UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Reforming International Investment Agreements

QUICK FACTS

• International investment agreements and bilateral treaties have increased from 72 in 1969 to 2844 in July 2021.

• As of December 2020, there were 1104 publicly known investor-state dispute settlement (ISDS) cases. Approximately 120 countries have responded to one or more ISDS claims.

• In 2019, investors from developed countries brought most of the 55 known cases against developing countries and transition economies.

• 29% of the cases were decided in favour of the investor, 37% in favour of the State and 20% were settled.

• The current arbitration system is proving very costly as average awards are between 8-30 USD per dispute.

The need to attract direct foreign investment coupled with an asymmetrical access to information and negotiation capacity often leads to unequal reciprocity, as opposed to mutual gain, in North-South investment agreements.

Addressing obstacles to development posed by international investment agreements is key to achieving the right to development and the 2030 Agenda for sustainable development

For decades, investment agreements and bilateral treaties have been touted as a route to economic development, but far from being a panacea, the agreements can and have undermined development. In many cases, they have resulted in the restriction of the type of policies that developing countries can adopt to grow their domestic economies and local industries. Investment protection clauses embedded in such treaties to legally protect foreign investors result in the constraining of policy autonomy for national governments. While the provisions are reciprocal, developing countries have less capacity than industrialised treaty parties to take advantage of cross-border investment opportunities and investment protection clauses.

Such investment protection clauses often include a prohibition on performance requirements, i. e. conditions that States design for foreign investors to meet in order to establish or operate a business in their territories. Examples include requiring foreign investors to source their production content and input from the domestic economy of the host State to promote domestic manufacturing capabilities or using public procurement as actionable ways to promote public policies (e.g., minority and women's inclusion, environmental sustainability). Historically, most developed countries employed policies supportive of development and industrialization when their national economic sectors and firms were still nascent. Other investment protection clauses include the fair and equitable treatment obligation, pre-establishment rights, most favoured nation treatment obligation, and binding restrictions on capital controls.

The fair and equitable treatment obligations stipulate that foreign investors should be treated no less favourably than domestic investors. States have often been found to be violating this obligation if they act in favour of public interest, human rights and environmental concerns. For example, in the Tecmed vs. Mexico case in 2003, when a local government in Mexico refused to relicense an operating waste treatment plant after community members found evidence of environmental damage and harm to human health from the plant's pollution, arbitration tribunals ruled that Mexico was violating the clause for fair and equitable and national treatment. Arbiters too often think human rights is not part of the rule of law that must be respected by both foreign and domestic investors.

Pre-establishment rights specify that potential and current foreign investors have the right to enter a host country and make investments on terms no worse than those available to domestic investors making the same type of investment. Pre-establishment rights directly constrain the development of infant industries in developing countries that sometimes need temporary support and assistance to help compete with the potentially crushing competition of more powerful and rich foreign firms and producers.

The most favoured nation treatment obligation allows investors to search for stronger investment protections in all other international investment agreements that their host States have with other States. The free flow of capital requirement exposes States to destabilising capital flows, which in turn impacts domestic economic stability. Too much money comes in when times are good, while economic downturns trigger panic exits of capital. During the 2007-2008 global financial crisis and recession, the abrupt outflows of capital from developing to developed countries reduced access to international capital markets for developing countries. This triggered a depletion of foreign exchange reserves in some countries, and currency depreciation, which adversely impacted economic growth and productivity, employment and wages, and subsequently, poverty and inequality.

Another defining feature of investment treaties is the investor-state dispute settlement system, through which foreign investors can bring the host government to an international arbitration tribunal and seek monetary compensation for measures that impact current or future profits. The system is marked by a lack of accountability on the power of tribunals and their interpretations of the treaties. There are limited avenues by which States can challenge financial damages determined by arbitrators and national courts are required to enforce them. Only foreign investors, including their subsidiaries and shareholders, are able to initiate claims against governments. The tribunals are typically composed of private arbitrators appointed on a case-by-case basis by both parties to the dispute, who decide on the investors' claims against governments. Financially, the burden these arbitration disputes can place on States is significant. Compensations allocated have been comparable to the annual public expenditure of many developing countries, in critical social sectors such as health and education.

In essence, structural obstacles posed by international investment agreements actively constrain the ability of developing States to realise a core component of the right to development, that of domestic industrial and economic development. Industrial development facilitates diversification, a generative feedback between productivity and investment and higher value-added in the domestic economy which generates skilled and higher wage employment, decent work opportunities as well as sustained economic growth. In particular, manufacturing sectors have a multiplication effect in creating jobs and generating resilient economic value to the national economy. Thus, industrial development, supported by clean technology and renewable energy, is a critical and required step to realising all human rights as well as a sustainable future.

The Declaration on the Right to Development provides grounds upon which investor protections contained in international investment treaties should be addressed to recalibrate the impact they have on the ability of States to regulate and enforce legislation and policies that uphold all human rights and the public interest. Not only does it mandate national and international development policies to create an enabling environment for development but it also provides a viable basis for legal cases in the African human rights system where it is justiciable by virtue of its embodiment in Article 22 of the African Charter on Human and Peoples' Rights and related jurisprudence. The Addis Ababa Action Agenda establishes a strong foundation for the implementation of the 2030 Agenda, article 68 in particular supports ongoing work in relevant institutions to help vulnerable countries build their national capacity to respond to external shocks. The issue of investment and trade agreements reform is linked to several of the Sustainable Development Goals, with the ambition to create a "universal, rules-based, open, non-discriminatory, and equitable multilateral trading system".

A range of reforms need to be considered by all actors. This includes: assessing options on performance requirement prohibitions; assessing provisions for international agreements amendments, interpretations or terminations; carrying out human rights impact assessments of trade and investment agreements for States; monitoring the implementation of treaties and identifying what is not working; running advocacy and capacity building activities on the linkage between industrial development, the 2030 Agenda and the Right to Development.

Foreign investors have sometimes used arbitrations to compel governments to alter public interest regulations such as government bans on harmful chemicals, environmental restrictions on mining, regulations regarding transport and disposal of hazardous waste, designation of national heritage sites and national parks, anti-corruption investigations and changes to domestic fiscal policy that are in the national interest.

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