- Terminate existing agreements that provide for an ISDS, ensure that "survival clauses" do not allow for subsequent litigation;

- In light of the threats revealed by the pandemic, comprehensively review existing agreements that contain an ISDS mechanism to see if they meet their purpose.

It is noteworthy that Togo is one of the 163 States (as of June 9, 2020) that has signed the Convention on the Settlement of Investment Disputes¹.

Date of signature for Togo: January 24, 1966; date of deposit of instruments of ratification: August 11, 1967; date of entry into force of the Convention for Togo: September 10, 1967.

For several months now, the international community has been engaged in the reform of this mechanism because of its harmful effects on the economies of the South, including those of Africa. Here and there, meetings are being held to find a solution to a situation that has become too cumbersome. On the African continent, from 25-26 September 2019, the Republic of Guinea hosted the third regional intersessional meeting on the reform of the investor-State dispute settlement system and a capacity building workshop on the same theme. These events were organized by the host country, the United Nations Commission on International Trade Law (UNCITRAL) and the International Organization of the Francophonie (OIF).

Some observers doubt that this will lead to a real break rather than a superficial reform. But civil society organizations, as a whole, are pushing for a fundamental rethinking of the mechanism. It is a question of giving real meaning to General Assembly Resolution 1803 (XVII) of December 14, 1962, which recognizes the "permanent sovereignty of the State over natural resources" as a fundamental element of the right of peoples and nations to self-determination.

Paragraph 7 of this Resolution states that "the violation of the sovereign rights of peoples and nations over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the safeguarding of peace.

On this basis, Friends of the Earth-Togo believes that it is important to dismantle investor-state dispute settlement mechanisms that allow companies to sue states for measures or policies designed to protect populations before, during and after COVID-19. In order to ensure justice for populations and binding rules for multinational corporations, the government must commit to a legally binding international human rights instrument on transnational corporations and other business enterprises. Such an instrument must put an end to impunity for transnational corporations and ensure justice for those people affected by human rights violations. The government must also commit itself to implementing ambitious binding legislation at the national level on transnational corporations and human rights.

NGO Les Amis de la Terre-Togo calls on the government to refrain from engaging in a process that would one day put it before an international arbitral tribunal for the settlement of investor-state disputes.

¹ International Centre for Settlement of Investment Disputes
List of Contracting States and signatories to the convention (as of June 9, 2020), 2020, P.5