
STATEMENT

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Various governments have reviewed their IIAs or are in the process of doing so.

However, governments face serious problems when it comes to the implementation of new reform proposals.

As we have seen views differ how a reform should look like, and sometimes strongly.

So renegotiations of IIAs and effort to find a common ground might not be easy.

A further complication is that BITs have been designed on purpose to prevent that they can be easily terminated.

Besides termination clauses that seriously constrain at what time an investment protection agreement can be terminated. "survival clauses" that extend protection to all investments made before the date of termination for an additional 10 -20 years are very problematic.

Termination of a BIT by mutual consent provides a means to address this problem.

However, we noted that even in cases were both parties publicly announced that the BIT in question is no longer fit for purpose, the treaty was not terminated by mutual consent. Meaning, that both parties now have to live for another decade with a treaty they find unacceptable.

The problem of IIA reform is even bigger for plurilateral agreements, since any such reform will require the consent of all parties.

But beside standalone Bilateral Investment Treaties (BITs) such investment protection agreements are also frequently contained in investment chapters of Free Trade Agreements.

One major problem for the reform of such IIAs is that Article 44 (1) of the Vienna Convention on the Law of Treaties clearly provides that the right of a state to denounce or withdraw from a treaty may be exercised only with respect to the whole treaty, unless the treaty provides or the parties otherwise agree.

One also should be aware that an outcome of a national review might be to take alternatives approaches to IIAs to protect investment.

For example we should recall that BITs and investment chapters in FTAs are not the only means how capital-exporting countries try to reduce the political risk for their companies that want to invest abroad.

The risks covered by BITs and **investment insurances** are frequently very similar. The German Political Risk Insurance provider Euler Hermes, for example, covers not only losses resulting from nationalization or expropriation but also “sovereign acts which in their effects are equivalent to expropriation”, as well as problems related to transferring funds to the home state of the investor.

In addition they protect against losses resulting from war, other armed conflicts or “civil disturbance” that are usually not covered by BITs.

When one looks at BITs from the perspective of a Host country it has to be re-stress that IIAs can never be an alternative to the proper codification of rights and obligations of foreign investors under national laws.

We therefore believe that it is important that future IIAs can be easier modified and terminated.