

## Towards a Repository of Policy Options for IIA Reform

### Meeting

#### South Africa, Africa, and International Investment Agreements<sup>1i</sup>

Policy Advisory Group Seminar, 17-18 February 2014, Stellenbosch, South Africa  
Centre for Conflict Resolution (CCR), Cape Town, South Africa

The Centre for Conflict Resolution (CCR), Cape Town, South Africa, and the South African Department of Trade and Industry (DTI) hosted a policy advisory group seminar in Stellenbosch, South Africa, from 17 to 18 February 2014, on “South Africa, Africa, and International Investment Agreements”.

The meeting brought together about 30 policymakers, scholars, and civil society actors from Africa, Asia, Europe, North America, and South America, to assess and broaden the debate on the implications of international investment agreements (IIAs) – including bilateral investment treaties (BITs) – for development efforts in Africa. The meeting also assessed the principles that underpin these agreements, which were conceived in the immediate post-colonial era during the Cold War, and are increasingly seen by critics as being at odds with emerging economic challenges confronting developing countries.

Particular attention was paid to **six key areas**: the global context and changing perspectives on international investment agreements; the benefits that can accrue from foreign direct investment (FDI) and the relationship between investment agreements and foreign direct investment flows; the structure and impact of investment treaties; the core provisions of international investment agreements; the international arbitration system that provides for investor claims against states; and the implications of all this for Africa’s structural transformation and economic development.

Although foreign direct investment can bring benefits to host economies, these do not accrue automatically. **Governments need to formulate policies and legislate proactively to ensure that such investment supports national development priorities.**

International investment agreements can not guarantee increased foreign direct investment, and have been criticised for creating an unbalanced regime that places obligations primarily on governments while reserving extensive rights for foreign investors. These treaties can constrain governments from legislating and regulating in the public interest. Moreover, the provisions contained in these agreements are prone to expansive interpretations by arbitration panels that often favour the interests of investors. The investor-state settlement system is established on an ad hoc and fragmented basis; generates inconsistent and unpredictable outcomes; and has compounded uncertainty about the meaning of treaty provisions. International arbitration in this area has become a profitable industry encouraging a rapid increase in the number of cases being brought before arbitration panels. Accordingly, many African and other governments are reconsidering their approaches to international investment agreements. Some are refusing to enter into new treaties; others are revising their international investment agreements and proposing changes to the arbitration system; while others are terminating their existing agreements and calling for a complete overhaul of the treaties and the regime for enforcing them. **African governments should therefore critically assess and review their international investment agreements, and develop new approaches to investment protection that better support the continent’s economic structural transformation, development, and integration efforts.**

### Policy Recommendations

The following ten policy recommendations emerged from the Stellenbosch policy advisory group seminar:

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<sup>1</sup> The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

1. African governments should **include properly researched and tested policies on international investment in their development strategies** in order to support national economic diversification and industrialisation priorities;
2. African governments must **draft investment laws that mobilise and harness domestic savings and funds**, thereby decreasing dependence on foreign direct investment. Governments should also encourage international investors to look beyond international investment agreements for other means of creating an enabling environment to attract foreign direct investment;
3. African governments must **review** their international investment agreements to determine whether these treaties contribute to inclusive and socially equitable economic development. They should seek to amend or renegotiate these treaties, as necessary, in order to create a **fair balance between the rights of investors and those of governments and their citizens**;
4. African governments must retain their **right to regulate** investments in the public interest and minimise their exposure to damaging litigation in all negotiations related to aid, trade, and international investment agreements;
5. African civil society and private sector bodies; governments; and sub-regional and continental organisations should coordinate their efforts in order to **harmonise protocols and legal frameworks regulating foreign investment**. African governments must also ensure that commitments agreed under investment treaties do not undermine the continent's integration efforts;
6. The **oversight role of African parliaments over international investment agreements** should be strengthened through greater coordination between national legislatures and the sub-regional and continental committees responsible for promoting investment legislation in support of Africa's economic development;
7. The existing **institutional architecture for investor-state dispute settlement must be reviewed** to ensure fairer and more equitable outcomes; measures to ensure the **transparency** of the system, particularly in respect of investor-state disputes, should be integrated into investment treaties; the **processes for nominating and selecting arbitrators** in investment disputes must also be revised to enlarge the pool and ensure representation of a broader spectrum of interests. Consideration should be given to employing **tenured judges as arbitrators**. A **code of conduct** for arbitrators must also be introduced, and an effective **appeals process** should be established;
8. African governments must explore **alternative models for the investor-state dispute settlement process**, such as promulgating national legislation that prioritises the domestic adjudication of disputes; establishes independent trade courts; and promotes African dispute settlement systems. **State-to-state dispute settlement** should be promoted as an effective alternative to investor-state dispute settlement;
9. The African Union (AU) Commission must facilitate a **dialogue among African trade ministers and sub-regional bodies** on the impact of international investment agreements on the continent's development agenda, at which lessons learned in international investment agreement negotiations should be shared and implemented; and
10. **Africa's regional organisations must coordinate with the continent's think-tanks to develop common benchmarks** for evaluating the quantitative and qualitative impact of investment policies – including those that promote international investment agreements – on sustainable development in Africa.

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<sup>i</sup> The meeting was a collaboration of the Centre for Conflict Resolution (CCR), Cape Town, South Africa, with the South African Department of Trade and Industry (DTI). The full report is available at <http://www.ccr.org.za/images/pdfs/V48-IIAs%20Report%20Web.pdf>. The Centre for Conflict Resolution was established in 1968. The organisation has wide-ranging experience in conflict interventions across Africa and is working on a pan-continental basis to strengthen the conflict management capacity of Africa's regional organisations. Its policy research focuses on Peacekeeping and Peacebuilding in Africa; Region-building and Regional Integration on the continent; Africa and the European Union (EU); the Millennium Development Goals (MDGs) and Africa; and South Africa's bilateral and multilateral foreign policy.