



SouthViews

No. 232, 10 December 2021

www.southcentre.int

Twitter: [@South_Centre](https://twitter.com/South_Centre)

Jamaica's Perspective on Reform of the Global Investment Regime

By Omar Chedda

The Covid-19 pandemic has dealt a severe blow to the world economy, and in particular, Jamaica's economy, due to supply chain bottlenecks and reduction of tourism, on which Jamaica is heavily dependent. This is the context in which Jamaica is now reviewing its investment regime to ensure that investments contribute to recovery, building resilience and sustainable development, while improving investor rights and obligations in line with global trends.

Overview of Jamaica

Jamaica is classified as an upper middle-income country¹ with a total area of 11,000 square kilometres. The population of 3 million has been growing at an average of one percent per year. Almost 50 percent of the population lives in the metropolitan region of Kingston and St. Andrew and its adjoining regions.

With a small domestic economy, the country is highly dependent on the export of goods and services to earn the foreign exchange required to finance the imports of inputs into the economy. Traditionally, the main foreign exchange earners are tourism, bauxite/alumina (which is made into aluminium by the importing countries) and agriculture.

The current growth strategy is based on moving the country up global value chains through positioning Jamaica as an integral part of the global logistics network, with the required infrastructure development; establishment of an International Financial Centre; further development and diversification of the tourism sector into health and wellness and medical tourism for example; expansion of the Information and Communication Technologies (ICT) sector; increasing earning opportunities in the creative industries; the development of agribusiness; and energy diversification. These areas have been prioritized based on their economic benefits as well as the existing pipeline of opportunities for which the Government of Jamaica (the Government) is seeking to attract investors over the short to medium term.

¹ World Bank, "Upper Middle Income". Available from <https://data.worldbank.org/country/XT>.

In terms of contribution to Gross Domestic Product (GDP), the greatest contributor is the service sector, followed by the manufacturing, mining, construction and agricultural sectors. 35 percent of the labour force is employed in the goods producing sector, whilst 65 percent is employed in the services sector. This underscores the fact that Jamaica is primarily a services-based economy.

Investment Framework

The Government actively promotes investment to achieve the national vision of Jamaica being “the place of choice to live, work, raise families and do business.” Thus, it is committed to strengthening a positive environment for business and investment. These commitments are outlined in the Vision 2030 National Development Plan².

Investors are welcome to invest in all sectors of the economy, with few caveats, and particularly in those sectors which can contribute to export earnings. In addition to encouraging local investment, the Government actively seeks foreign direct investment (FDI) to strengthen the economy through the inflow of new capital, technology and management skills. The Government has streamlined legislation and procedures to encourage the establishment and expansion of enterprises capable of providing increased employment opportunities and contribute substantially to widening the economic base of the country.

The Government is committed to improving the facilitation of investment, and the country is actively involved in the World Trade Organization (WTO) discussions on Investment Facilitation for Development. A National Investment Policy was recently developed which sets out the Government’s policies for promoting and facilitating private investment.³ Jamaica is a Member of the Caribbean Community (CARICOM), and as such, regional partners are being consulted regarding regional investment negotiations and policies. The Government is committed to these policies and continues to review them in an endeavour to further improve the environment for private sector development.

Bilateral Investment Treaties

Jamaica has signed seventeen bilateral investment treaties (BITs), of which eleven are in force and six were signed but never entered into force.⁴ It is also considering negotiating other BITs with additional countries because these treaties are viewed as tools that can be used to attract foreign investment. However, there is little evidence that Jamaica’s BITs have played a significant role in attracting FDI, and there is no mechanism in place to measure the impact of these treaties.

BITs can reduce a country’s policy space due to the significant risks of dispute settlement procedures being used by private investors to pursue claims against the host state for changes in legislation and policies which are viewed as having a detrimental impact on their investments. Jamaica is developing policy positions on the way forward with its existing stock of BITs, and

² The Planning Institute of Jamaica, *Vision 2030 Jamaica National Development Plan*. Available from <https://www.vision2030.gov.jm/>.

³ Jamaica, Ministry of Industry, Investment and Commerce, National Investment Policy Statement. Available from <https://www.miic.gov.jm/sites/default/files/pdfs/National%20Investment%20Policy%20Statement%20-%20Jamaica.pdf>.

⁴ Based on the United Nations Conference on Trade and Development (UNCTAD)’s International Investment Agreements Navigator. Available from <https://investmentpolicy.unctad.org/international-investment-agreements/countries/104/jamaica>.

the plans for negotiating additional treaties. The International Institute for Sustainable Development has been assisting Jamaica in this regard. This issue is even more critical at this time due to the measures implemented by the Government to control the Coronavirus pandemic, which includes restrictions on travel and curfews.

Officials in Jamaica are currently examining the various options and approaches for international investment negotiations and studying the experiences of other developing countries. Some of these countries have successfully renegotiated or denounced investment treaties which were considered detrimental to their development efforts, and there are useful lessons to be learned.

One such case is South Africa. South Africa's current policy is informed by a review of its BITs concluded in 2009, which found no correlation between the country's BITs and FDI flows, and an imbalance in the substance of those BITs, especially with respect to Investor-State Dispute Settlement (ISDS).⁵ As a result, a strategy was approved which included (1) no new BITs; (2) passage of the Protection of Investment Act; (3) development of a new BIT model; and (4) establishment of a cross-government investment committee. South Africa's new BIT model does not contain fair and equitable treatment (FET) provisions, ISDS or most favoured nation (MFN) clauses, but guarantees procedural rights, in line with regional developments in Africa. It was noted that these reforms have not negatively impacted FDI flows into South Africa.⁶

It was also noted that the Pan-African Investment Code, Article 17, gives governments the right to impose performance requirements for investors to achieve the development objectives of the region.

Jamaica is consulting and working with developing country partners to build common positions and proposals on pertinent issues for international investment negotiations going forward, particularly for the Sessions of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII) on ISDS Reform. Some of these issues are related to third party funding for claimants to undertake arbitration proceedings against host states; the appointment of arbitrators; treatment of investors who engage in corrupt practices; the risks of broad FET provisions; survival clauses in treaties; regulatory chill and protection of policy space; and MFN clauses, among other issues of importance.

Various options and approaches for reforming the international legal arrangements for ISDS are being examined. This process involves weighing the benefits, costs and risks, while taking into consideration the differences among developing country regions, such as Latin America, the Caribbean, Africa and Asia. Developed countries, such as those comprising the European Union (EU), have taken the lead in developing proposals for ISDS reform which serve their interests, such as the establishment of a Multilateral Investment Court. These latest developments are being examined to agree on counter proposals to better serve developing country interests.

⁵ Xavier Carim, "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa", Investment Policy Brief, No. 4 (Geneva, South Centre, 2015). Available from https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf.

⁶ International Institute for Sustainable Development, 12th Annual Forum of Developing Country Investment Negotiators, Cartagena, Colombia, 27 February - 1 March 2019.

Jamaica's Experience with ISDS⁷

Jamaica's BITs provide foreign investors with procedural rights which permit them to challenge government measures in international arbitration. In some instances, this may be done without having to resort to the domestic court system. However, in other cases, investors must first resort to local courts before going to arbitration.

Specifically, the BITs provide for dispute settlement options between investors and the host country, which include amicable settlements. Some BITs specify that this should be pursued as far as possible through consultation and/or negotiation. In this regard, Jamaica's BIT with the Argentine Republic⁸ only refers to the use of 'diplomatic channel'.

Where there is recourse to domestic courts, BITs often provide that the legal procedures and remedies under the laws and regulations must be available to the investor of the other Contracting Party and vice versa 'on the basis of treatment no less favourable than that accorded to investments of its own investors or investors of any third State, whichever is more favourable to the investor'.

If the dispute has not been settled within a specified time, for example, three, six or nine months (as stipulated in the BIT) from the date on which the dispute has been formally raised by either party, the investor or the Contracting Party must submit the matter to the International Centre for the Settlement of Investment Disputes (ICSID). Alternatively, as evinced in the case of the BIT with Indonesia⁹, the dispute may be submitted to an ad hoc tribunal set up in accordance with the Arbitration Rules of UNCITRAL or simply, an ad hoc tribunal as in the case of the BIT with the Republic of China (also requires that the tribunal provides a reason for its award). Arbitral awards are final and binding; the Contracting Parties agree, in some BITs, to enforce the arbitral awards and in others, to pay the cost of their arbitrators.

There are several BITs which include 'fork-in-the-road' provisions. Pursuant to these treaties, investors have the option of choosing to pursue their claim either through the courts of the host state or by way of international arbitration. Either way, the decision of the courts or tribunal or international arbitration is final.

On the other hand, the BITs with Italy regarding claims for expropriation and nationalization, as well as Switzerland and the United Kingdom, stipulate that local remedies must first be exhausted prior to the exercise of the right to commence arbitration in respect of investment disputes. Also, the BITs relating to Germany, Korea and Netherlands expressly provide that arbitration proceedings may be commenced after there has been a pursuit of domestic remedies. It is clearly stated in the Germany and Netherlands BITs that the prior exhaustion of domestic remedies is not, however, a condition precedent to the right to commence arbitration.

⁷ Ministry of Foreign Affairs and Foreign Trade of Jamaica.

⁸ Agreement Between the Government of Jamaica and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments. Available from <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/100/download>.

⁹ Agreement Between the Government of the Republic of Indonesia and the Government of Jamaica Concerning the Promotion and Protection of Investments. Available from <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1619/download>.

Enforcement of Judgments

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) came into effect for Jamaica on 14th October 1966. The International Investment Disputes Awards (Enforcement) Act 1967 gives the Washington Convention force of law in Jamaica.

Jamaica acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 10th July 2002. The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001 gives the New York Convention force of law in Jamaica.

In addition to the 2017 Arbitration Act, Jamaica enforces the judgments of foreign courts through The Judgments and Awards (Reciprocal Enforcement) Act, The Judgments (Foreign) (Reciprocal Enforcement) Act, and The Arbitration (Recognition and Enforcement of Foreign Awards) Act. Pursuant to these Acts, judgments of foreign courts are accepted wherever there is a reciprocal enforcement of judgment treaty with the relevant foreign state. It is worth noting that Jamaica does not have a history of extrajudicial action against foreign investors.

Specific Cases

Three ICSID claims were brought against Jamaica in 1974 by bauxite mining interests and discontinued three years later, due to out of court settlements. No investment treaty claims have been brought against Jamaica since then. Although, there have been disputes which have been amicably settled without recourse to international arbitration.

The Regional Perspective¹⁰

Some of the key features of CARICOM Member States' experience with ISDS, compared to that of states driving the ISDS reform agenda are that:

- (i) CARICOM Member States have comparatively fewer BITs. No CARICOM Member State has more than 12 or 13 BITs in force. Generally, more BITs lead to a greater pool of potential claimants;
- (ii) CARICOM Member States have a small number of regional treaties with investment provisions;
- (iii) CARICOM Member States have been involved in comparatively fewer ISDS cases. Several of these ISDS cases arise under contracts and not BITs. Furthermore, there have not been in recent times multiple, related cases or multiple concurrent proceedings. Although cases with claimants from CARICOM countries are arising, most countries remain in the position of potential respondents.

CARICOM countries by and large have not experienced the issues driving the principal concerns identified in prior sessions of the UNCITRAL Working Group meetings. However, based on the number of old generation BITs in force and the changing investment landscape, particularly because of the Coronavirus pandemic, the risk for ISDS claims is high. Additionally, given the intensive focus on procedural reforms and proposed improvements to the ISDS

¹⁰ Caribbean Community, Forum on International Investment Agreements, Barbados, 30 September –2 October 2019.

regime, this is the opportune time for the region to ensure that it is involved in reshaping the global investment regime.

CARICOM partners agree that their domestic legal frameworks need to be upgraded to adequately address the concerns of investors without resort to international arbitration. However, this is a challenge for the region due to inadequate resources, and regional courts continue to struggle with a backlog of cases. Recognizing the deficiencies in domestic law and courts, the following recommendations are being proposed by some CARICOM partners:

- (i) increasing the number of judges and providing additional training for judges in the area of investment law;
- (ii) recourse to separate or special mechanisms for the settlement of commercial disputes, which may lead to such disputes being handled more expeditiously than through the regular court system;
- (iii) establishment of respected arbitration centres in the Caribbean upon which investors can rely;
- (iv) the extension of the original jurisdiction of the Caribbean Court of Justice (CCJ) to investment disputes (although not all CARICOM partners agree with this recommendation due to disagreements over the appropriate jurisdiction for the CCJ).

Such improvements could reduce the risk profile of Member States, by signalling to investors the existence of a robust legal system.

The following Box suggests some principles and objectives relevant for the negotiation or revision of BITs by Jamaica.

Recommendations and Guiding Principles being considered and, in some cases, adopted by Jamaica

Jamaica is being guided by global best practice principles in international investment negotiations so as to ensure that the investment regime is mutually satisfactory to both investors and the host state, including the following:

Investments should be defined in BITs in a way which affords protection to long-term investments with significant development impacts rather than speculative short-term investments.

Developing countries should put in place policies which attract investments that facilitate structural transformation of the economy and include related positions in investment negotiations.

Existing BITs have significant dispute settlement procedures which involve international arbitration, which can be costly, and historically has not favoured developing country host states in terms of the awards of claims. Developing countries should engage in negotiations for reform of the existing arbitration process, such as allowing only state to state arbitration with the consent of the host state.

In negotiating investment agreements, carve outs (exclusions or limitations) should be considered for sensitive sectors in which the host state might want to maintain a certain level of control for development purposes, such as natural monopolies, national security and sensitive technologies. For this reason, developing countries should be careful about mixing trade liberalization with investment liberalization.

Investment treaties should not be treated in the same way as trade agreements because the scope and impacts are different. Therefore, the World Trade Organization (WTO) may not be the best forum for investment negotiations, as too many trade-offs would be required which could negatively affect the negotiated terms of investment agreements. However, developing countries should engage with the WTO if investment discussions take place there. In this case, unified objectives should be determined and negotiated with solidarity.

Developing countries should consider removing MFN clauses from investment agreements where these exist. MFN clauses obligate the parties to the agreement to share the same benefits given to other parties in other agreements. MFN clauses should not be applied to ISDS provisions in treaties because these are used by investors to import more favourable dispute settlement provisions from other, sometimes older, treaties which put host states at a disadvantage, and are also used to avoid investor obligations.

The language of the new generation of BITs needs to be more precise to preserve policy space for the host state to achieve development goals. In this vein, there should be explicit recognition of sustainable development and the right to regulate.

With regard to the treatment of older-generation treaties, the options are renegotiating and amending existing investment treaties; jointly interpreting existing investment treaty provisions; and terminating existing investment treaties.

Investment treaties should not grant greater rights for foreign investors compared to local investors.

Dispute avoidance measures should be considered which give the host state and investors the ability to invoke certain remedies. Domestic laws should attempt to address the concerns of investors.

Developing countries could consider how to address their most pressing problems around ISDS. Interim measures could include: a moratorium on ISDS; a requirement for the exhaustion of local remedies; setting up interim rosters of adjudicators; provisions on costs; or an agreement to suspend or terminate outdated treaties.

The Way Forward

UNCITRAL WGIII is considering ISDS reforms, including replacing arbitration procedures under BITs with a multilateral investment court. The EU is proposing a multilateral investment court as part of the reform process, and this is an initiative that Jamaica is also considering. This might

subject dispute settlement procedures to legal precedents, reviews and appeals, unlike the current arbitration process.

Jamaica, along with other developing countries, is considering supporting the recommendation that UNCITRAL be the international forum in which dispute settlement is addressed, with the solutions replacing the existing dispute settlement rules in existing treaties. This would require renegotiating these treaties.

CARICOM has developed a BIT template which defines substantive standards of protection with greater precision and includes investor obligations. In terms of ISDS procedure, the template includes: a code of conduct for arbitrators; provisions for joint interpretations; transparency; preliminary objections and consolidation; non-party interventions; and amicus curiae.

Conclusion

A regional approach for investment negotiations might be best for small developing countries like Jamaica. In this vein, Jamaica and its CARICOM partners are considering whether the international legal arrangements for investment protection and the current reform proposals serve their best interests and are in alignment with the United Nations Sustainable Development Goals (SDGs).

International investment negotiations going forward will look at broad systemic reforms which focus on how international law should promote the relationship between FDI and the SDGs.

Author: Omar Chedda, Senior Director, Investment Unit, Ministry of Industry, Investment and Commerce, Jamaica. E-mail: omar.chedda@miic.gov.jm

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

SOUTHVIEWS is a service of the South Centre providing opinions and analysis of topical issues from a South perspective.

To view other articles in SouthViews, please [click here](#).

To see the previous version of SouthViews, please [click here](#).

For more information, please contact Anna Bernardo of the South Centre: Email bernardo@southcentre.int, or telephone +41 22 791 80 50.