World Investment Forum 2014: Investing in Sustainable Development

IIA Conference - 16 October 2014

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International Investment Agreements: The Barbados Agreements - Current situation and Prospects

Introduction
Currently, Barbados has in place about 19 bilateral Investment and regional agreements. These include combined Trade and Investment agreements as well as standalone bilateral investment agreements (BITS). Most of the regional agreements combine coverage of both trade and investment and are principally free trade agreements (FTAs) with investment provisions. The latter were concluded in Barbados's capacity as a Member of CARICOM and in one case as a member of CARIFORUM (that is, it includes the Dominican Republic) and in another, as a member of the ACP (that is, the African Caribbean and Pacific group). Most of the bilateral Investment treaties (BITS) were concluded in the 1990s.

Challenges facing Barbados in relation to investment treaties
All of the bilateral investment treaties which Barbados has negotiated are still in force but in some cases are running in parallel with investment provisions in subsequent regional agreements. However, observers are aware that particularly since the global economic recession which started in 2008, and the subsequent fiscal and other restructurings which were necessary in some developed countries, a number of clauses in bilateral agreements are being re-examined by the parties to these arrangements. These involve issues of transparency, predictability and policy space, as well as the objective of ensuring coherence between IIAs and other areas of public policy, including , the capacity to restructure, and to implement policies to address global challenges. While there is a consciousness of these issues, Barbados has not been specifically affected by them in a demonstrable way, but is aware of the global developments and their implications.
Since the 1990s when 9 BITS were concluded, only one BITs has since been concluded by Barbados. This was with Mauritius in 2004, while one with Belgium- Luxemburg has been signed but is awaiting ratification and another with Ghana is also waiting ratification. This slowdown also reflects the global situation with respect to BITS.

Trends towards mega- regionals
Instead of new BITs, the last two years have seen an expansion of negotiation of mega-regional agreements. Work on the Trans-Pacific Partnership (TPP), the EU-United States Transatlantic Trade and Investment Partnership (TTIP) and the Canada – EU Comprehensive Economic and Trade Agreement (CETA) are cases in point. Once concluded, these are likely to have a major impact on global investment rule- making and global investment patterns. CARICOM countries may need to develop appropriate responses aimed at enhancing their competitiveness in a world that is increasingly characterized by such mega-regional FTAs.
The negotiation of non-traditional plurilateral arrangements also deserves mention within the context of the IIA regime. The Trade in Services Agreement (TiSA) which is currently being negotiated by a group of 23 WTO Members is one such agreement. Although investment is not explicitly being negotiated by the agreement, it includes the negotiation of Mode 3: commercial presence market access provisions. Commercial presence has been included separately in some RTAs as investment in services and although the inclusion is not as in depth as typical IIAs there are some apparent similarities between these two concepts. The extent to which investment in services will be covered in the TiSA has not yet been articulated. Such an agreement however, could potentially have extended reach for small economy non-participants like

Barbados. Of critical importance therefore will be our country's ability to assess and respond to the potential impact that such an agreement could have on our economies.

<u>The implication of mega trade deals for small and non-participating countries</u>

Globally, regionalism is effectively leading to a network of international investment obligations which are even more complex and prone to overlap and to inconsistency. As mega-regional agreements make it even more difficult for non-parties to effectively contribute to the shaping of the global trade and investment rules, and create new rules, non-parties may be left out of the discourse. From the perspective of small countries, mega regionals have the potential to marginalize third parties.

Complexity and ambiguity tend also to plague BITS, particularly where new agreements reaffirm obligations under pre-existing agreements, leaving open the question of whether prior BITS remain in force and will co-exist with the regional IIAs. The extent to which parties opt to replace existing BITS with investment chapters was partly exemplified in the EU context where Regulation 1219/01 adopted in 2012, set out a transitional arrangement for BITS between EU member states and third parties until a bilateral investment agreement between the Union and the same third country enters into force.

The global economic crisis has also emphasized an area in need of review. It has highlighted that governments may also need some freedom to maneuver in the area of sovereign debt restructurings and that IIAs should not prevent debtor nations from negotiating debt restructurings in a manner that facilitates economic recovery and development and ultimate debt repayment.

In this regard national treatment and Most Favoured Nation (MFN) treatment are the areas most relevant. While this has not been a problem for Barbados, the example of one of our Latin American neighbours, is instructive. It has been suggested that removing foreign debt from the IIAs coverage may be the answer. Also, that the permitted steps to ensure "security" could be defined to include economic and financial crises.

<u>The deficiencies and challenges arising from the international IIA regime</u>

The slowdown which has resulted in the creation of new BITS can also be observed in the Caribbean, including in Barbados. Some of the concerns which trouble parties to these arrangements are the lack of balance between the rights and obligation of the investor on the one hand, and broadly drafted provisions that increase legal uncertainty. They can also relate to a country's ability to regulate FDI for specific development projects or national strategies. These issues are relevant for all developing countries. In some cases their review would correct an existing problem and in others are more pre-emptive.

<u>Possibilities for reform of the IIA regime</u>

The recent 2014 World Investment Forum Report refers to four options of reform to be considered. Those which best cater to developing countries specific interests and goals relate to fiscal space and national policy goals. Generally, how to strengthen the sustainable dimension of IIAs and to preserve appropriate regulatory policy space for host countries are areas that require attention.

<u>Challenges to reform for Barbados' IIA regime</u>

Barbados has not been one the countries which has had to restructure in ways which affected investors. However, like all parties to existing treaties, Barbados is conscious of what has occurred in other jurisdictions and is conscious of the need to be open to change.

Resolving issues stemming from the increasing complexity of international investment policy regimes, are areas to be addressed on a global scale and will help to simplify such arrangements for all participating countries. If a roadmap for IIA reform can be developed by UNCTAD to address some of the areas discussed earlier this will help to clarify the thinking on this important topic.

Most developing countries, including Barbados, would also welcome IIAs which support policies for industrial development.

<u>Role of UNCTAD as an important focal point for consensus building on IIA-related issues</u>

UNCTAD has an important role to play as a focal point for consensus- building and technical assistance activities on IIA related issues. UNCTAD can also help ensure the inclusiveness and the universality of the process, and can help bridge the gap between the opposing views in this field (those who wish to exit current BITS and those who wish greater investor protection). Its role in multilateral consensus building, given the changes in the economic and policy environments, could be utilized effectively in this area.

<u>UNCTAD strengthened technical assistance and capacity building activities on issues related to IIAs.</u>

UNCTAD has an opportunity to use its strategic position to examine these issues and to bridge the gap between the two positions with a view to reaching a coherent and balanced regime.

Investment policies which see investment as a key driver of development strategy are emerging, as is the need to incorporate social and environmental goals into investment objectives. The resulting consensus-building can also bring further clarity, stability and transparency to the IIA system.