Land and Trade Briefing Paper:

INVESTMENT

Foreign investment is often regarded as a major part of any country's ability to achieve development. It is argued that the money and infrastructure that comes from foreign companies investing in countries will bring jobs, greater tax revenue for governments and create flow-on effects, boosting the entire economy.

Investment is often also referred to as 'Foreign Direct Investment', that is foreign entities establishing themselves in another country. This investment can take the form of buying or building factories/resorts/shops etc as well as establishing services like banks/law firms/private hospitals etc, or even in the purchasing of land. It is argued that for the receiving country, foreign direct investment brings infrastructure, transfer of skills and experience, as well as revenue. The investor benefits by taking the profits and royalties.

As such what determines whether or not an investor will invest in a country can vary. Some of the reasons for investing include(1):

* The rules and regulations regarding the entry of operations into a country;
* The standards and treatment of foreign companies compared to domestic ones;
* Business facilitation measures including incentives and other measures to reduce the cost of doing business;
* Closeness to markets (either domestic or export);
* Political stability.

International investment agreements often claim to be a way to attract more foreign investment to countries. This however doesn't appear to be the case(2). These agreements though aim to create certainty for investors by enshrining their rights through binding commitments that reduce the regulatory scope of governments. The prominent critic of custom land in the Pacific, the late Helen Hughes, argued that the Pacific could garner greater economic growth but it had to embrace more neoliberal, capitalist policies. Specifically she commented that "the policy measures needed to make every Pacific island viable are well known: abandoning communal land ownership for individual property rights; deregulating counterproductive rules that prevent the growth of an informal sector, eliminating protectionist measures, freeing up labour markets and downsizing and privatising the public sector." Free trade agreements aim to tick off that list.

Whilst such agreements may provide certainty for investors they can create uncertainty for governments as the rights conferred to investors under these agreements leave many governments open to challenge for any changes in regulation or public policy that may, even inadvertently, impact upon investments.

International treaties on investment allow for corporations to have 'legitimate expectations' through so-called 'fair and equitable treatment' clauses. This means that once a corporation has formed a legitimate expectation it then becomes an entitlement and the corporation can claim compensation if that is infringed upon. An example of this could be in relation to accessing water on an acquired piece of land, if the agreement doesn't stipulate that such access would be reviewed any actions by a government to restrict that access (for example to ensure communities have access etc) could see the government taken to international courts(3).

Numerous investment agreements (both bilateral investment agreements and free trade agreements) have included an "investor-state" disputes mechanism. This is a mechanism for private companies to take national governments to international arbitration if they feel that their rights under the agreement have been infringed upon. Such mechanisms have been highly controversial as corporations have taken governments to court over actions taken either to protect the environment or health and safety.

Pacific nations currently negotiating the PACER-Plus trade agreement with Australia and New Zealand have now included negotiations on investment. The current proposals include a mechanism for foreign investors to use the domestic courts to argue that the Agreement has been breached, a mechanism completely unnecessary and that will lead to the domestic courts dealing with the administrative and legal burden of interpreting such an agreement.

For the Pacific one possible outcome from commitments on an investment agreement could apply to land reforms. Currently in many Pacific nations whilst land ownership is reserved only for customary inhabitants, the leasing of land is possible. Despite land not being officially taken away from customary owners the conditions of the leases – length of time, paying for any improvements to the land etc can mean that the land is effectively taken away. If a Pacific nation wasn't careful, changes to land tenure and lease systems could result in investors demanding compensation under international agreements. Often such compensation would be paid at much higher rates than what the investor initially paid leaving governments to divert scare resources to paying corporations(4).

Further to this if a government decides to change laws relating to the environment or other public policies this can impact investments. Corporations feeling that they have been negatively affected by such public policy changes can claim that this is 'indirect expropriation' – that is indirectly taking away from the owner their investment and as such claim compensation under international arbitration(5). Further, in bodies like the World Trade Organization (WTO) we have seen environmental and human health laws overturned in the interests of facilitating trade. Even when the WTO's own exception to trade commitments on the grounds of protecting humans and the environment has been used as a defence by governments it has lost an astonishingly 96% of times applied(6).

All this international arbitration undermines the ability of governments to govern. Either by directly undermining any policies that place custom land stewards or the environment above foreign investments but also by simply the threat of such actions can result in governments self-censoring themselves when thinking about such measures. This 'regulatory chill' has a pervasive influence on governments who have entered into investment agreements and often can see them holding back on regulatory reform that they want but are worried may be challenged (the current discussions in the Pacific about banning fatty foods is a good example).

International agreements on investment are first and foremost about the investor. Whether by giving the investor certainty and rights in a countries investment regime, governments are sacrificing their regulatory capacity in exchange for the hope of foreign investment. When such sacrifices are made and ownership or control of land becomes intertwined, the impacts can be truly devastating. The Pacific needs to learn the lessons from others burnt by such investment agreements and retain their sovereignty to ensure that the foreign investment that enters does so on the terms of the Pacific and upholds the unique and central components of Pacific life, especially land.

This brief was compiled by the Pacific Network on Globalisation (PANG).
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References:

1. This is an adapted list from http://www.globalization101.com/factors-influencing-foreign-investment-decisions/.

2.See Poulsen, L. The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence, Yearbook on International Investment Law and Policy 2009/2010.

3. For more information see: Traidcraft Briefing note, January 2013, Investors running wild on land: the threats posed by international investment agreements.

4. Traidcraft Briefing note, January 2013, Investors running wild on land: the threats posed by international investment agreements.

5. ibid

6. See Public Citizens analysis on the WTO disputes cases involving the GATT XX Article Exceptions, available here: http://citizen.typepad.com/eyesontrade/2011/09/wto-is-the-big-kid-on-the-seesaw.html