



World Investment Forum 2014: Investing in Sustainable Development

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What are the key areas and pressing issues in IIAs and investment dispute settlement that need to be addressed?

Over the last decade the number of BITs has grown exponentially and they are signed mostly between developed and developing countries. BITs provide for extensive investment arrangements, including a dispute settlement procedure. The dispute settlement process means accommodating investor-to-state procedures, or ISDS, thus enabling private actors to bring an action against a state in an international forum. A number of recent economic studies regarding the potential benefits and costs of investment protection provided in treaties, including ISDS have shown there is no correlation between investment flows and the prevalence of BITs, and therefore questioning the rationale for States to commit to them. It is a known fact that there is a significant risk inherent to ISDS for host countries, particularly developing host countries, while statistics show that claimants are predominantly investors from industrialized countries. More worrying of course, is that legal and arbitration costs are significant and are especially posing challenges to developing states. The resulting awards and the high cost of ISDS proceedings, including important legal counsel and arbitrator fees, can pose a significant budgetary threat for many developing countries. Typical provisions within BITs such as national treatment and pre-establishment rights impose contractual obligations on Governments that limit their right to regulate and for developing countries hampers their ability to act in their own interest. While the entire process of arbitration and dispute resolution remains less than transparent, the future continuation of investment treaties and arbitration as tools to protect and promote foreign investment is questionable.

Namibia has signed 15 BITs in total, of which twelve have been ratified and seven are in force. Over the recent years, Namibia realised the shortcomings of the existing agreements as mentioned above, and that they do not serve our interests anymore due to changes in the domestic laws and regulations. The Namibian Government decided to re-evaluate its BITs regime, and while Namibia is fortunate not to have had any investor dispute claim, there is concern entrenched extra-territorial ISDS might give rise to costly investor dispute claims.

What are the key ways and means to address these issues?

Some of the key ways and means to address the shortcomings in BITs and specifically the ISDS are:

- Creating political awareness regarding investment treaties and their challenges. This includes strengthening technical capacity of treaty negotiators especially in developing countries. This should also be broadened to include strengthening of regional cooperation and consensus-building. Eg., SADC member countries developed a set of guidelines for BIT negotiations.
- Explore innovative models of investment treaties, in order to shift away from a “protection and lawyer-arbitrator-business” model to an approach that focuses on the real considerations of investors in making investment decisions, such as investment facilitation and promotion. The risk of “regulatory chill” or standstill – which may cause Governments to forgo the adoption of legitimate regulatory changes for the environment, health, or natural resources because of the threat of arbitration – can be avoided if BITs include adequate definitions of investment protection standards, appropriate exception clauses, and fair procedural safeguards.
- Including the exhaustion of local remedies in BITs prior to commencing with ISDS, to serve as an alternative to the current model of investment arbitration. Domestic laws and remedies should be improved and instead of treaty-based investment arbitration rather implement contract-based arbitration. Governments, sub-regional and continental bodies need to coordinate and make continuous attempts to further develop and enhance the use of alternative dispute resolution (ADR).
- Reviewing the current international arbitration system to ensure a more transparent system. In addition, an independent, impartial and neutral appeals process should be established. To ensure better accountability of arbitrators, an arbitrator roster could be initiated, whose membership should reflect geographical diversity, and onto which arbitrators would be appointed based on expertise and impartiality. In addition a binding code of conduct for arbitrators should be developed.

With regard to the Namibian situation, the Namibian Government is currently reviewing its investment act, which includes many of the attributes needed to attract FDI flows. The act will also provide more transparency in relation to decision-making by Government and clearer rights for investors. This single investment policy should rather be considered against investment treaties as a possible option for Namibia to improve its attractiveness to draw investors. In our opinion, entering into treaty negotiations is not obviously likely to be more effective than more targeted measures, especially given the size of the Namibian economy.

What types of mechanisms and platforms are needed to facilitate the reform?

- Dialogue should be created between regional and continental Governments, eg the SADC region and the African Union.
- Coordination and dialogue for reform with international organisations, such as the World Bank, OECD and UNCTAD, dealing with IIAs should be established.
- Forums to be held at national and regional level involving civil society and the public sector in order to obtain inputs for harmonising the FDI regime and to create a fair balance between the rights of investors and those of Governments and their citizens.