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Challenges of Investment Treaties on Policy Areas of Concern to Developing Countries

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I. Introduction

International investment agreements (IIAs)[1] have played a significant role as an element of both developed and developing countries' investment policies. IIAs offer foreign investors a number of protections through establishing standards of treatment that have been worded broadly and interpreted expansively by arbitral tribunals[2]. They also provide foreign investors with the legal power to seek compensation for what is considered adverse acts/omissions by a sovereign State, such as direct or indirect expropriation or other impairments or breaches of a certain treatment, including non-discrimination, the 'fair and equitable treatment' standard, and the protection against illegal or uncompensated expropriation[3]. Overall, as the primary policy objective of most IIAs is to provide foreign investors with protection, IIAs tend to not impose obligations on investors nor address the distortive effects of investment incentives. Neither do IIAs seek to discipline any competition that may arise among countries to attract foreign direct investment (FDI) through the introduction of incentives.

During the past few years, IIAs have been under critical discussion and review, including their implications on the use of policy tools essential to achieve growth, industrialization and sustainable development goals (SDGs) including addressing inequalities[4]. The legitimacy of the investor-state dispute settlement (ISDS) system embedded in these treaties has been questioned[5]. There have now been numerous reform efforts with respect to IIAs, with many of the new IIAs incorporating sustainable development-oriented reform elements suggested by the United Nations Conference on Trade and Development (UNCTAD) as part of its reform package for IIAs[6] for the preservation of policy space and improvements on or exclusion of ISDS.

According to UNCTAD, there are more than 3,300 existing IIAs as of 2017, including bilateral investment treaties (BITs) and other forms of IIAs[7], "most of them belonging to the 'first generation' IIAs that are in need of reform"[8]. Seventeen new IIAs were concluded in 2017, while at the same time, 22 IIAs were terminated[9].

Moreover, the number of known ISDS cases amounted to at least 855 as of 1 January 2018, including a record number of at least 65 new cases logged during 2017[10]. According to UNCTAD[11], more than two-thirds (around 70%) of the ISDS cases filed in 2017 related to activities in the services sector (finance and insurance services, construction, energy supply, information and communication, transportation and storage), while the primary industry and manufacturing sectors each accounted for 15% of the new cases[12].

IIAs were signed primarily based on the premise of attracting FDI, which is considered essential for growth and achievement of development objectives, and on the assumption that they will guarantee legal security to foreign investors especially where it is perceived that the domestic legal system does not offer such guarantees. However, empirical evidence pertaining to a positive correlation between IIAs and FDI does not prove to be solid[13]. While IIAs have not been critical in attracting FDI, they have become platforms for multi-billion compensation complaints logged through the ISDS system, and have also contributed to increasing the debt burden of a number of countries[14].

Moreover, investors have been using the ISDS mechanism to bring, or threaten the bringing of, costly cases in an attempt to prevent new legislation and other measures from being adopted or applied, thus effectuating a 'chilling effect' on the regulatory process[15]. Indeed, the investors' right to directly sue host States, which is enabled through

Abstract

Country experiences have revealed that international investment agreements (IIAs) could have an adverse policy impact on various policy areas that are generally important for developing countries in relation to the achievement of their development objectives. This policy brief gives an overview of challenges resulting from IIAs to major policy areas of concern to developing countries. These policy areas include industrial policy, tax reform, handling debt crisis, the use of capital controls, intellectual property rights, public-private partnerships, and climate change action in relation to investment in clean technologies.

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the ISDS mechanism, has allowed unprecedented challenges to governmental action[16].

Within this context, many developing countries have started reviewing and reforming the IIAs that they are parties to (see Box 1). According to UNCTAD, since 2012, over 150 countries have undertaken at least one action in the pursuit of reforming IIAs to enhance their sustainable development orientation[17]. Moreover, 2017 was the year in which for the first time the number of effectively terminated IIAs (22) exceeded the number of newly concluded treaties (18) and the number of new treaties entering into force (15)[18].

The following section reviews some of the major challenges posed by IIAs on policy areas of crucial concern to developing countries.

Box 1: Examples of action taken by selected developing countries, including Group of Twenty-four (G24) Member States, reforming their approach to investment treaties

Several developing countries have taken steps towards reviewing their commitments under IIAs and developing new model investment treaties. South Africa, Indonesia, India, Ecuador and Bolivia chose to withdraw from all or selected treaties. South Africa chose to replace BITs by a new national investment law entitled "Promotion and Protection of Investment Bill" that clarifies investment protection standards in line with the South African constitution. India chose to develop a new model investment treaty, so did several other countries such as Colombia and Egypt. Brazil, which for a long time did not ratify investment treaties, developed a treaty model focused on promotion and facilitation of investment. Some states are pursuing alternatives at the regional level, through developing model rules that take into consideration the developmental concern they face collectively, such as the Pan-African Investment Code. The member countries of the Common Market for Eastern and Southern Africa (COMESA) have been working on a COMESA Investment Agreement that adopts reforms aimed at achieving more balanced investment protections, safeguarding the right of host States to regulate investment and ensuring that investment benefits flow back to local communities.

II. Challenges Posed by International Investment Agreements on Policy Areas of Concern to Developing Countries

Country experiences have revealed that IIAs could have an adverse policy impact on various policy areas that are generally important for developing countries in relation to the achievement of their development objectives. Following is a brief overview of challenges resulting from IIAs to major policy areas of concern to developing countries. These policy areas include industrial policy, tax reform, handling debt crisis, the use of capital controls, intellectual property rights, public-private partnerships, and climate change action in relation to investment in clean technologies.

Impact of IIAs on policy space, growth and industrialization

The use of national industrial development policy to promote economic development has expanded, notably after the 2008 global financial crisis. In the period between 2013-2018, "at least 84 countries have issued industrial policy statements or explicit policy frameworks for industrial development…. Countries at all levels of development are using targeted industrial policies, not only for economic development purposes, but also to respond to myriad contemporary challenges, such as creating jobs and reducing poverty, participating in the technological revolution and in global value chains (GVCs), promoting efficient and clean energy and greening the economy"[19]. In this context, foreign investment policies to attract, anchor and upgrade FDI and to regulate it are an important element of industrial policies[20].

FDI promotion can support industrial policy in the sense that it can lead to the provision of "a package of assets that includes long term capital, technology, market access, skills and know-how"[21]. However, country experiences have shown that a laissez-faire approach to FDI would not yield much benefit[22]. While the immediate contribution of FDI to balance-of-payments may be positive, its longer-term impact is often negative because of high import content of foreign firms and profit remittances[23]. Akyüz has shown that this is true even in the case of countries highly successful in attracting export-oriented FDI[24]. Indeed, an FDI policy should be embedded in a country's overall industrial strategy in order to ensure that it contributes positively to a host country's economic dynamism[25].

As UNCTAD points out, "many of the potential benefits of investment do not materialize automatically or optimally, and policies to maximize positive spillovers for domestic industrial development are a common feature of industrial policy. Furthermore, industrial policies in some economies include foreign ownership limitations or joint-venture requirements to support domestic industrial build-up and to protect strategic industries and key technologies from foreign takeover"[26]. What this means, essentially, is that the inclusion of investment policy as a component of national industrial strategies need to be undertaken in a strategic and integrated manner, so that investment policy (including investment promotion, protection, and regulation) effectively contributes to the achievement of national development objectives. Furthermore, the differences in national industrial policy design among countries will also mean that there will be significant variations between them in terms of the policy and regulatory framework for investments[27].

However, Akyüz notes that country experiences strongly suggest that policy interventions that would be necessary to contain adverse effects of FDI on stability, balance of payments, capital accumulation and industrial development and to activate its potential benefits, have been increasingly circumscribed through rules imbedded in IIAs[28]. For example, action in support of infant-industry and domestic firms with the aim of enabling them to compete with foreign affiliates or successfully link up to global chains is restricted under the 'national treatment' clause of IIAs, which requires that host countries treat foreign investors no less favorably than domestic investors[29]. This is among a range of other prohibitions on governmental action needed to achieve a positive spill-over from FDI and limit negative impacts, including prohibitions on performance requirements, capital controls, trade-related investment measures such as local content requirements, among other restrictions on regulatory action[30].

Challenges in the area of tax reform

States are increasingly recognizing the need for tax reforms as a key aspect of their domestic resource mobilization effort. This is an issue that features strongly on the agenda of many developing countries[31], including issues pertaining to whether multinational enterprises (MNEs) pay their fair share of taxes and addressing base erosion and profit shifting (BEPS)[32].

Yet, States are increasingly recognizing that attempts to address shortcomings of tax regulatory frameworks could be undermined by investment protection rules established under IIAs. The ISDS mechanism has been used for tax disputes (see Annex 2)[33], whereby at least 24 countries have faced ISDS cases related to tax[34], including Uganda, India, Laos, Algeria, Yemen, Ecuador, Venezuela, Peru, Bolivia, Mexico, Argentina, among other countries.

These difficulties involved state policies regarding the payment of taxes in the host State, changes to tax regulations, withdrawal of previously granted tax breaks to foreign investors, and the imposition of higher taxes on profits from oil and mining.[35] Indeed, tax avoidance countermeasures taken by States can be interpreted as a violation of the 'protections' that investors are to be guaranteed under IIAs. Even where IIAs include a 'carve-out' of tax from the purview of IIAs, such clauses do not offer full protection against tax-related disputes brought by investors, in which changes in regulations related to tax could be interpreted as 'indirect expropriation' or unfair treatment to the foreign investor[36].

Challenges emerging from IIAs in regard to handling debt crisis

Rising debt vulnerabilities, which threaten debt sustainability, require governments to adopt timely and targeted policy responses to prevent or contain debt crisis[37]. The need for policy space to allow such measures was made clear in the cases of numerous defaults during the 1990s, and restructurings[38] such as Argentina's debt restructuring in 2001, as well as the latest global financial and economic crisis[39].

Yet, these crises have also revealed that IIAs pose several challenges in this area. Where public debt obligations are covered by IIAs, these agreements allow bondholders and FDI investors to use ISDS in addition to litigations at national courts in order to pursue their financial interests[40]. This could prevent debtor countries from negotiating debt restructuring in a manner that facilitates economic recovery and development[41]. For example, in the *Abaclat* case versus Argentina[42], which is the first prominent use of arbitration proceedings to challenge a sovereign government's handling of a default and restructuring[43], the arbitral tribunal ruled that individual investors and creditors could bring an ISDS case against a defaulting sovereign and attempt to resolve claims related to sovereign debt restructurings through arbitration in parallel with litigations at the US court. In the case of the Greek crisis, a claim was brought against Greece by *Poštová banka*, a Slovak bank, together with its Cypriot shareholder, alleging that as owners of Greek sovereign bonds, they suffered losses arising from the 2012 Greek Bondholder Act (see more details on these cases under Annex 2). This case could open the way for more such claims to resort to arbitration rather than domestic courts[44].

For quite a number of sovereign debtors facing liquidity or solvency problems, enormous ISDS claims have constituted a heavy drain to their depleting foreign exchange reserves, exacerbating the debt servicing burden and limiting their efforts towards reduction of poverty and economic development[45]. While a comprehensive global regime for sovereign debt workout remains unavailable, the ability of investors to challenge sovereign policy responses to debt crises expose countries to heightened uncertainties and could end up deepening the negative impacts of debt crises.

Impact of IIAs on the use of capital controls

Under its Articles of Agreement[46], members of the International Monetary Fund (IMF) have the sovereign right to regulate capital controls. However, when IIAs define a broad range of assets as covered investments – including deposits, loans, bonds, foreign exchange positions and derivatives - they could be effectively giving up these rights[47]. On many occasions, the G24 has called on developed countries to adopt a better policy mix in terms of their fiscal and macroeconomic (including on investment) policies in order to curb negative spillovers in the form of volatile capital flows and commodity prices[48].

In December 2012, the IMF made public an IMF Executive Board-approved "institutional view" on capital account liberalization and the management of capital flows, which acknowledged the use of inflow or outflow capital flow management measures as an appropriate policy response in certain circumstances[49]. That said, the IMF recognized that such measures could still violate a member's obligations under other international trade and investment agreements if those agreements do not have temporary safeguard provisions compatible with the Fund's approach[50].

Indeed, IIAs often stipulate that State Parties "shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory"[51], which in effect restrict the policy tools available to governments to respond to financial crises. Generally, a number of policy tools should be available to States when preventing or facing financial crisis, including macro-prudential policies and capital control measures[52]. The effectiveness of such measures will require their calibration to country characteristics and circumstances[53]. In the case of countries facing balance of payments pressures due to capital flows, capital control measures could take various forms, ranging from foreign exchange measures to control on capital transactions[54]. Such measures could provide certain stability in exchange rates and the availability of finance, at reasonable rates of interest, and support domestic investments in order to engender long-term economic diversification[55]. Nonetheless, investors have challenged such capital control measures taken by States using the ISDS mechanism (see example of ISDS cases in Annex 2).

The IMF has expressed its reservations about the prohibition on the use of capital control measures introduced in a number of IIAs[56]. The prohibitions under IIAs could expose IMF Members to challenge by investors through international arbitration, which could effectively limit the IMF Members´ right to impose capital controls. In such contexts, adherence by an IMF member to the provisions of the IIA on capital transfers could create the risk of being rendered ineligible to use the Fund's resources as it would be unable to comply with the IMF Articles[57].

IIAs and enforcement of intellectual property rights

The interaction between intellectual property protection and the protections offered by IIAs could provide room to challenging national decisions relating to the eligibility for or the scope of protections under intellectual property rights (IPRs)[58]. This is the case even when national action is in line with negotiated international treaties, such as the World Trade Organization (WTO) Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

For example, in the case of Eli Lilly versus Canada[59], the company alleged that the interpretation by Canadian courts, including the Supreme Court of Canada, of Canada's Patent Act violated Canada's obligations under the North-American Free Trade Area (NAFTA) investment chapter[60]. The investor challenged matters that the TRIPS Agreement had left to the discretion of WTO Members (see more details on this case under Annex 2). Indeed, deciding on which grounds a patent can be invalidated and how the patentability requirements are applied are among the important flexibilities allowed by that Agreement[61].

Accordingly, IIAs have enabled private entities to challenge matters heavily negotiated by States under finely calibrated international agreements, such as TRIPS, thus undermining the implementation of such agreements and their built-in flexibilities.

IIAs and private-public partnerships

Many developing countries have encouraged the participation of the private sector as an additional source of capital necessary to address the large and growing infrastructure needs and financing requirements in developing countries[62]. Public-private partnerships (PPPs) are contractual arrangements that are covered under IIAs' definition of protected investments when involving a foreign investor. Recent evidence on the trends of PPPs in infrastructure shows that foreign investors have accounted for a large amount of investments in the provision of public infrastructure worldwide[63].

States have faced multiple ISDS cases in relation to contracts with private entities, including cases related to construction of airport terminal[64], toll roads[65], construction of a power plant and selling electricity[66],construction of a gas pipeline and a dike[67], development of hotels and buying gas[68] (see more details of selected cases in Annex 2). Expanding PPPs in a context where IIAs offer unbalanced protections to private entities could potentially expand the liability of states under the ISDS mechanism.

Implications of IIAs on climate action and policies targeting investment in clean technologies

Changing patterns of sustainable production and consumption, moving towards implementing climate action plans, and providing finance for this transformation are central to sustainable development. However, government interventions to promote investment in renewable energy and related production schemes could be restricted through IIAs. Indeed, if renewable and non-renewable investments are considered to be in "like circumstances," this may allow challenges against special incentives given by a host state to investors in renewable energy only[69]. IIAs require that parties to a treaty shall accord investments and investors from the other party, when in 'like' circumstances, treatment that is no less favourable than that accorded to investments by its own nationals.

The question of 'likeness' of investments is central to addressing the issue of national treatment. Some tribunals have taken an expansive approach to this question, thus finding investors that are involved in completely different sectors as investors in 'like circumstances'. Such an approach limits the ability of governments to differentiate between investors based on factors related to their activities and the overall cost and benefit associated with the investment, such as their environmental impact and their implications on industrialization and development (see Annex 2 for case examples).

III. Conclusion

As examined above, IIAs pose significant challenges to major policy areas of concern to developing countries, including with respect to industrial policy, tax reform, handling debt crisis, the use of capital controls, intellectual property rights, public-private partnerships, and climate change action in relation to investment in clean technologies.

In a context where a lot of attention by the international community is focused on financing the Sustainable Development Goals (SDGs), it is crucial that developing countries review their approach to investment law and policy in order to enable an approach that supports, and does not hinder, their development efforts. One of the main questions facing developing countries today pertain to the nature of the reforms in IIAs that will help reshape IIA policies and commitments into one that is conducive and supportive of the achievement of development goals. For those countries, the reforms should help establish conditions where FDI could provide a stable source of support to industrialization and development, including through supplementing domestic resources, enhancing productive capacities, and supporting technological progress and industrial upgrading, including environmental transformations.

While investment policy can be an important component in developing countries' overall development and industrial policy framework, the use of such policy (including the entry into IIAs) must be strategic, integrated and coherent with such framework. This should be done with a view towards ensuring that any adverse policy impact on various policy areas that are generally important for developing countries in relation to the achievement of their development objectives can be averted or minimized. A nationally-appropriate balance between the use of IIAs as an investment promotion and protection tool and the preservation of national policy regulatory space with respect to investments is important to achieve.

Annex 1: Typical Provisions in International Investment Agreements

- **Broad definition of protected investor and investments:** these definitions generally extend beyond FDI to covering "any kind of asset", including intangibles (mortgages, intellectual property rights, shares, stocks and similar forms of participation in companies, expectations of future gains and profits).
- **National treatment:** parties are required to accord investments by investors from the other party treatment that is no less favourable than that accorded to investments by its own nationals. For example, this standard precludes the contracting state from imposing more onerous tax or other obligations on the foreign investors than that accorded to the investors of their own nationals.
- **Most-Favored Nation (MFN) treatment:** parties are required to accord investments by investors from the other party treatment that is no less favourable than that accorded to investors of other countries. Some analysts are of the opinion that investors can even invoke the MFN clause in order to obtain longer protections through more favourable survival clauses after a treaty denunciation, or to obtain the right to claim less onerous procedures to use ISDS.
- **Fair and equitable treatment (FET):** this principle has been construed broadly by investment tribunals to include a right to a "stable and predictable" business and regulatory environment, allowing investors to seek compensation for changes in tax and regulatory standards. It has been interpreted to cover loss of future expected profits. This standard of protection has been the most frequently used as a basis for ISDS claims.
- **Indirect expropriation**: IIAs allow expropriation but under strict conditions of compensation, requiring that expropriation be for public purpose, non-discriminatory - thus not targeted at a specific company or nationality - and in accordance with due process of law. Investment agreements have expanded the coverage of the rules to include direct and indirect expropriation, or what is referred to as 'expropriation and measures tantamount to expropriation'. Under the expansive approach to interpreting 'indirect expropriation', any regulatory measure - such as those dealing with production processes, or ban on harmful material - could be judged as indirect expropriation.
- **Repatriation of profits or free transfer of capital:** IIAs often require that all funds of foreign investors covered by the protections of a treaty be freely transferable without unreasonable delay on a non-discriminatory basis, at the prevailing market exchange rate on the date of the transfer, and to be fully convertible to the currency in which the investment is made or in any convertible currency. This would include flows of capital in and out of the country.
- **Performance requirement prohibitions:** under this type of clauses, States give up their right to impose performance requirements on foreign investors, such as exporting certain percentage of the production, minimum local content or entering joint ventures with local companies, employing certain percentage of local workers, transfer of technology, or contribution to research and development.
- **Survival clause**: this clause extends investors' rights and remedies under IIAs following their termination or denunciation. This type of provisions lock in States' consent to international arbitration after the termination of the BIT, for up to 20 years in some cases[70], allowing established foreign investors to sue the host State during the post-termination period.
- **Pre-establishment rights:** Pre-establishment rights refer to the right of entry of investors of a Party into the territory of another Party. Including 'pre-establishment rights' in an IIA extends national treatment and most-favoured-nation treatment to the "establishment, acquisition and expansion" of investments. Accordingly, each Party allows investors of other Parties the right to establish an investment in their territory on terms no less favorable than those that apply to domestic investors (national treatment) or

investors from third countries (most-favored-nation treatment).

Annex 2: Examples of Relevant ISDS Cases

i. Challenges to measures related to growth and industrialization

Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15, 2014)

The government of Indonesia adopted a new law in 2009 introducing new export restrictions on copper, including an export duty and a ban on the export of copper concentrate with the objective of boosting domestic employment and local economy. In July 2014, Newmont Mining Corporation filed a claim against Indonesia before the International Centre for the Settlement of Investment Disputes (ICSID), on the basis that introducing the mining law imposed new export conditions not included in the contract and breached the Indonesia-Netherlands Investment Treaty. In August 2014, the Secretary-General of ICSID took note of the discontinuance of the procedure as the parties signed a Memorandum of Understanding which gave the mining company special exemptions from the new mining law[71].

ii. Challenges in the area of tax reform

Cairn Energy PLC v. India (UNCITRAL Rules, 2015)

The British oil company Cairn Energy filed a dispute against India under the UK-India Investment Treaty. The case concerns an action taken in 2014 by the Indian Income Tax Department, whereby it ordered the payment of USD 1.6 billion by the Cairn India subsidiary as a capital gain tax derived from the transfer of Cairn assets to a new company in 2006[72]. The company claims that the retrospective collection of capital gain taxes from the period 2006-2007 and the restriction to sell its shareholding in Cairn India, breach the fair and equitable treatment clause in the investment treaty[73], and seeks a compensation of USD 5.6 billion due to loss of value of its shares in India. The case is still pending.

Total E&P Uganda BV v. Uganda (ICSID Case No. ARB/15/11, 2015)

In 2006, the government of Uganda embarked on reviewing its legal and institutional framework for the management of oil revenues and environmental aspects of production, which included a limitation on tax incentives. In 2015, Total E&P Uganda BV (Dutch), subsidiary of French company Total S.A., brought a claim against Uganda under the Netherlands – Uganda BIT before ICSID. The claim is based on the stamp duty imposed by the Uganda Revenue Authority on the acquisition of shares from London-listed Tullow Oil[74]. Total argues that it is entitled to a tax waiver by virtue of its contract with the government of Uganda.

iii. Challenges in regard to handling debt crisis

Abaclat and others v. Argentine Republic (ICSID Case No. ARB/07/5, 2006)

The case was brought in 206 by tens of thousands of Italian bondholders, using the Italy-Argentina investment treaty. In 2001, Argentina defaulted on its sovereign debt. In 2005, the country launched a voluntary exchange offer to bondholders, consisting of exchanging bonds on revised terms. The claimants refused to participate in the exchange offered, and argued that the refusal to pay the sovereign bonds on their original terms was a breach of the BIT[75]. The arbitration tribunal concluded that sovereign debt instruments constituted a protected investment under the BIT, which gave rise to some commentators' view that the term "investment" was interpreted beyond the intention of States[76].

Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic (ICSID Case No. ARB/13/8)

In 2015, a claim was brought against Greece by Poštová banka, a Slovak bank, together with its Cypriot shareholder, alleging that, as owners of Greek sovereign bonds, they suffered losses of EUR 275 million, arising from the 2012 Greek Bondholder Act. The ICSID tribunal dismissed for lack of jurisdiction the claims of Poštová Banka A.S. (a Slovak entity) and its shareholder Istrokapital S.E. (a Cypriot entity) against Greece. See: Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic (ICSID Case No. ARB/13/8), Award, 9 April 2015. The tribunal found that the definition of investment in the BIT at hand contained "less encompassing language" than that in the Argentina-Italy BIT in the cases Abaclat v. Argentina and Ambiente Ufficio v. Argentina. It stressed that the reference to bonds in the Greece-Slovakia BIT was limited to "debentures of a company"[77].

iv. Cases challenging financial measures and capital controls

El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15, 2003)

El Paso Energy is a company incorporated in the United States. In 2003, it initiated procedures against Argentina based on the United States – Argentina investment treaty. According to the claimant, certain economic measures taken by the Argentinian government to cope with the 2001 economic crisis, in particular restrictions on transfers, rescheduling of cash deposits and pesification of US dollar deposits, were in violation of the BIT provisions on expropriation, 'fair and equitable treatment' and 'full protection and security'[78], and therefore affected El Paso's investments. The arbitration tribunal considered that a tax on outflows, as well as other capital control measures, constituted an infringement of the provision on free transfer of capital in the BIT.

Philippe Gruslin v. Malaysia (I) (ICSID Case No. ARB/94/1, 1994)

A Belgian investor sued Malaysia under the Belgium and Luxembourg-Malaysia investment treaty after losing money on portfolio investments in the Kuala Lumpur Stock Exchange. He argued that the loss was caused by

Malaysia's introduction of exchange controls in September 1998 in the context of the Asian financial crisis. The arbitral tribunal did not resolve conclusively this aspect of the claim. Although the claimant was unsuccessful, the case demonstrates that general financial regulatory measures could be subject to challenge by foreign investors under IIAs.

v. Cases pertaining to intellectual property

Eli Lilly and Company v. The Government of Canada (UNCITRAL, ICSID Case No. UNCT/14/2, 2013)

Eli Lilly brought a claim against Canada on the basis of the investment chapter under NAFTA and UNCITRAL rules. In 2010, the Federal Canadian court invalidated a patent that Eli Lilly held. In accordance with generally accepted principles of international law, the courts of the country granting a patent have the exclusive jurisdiction to address issues of invalidation[79]. Eli Lilly started procedures before an international arbitral whose decision would not be appealable before Canadian courts to award it compensation for alleged losses due to the invalidation of the patent. It is worth noting that the TRIPS agreement left wide room for Member countries to revoke a patent, including invalidating patents.

vi. Cases pertaining to public-private partnerships

Walter Bau AG (in liquidation) v. The Kingdom of Thailand (UNCITRAL, 2009)

Walter Bau AG, a German company, was a shareholder in the company which became the Concessionaire under a tollway concession granted by Thailand, as part of a joint venture. According to the contract, toll rates could only be increased with the approval of Thai authorities. The claimant alleged that the refusal by Thailand to approve toll hikes throughout the existence of the project amounted to expropriation and a violation of 'fair and equitable treatment' under the German-Thailand investment. The Tribunal rejected Walter Bau's claim of creeping expropriation but found that Thailand had breached the 'fair and equitable treatment' provision by violating Walter Bau's legitimate expectations of a reasonable return on their investment through the tolls received.

Occidental Exploration v. Ecuador (LCIA Case No. UN 3467, 2004)

Occidental Exploration is a United States based oil company which entered into a participation contract with the Ecuadorian State-owned oil corporation to undertake exploration and exploitation activities in Ecuador. In 2001, the Ecuadorian Tax Authority stopped all further reimbursement applications of value added tax (VAT) by Occidental and other companies in the oil sector, given their understanding that such reimbursement was already accounted for in the percentage of participation by the investor established in the contract. The claimant argued that Ecuador had breached its obligation under the BIT because a number of other companies had received VAT refunds. The tribunal found that Ecuador had breached its obligation under the national treatment provision as investors in the oil production and exploration were found in 'like situation' with domestic entities operating in other sectors[80].

vii. Cases pertaining to environmental regulations

Elser and Energia Solar v. Spain (ICSID Case No. ARB/13/36, 2017)

The companies Elser Infrastructure and Energia Solar brought claims against Spain under the Energy Charter Treaty (ECT) for alleged violation of the FET obligation under Article 10(1) of the ECT arising from changes in Spain's tariff regime for renewable energy producers. In 2007, Spain had put in place a tariff regime that guaranteed profitability for renewable energy producers, as a result of which the claimants established three renewable energy plants. Between 2012 and 2014, Spain repealed the 2007 tariff regime and introduced a new one that was made applicable to existing investments. This resulted in revenue losses for the claimants. The tribunal found that the elimination of the 2007 tariff regime and its replacement with a different regulatory approach was unfair and inequitable in violation of Spain's FET obligations under the ECT.

Metalclad Corporation v. The United Mexican States (ICSID Case No. ARB(AF)/97/1, 2000)

Metalclad, a United States company, brought a claim against Mexico under NAFTA. Metalclad had bought interests in the construction of a hazardous waste landfill in Guadalcázar. According to the claimants, by denying a construction permit based on environmental grounds, Mexican local governments of San Luis Potosí and Guadalcázar interfered with the investor's development and operation of the hazardous waste landfill. The arbitration tribunal found that the environmental regulations that restricted the investor from operating a landfill constituted an 'indirect expropriation'.

Vattenfall AB and others v. Federal Republic of Germany (II) (ICSID Case No. ARB/12/12, 2012)

Vattenfall, a Swedish State-owned enterprise in the energy sector, initiated procedures against Germany under the Energy Charter Treaty. Vattenfall claimed that the enactment of legislation in Germany to phase out nuclear power plants in the country by the year 2022 directly impacted Vattenfall's investment in two nuclear power plants for which the company should obtain fair compensation for financial losses, including past and future lost profits, which amounts to USD 4.4 billion[81]. The case is still pending.

Endnotes:

1 IIAs is used in this brief to stand for investment agreements and investment rules in free trade agreements.

2 See Annex 1 describing some typical provisions that are generally included in IIAs as protections for foreign investors.

[3] See: Carlos Correa and Jorge Vinuales, "Intellectual Property Rights as Protected Investments: How Open are the Gates?", J Int Economic Law (2016) 19 (1): 91-120, available at: https://academic.oup.com/jiel/article/19/1/91/2357950/Intellectual-Property-Rights-as-Protected.

[4] See, e.g.: UNCTAD, Reform of the IIA regime, available at: https://investmentpolicyhub.unctad.org/IIA/KeyIssueDetails/42. UNCTAD, in its World Investment Report 2016, stated that "reform to bring the IIA regime in line with today's sustainable development imperative is well under way." See UNCTAD, World Investment Report 2016, p. 108, available at: https://unctad.org/en/PublicationChapters/wir2016ch3_en.pdf. See also, UNCTAD, UNCTAD's Reform Package for the International Investment Regime (2018), available at: https://investmentpolicyhub.unctad.org/Upload/Documents/Reform_Package_web.pdf.

[5] For this discussion see: South Centre, Investment Treaties: Views and Experiences from Developing Countries (2015), available at: https://www.southcentre.int/book-by-the-south-centre-2015-2/ ; UNCTAD, "Reform of the Investor-State Dispute Settlement: In Search of a Roadmap" (June 2013), available online at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf; Nathalie Bernasconi-Osterwalder, "Rethinking Investment-Related Dispute Settlement", International Institute for Sustainable Development (2015), available online at: https://www.iisd.org/itn/2015/05/21/rethinking-investment-related-dispute-settlement/ .

[6] See: UNCTAD, World Investment Report 2018, pp. 95-96, available at: https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

[7] It is worth noting that investment-related rules are included in BITs, regional agreements, investment chapters under free trade agreements (FTAs), as well as national investment laws. See UNCTAD, World Investment Report 2018, p. 88, available at: https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

[8] Ibid., p. 88.

[9] Ibid., p. 88.

[10] Ibid., p. 91.

[11] Ibid., p. 93.

[12] Ibid., p. 93.

[13] Empirical evidence from surveys of investors and political risk insurers have shown that it is exceedingly rare for foreign investors to factor in investment treaties (including liberalization agreements) when committing capital abroad, including deciding on the destination and volume of their investments. Similarly, availability and pricing of public and private political risk insurance are very rarely affected by the presence or absence of an investment treaty. See: Lauge Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence", in Yearbook on International Investment Law & Policy 2009/2010 (New York: Oxford University Press); Jason Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment: Some Hints from Alternative Evidence", Virginia Journal of International Law, 51:397 (2010-2011). UNCTAD points out that existing empirical studies of IIAs' impact on FDI provide heterogeneous results and have some limitations because of data and methodological challenges, among other factors. More importantly, UNCTAD points out that "prominent counterfactuals (i.e. investment relationships that exist without being covered by IIAs) suggest that legal instruments' influence on economic matters are limited and that other determinant, in particular the economic ones, are more important." See: UNCTAD, IIA Issues Note (Sept 2014), "The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014", available at: http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2024.pdf .

[14] The World Bank estimates that more than one third of the countries that qualified for its debt relief initiative have been targeted by lawsuits, including under IIAs, by at least 38 litigating creditors, with judgments totaling $1 billion in 26 of the cases. See Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights, UN Doc A/HRC/33/54, 20 July 2016. See also: Yuefen Li, "Impact of Hedge Funds' Activities on Human Rights" in South Bulletin 86, 9 October 2015.

[15] See: "A Need for Preventive Investment Protection?" by Cezary Wiśniewski and Olga Górska, Kluwer Arbitration Blog, September 30, 2015, available at :

http://kluwerarbitrationblog.com/blog/2015/09/30/a-need-for-preventive-investment-protection/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29.

[16] See examples of arbitration cases challenging State action in Annex 2.

[17] UNCTAD World Investment Report 2018, p. 96.

[18] See UNCTAD, "Recent Developments in the International Investment Regime", May 2018. See: http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf.

[19] UNCTAD, *World Investment Report 2019*, p. 128. Available from https://unctad.org/en/PublicationChapters/wir2018ch4_en.pdf

[20] Ibid., p. 131.

[21] Ibid.

[22] Yılmaz Akyüz, "Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities", South Centre Research Paper 63 (October 2015), page 1. Available from https://www.southcentre.int/research-paper-63-october-2015/ .

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] UNCTAD, *World Investment Report 2019*, p. 132.

[27] Ibid., p. 137.

[28] Yılmaz Akyüz, "Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities", South Centre Research Paper 63 (October 2015),

[29] Ibid.

[30] For more information, see: South Centre , Investment Treaties: Views and Experiences from Developing Countries (2015). For more details, see: https://www.southcentre.int/product/investment-treaties-views-and-experiences-from-developing-countries/.

[31] See G24 Communiqué (October 6, 2016), available at:

http://www.g24.org/communiques/.

[32] Major tax reform issues include tax cooperation and the participation of developing countries in international cooperation on tax matters on an equal footing. See also e.g. Martin Hearson, Developing Countries' Role in International Tax Cooperation (G-24 Working Paper, 25 May 2017), available at: https://martinhearson.files.wordpress.com/2017/08/developing-countries-role-in-international-tax-cooperation.pdf; Manuel Montes, Designing a Developing Country Agenda on Tax Cooperation (South Centre, South Bulletin No. 92, 4 August 2016), available at: https://www.southcentre.int/question/designing-a-developing-country-agenda-on-international-tax-cooperation/; Martin Hearson, The challenges for developing countries in international tax justice (London School of Economics and Political Science, 2017), available at: http://eprints.lse.ac.uk/73324/1/Hearson_Challenges%20developing%20countries_2017.pdf; Wang Jianfan (Ministry of Finance, People's Republic of China), Challenges of International Taxation for Developing Countries (presentation at the 6th IMF-Japan High-Level Tax Conference for Asian Countries, 9 April 2015), available at https://www.imf.org/en/News/Seminars/Conferences/2016/12/31/Emerging-Tax-Issues-in-Asia.

[33] See: UNCTAD World Investment Report 2015. For more information on the cases, see http://www.iiapp.org/.

[34] See: Claire Provost, "Taxes on Trial: How Trade Deals Threaten Tax Justice" (2016), available online at: https://www.tni.org/files/publication-downloads/taxes-on-trial.pdf. In a presentation in 2016 at the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), Julien Chaisse of the Chinese University of Hong Kong stated that "since 1999, at least 32 tax-related cases have been brought to international investment arbitration". See Julien Chaisse, The treatment of national taxes in tax and non-tax international agreements (presentation at the 6th Meeting of the Asia-Pacific FDI Network, UNESCAP, June 2016), available at https://www.unescap.org/sites/default/files/5.%20Julien%20Chaisse_Tax.pdf. In 2017, at least 4 ISDS cases were tax-related. See UNCTAD, World Investment Report 2018, p. 94, available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf. In 2016, there were at least 5 tax-related ISDS cases. See UNCTAD, IIA issues note "Investor-State Dispute Settlement: Review of Developments in 2016" (No. 1, May 2017), available at: https://investmentpolicyhub.unctad.org/Upload/Documents/diaepcb2017d1_en.pdf. See also UNCTAD, IIA issues note "Investor-State Dispute Settlement: Review of Developments in 2017" (No. 2, June 2018), available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.

[35] See: UNCTAD, IIA issues note "Investor-State Dispute Settlement: Review of Developments in 2015" (No. 2 June 2016), available at: investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf. See also: Claire Provost, "Taxes on Trial: How Trade Deals Threaten Tax Justice" (2016), available online at: https://www.tni.org/files/publication-downloads/taxes-on-trial.pdf.

[36] Claire Provost, "Taxes on Trial: How Trade Deals Threaten Tax Justice" (2016), available online at: https://www.tni.org/files/publication-downloads/taxes-on-trial.pdf.

[37] See: Amr Hosny and Said Bakhache, IMF Survey: Public Debt in Low-Income Countries: Opportunities and Vulnerabilities, IMF Strategy, Policy, and Review Department (January 14, 2016), available at http://www.imf.org/en/News/Articles/2015/09/28/04/53/sores011416b.

[38] Cases of debt crisis: Russia (1998-2000), Ukraine (1998-2000), Pakistan (1999), Ecuador (2000), Uruguay (2004), Argentina (2005), Argentina (2010). See: UNCTAD IIA Issue Note 2011, "Sovereign Debt Restructuring and International Investment Agreements", prepared by Kevin P. Gallagher.

[39] See: UNCTAD IIA Issue Note 2011, "Sovereign Debt Restructuring and International Investment Agreements", prepared by Kevin P. Gallagher.

[40] See Yuefen Li, "How international investment agreements have made debt restructuring even more difficult and costly", Investment Policy Brief, No. 10, South Centre, February 2018.

[41] See: UNCTAD IIA Issue Note 2011, "Sovereign Debt Restructuring and International Investment Agreements", prepared by Kevin P. Gallagher.

[42] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5. See: Federico Lavopa, "Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina", South Centre Investment Policy Brief 2 (July 2015), available at: https://www.southcentre.int/investment-policy-brief-2-july-2015/.

[43] Jessica Beess und Chrostin, "Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, The Abaclat Case", *Harvard International Law Journal* Volume 53, Number 2, Summer 2012.

[44] Ibid.

[45] In one case, litigation ended by awarding almost 15% of the total government social benefits' expenditure to creditors in secondary markets, money that could have been channeled to education, health care and poverty alleviation. Similarly, in a number of other cases countries facing litigation have been compelled to service their external debt obligations, thereby reducing their capacity to address poverty reduction and pursue their economic development efforts. See: Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights, UN Doc A/HRC/33/54, 20 July 2016 and Yuefen Li, "Impact of Hedge Funds' Activities on Human Rights" in South Bulletin 86, 9 October 2015.

[46] See IMF, Articles of Agreement, Art. VI, Sec. 3; Art. VII, Sec. 3(b); and Art. XIV, Sec. 4.

[47] See Manuel F. Montes, "Capital Account Regulations and Investor Protections in Asia", Policy Brief No. 15, South Centre, January 2015.

[48] See, for example, G24 communiqués at: http://www.g24.org/communiques.

[49] International Monetary Fund, "The Liberalization and Management of Capital Flows: An Institutional View", (Washington DC, November 14, 2012), available at: http://www.imf.org/external/np/pp/eng/2012/111412.pdf.

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[53] Ibid.

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[58] See: Carlos Correa and Jorge Vinuales, "Intellectual Property Rights as Protected Investments: How Open are the Gates?", J Int Economic Law (2016) 19 (1): 91-120, p. 2, available at: https://academic.oup.com/jiel/article/19/1/91/2357950/Intellectual-Property-Rights-as-Protected.

[59] Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2 - see more at: http://www.italaw.com/cases/1625#sthash.jJQ1uGrN.dpuf .

[60] See: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng.

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[65] Walter Bau v. Thailand, UNCITRAL case.

[66] Nykomb v. Latvia, Stockholm Chamber of Commerce.

[67] Saipem v. Bangladesh, ICSID Case No. ARB/05/07.

[68] Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No. ARB/98/4; Petrobart Limited v The Kyrgyz Republic, SCC Case No. 126/2003.

[69] Bradford S. Gentry and Jennifer J. Ronk, "International Investment Agreements and Investments in Renewable Energy", page 67. Available from http://www.waipa.org/wp-content/uploads/2016/07/Ronk_International-Investment-Agreements-and-Investments-in-Renewable-Energy.pdf .

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This brief is part of the South Centre's policy brief series focusing on international investment agreements and experiences of developing countries.

While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Systemic reforms that would safeguard the sovereign right to regulate and balance the rights and responsibilities of investors would require more concerted efforts on behalf of home and host states of investment in terms of reforming treaties and rethinking the system of dispute settlement.

Experiences of developing countries reveal that without such systemic reforms, developing countries' ability to use foreign direct investment for industrialization and development will be impaired.

The policy brief series is intended as a tool to assist in further dialogue on needed reforms.

***** The views contained in this brief are attributable to the author/s and do not represent the institutional views of the South Centre or its Member States.**

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The South Centre is the intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. The South Centre was established by an Intergovernmental Agreement which came into force on 31 July 1995. Its headquarters is in Geneva, Switzerland.

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