



World Investment Forum 2014: Investing in Sustainable Development

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According to UNCTAD, German FDI abroad has almost doubled since 2000, and increased fivefold since 1990. Through their foreign investments, German companies have direct or indirect influence on 34,686 foreign firms and have contributed to the creation of around 6.5 million jobs (2012) abroad. The increasing significance of FDI for Germany is also reflected by the fact that German industry sells more than twice the volume of goods abroad through these direct investments (2012: €2.4 trillion) than it exports from Germany (2013: €1.1 trillion). Germany was the first country in the world to conclude an IIA when it signed a treaty with Pakistan in 1959. Germany currently has 139 IIAs, of which 131 are in force, making it the country with the highest number of IIAs, followed by China and Switzerland.

The primary objective of IIAs (and of investment protection chapters in FTAs) is and should be to create legal certainty for investors by protecting them against events such as expropriation without proper compensation. By making an investment, investors commit to a long-term relationship with the host state. Germany's current IIAs provide German investments abroad with a high level of protection. When the Treaty of Lisbon entered into force in December 2009, the regulatory competence for FDI was transferred from the EU Member States to the EU.

What are the key areas and pressing issues in IIAs and investment dispute settlement that need to be addressed?

In the last months, a public debate has flared up on the topic of IIAs. The critics fear that IIAs, and in particular ISDS, restrict the host state's ability to regulate in the public interest. The debate has been fuelled by several ongoing arbitral proceedings (e.g. Vattenfall, Philip Morris). Meanwhile, several countries have unfortunately revoked their IIAs (e.g. South Africa, Bolivia). Critics have a valid point in one important respect: many of the existing IIAs and current practices within ISDS do have some weak points. Instead of rejecting IIAs and ISDS in general, however, BDI calls for a reform of these instruments. For BDI, key areas and pressing issues in IIAs and investment dispute settlement are:

- **The effectiveness of dispute settlement:**
The ability to seek international arbitration has already proven its worth in IIAs. It enables disputes to be settled in a relatively fast, objective, and depoliticized manner. Also future IIAs must provide effective protection.
- **Vague legal concepts:**
IIAs contain a series of principles whose formulation often leaves much room for interpretation. For example, the definition of indirect expropriation in existing IIAs is often vague and leaves room for questionable claims. This term should therefore be defined more precisely. We need to find a compromise that grants investors protection against indirect expropriation, but still leaves governments the scope they need to adopt regulations for the common good. At the same time, it would be advisable to define "fair and equitable treatment" more precisely.
- **Unjust or frivolous lawsuits:**

IAs should include a protection mechanism against unjustified or frivolous claims. However, regulations to reduce frivolous claims should not be formulated in such a way as to block justified claims from reaching arbitration.

- **Lack of transparency:**
Arbitral proceedings are not completely transparent. This is not possible, as trade secrets have to be protected. At the same time, ISDS proceedings should be as transparent as possible, and much work is currently being done to achieve this. UNCITRAL has adopted the new Rules on Transparency in Treaty-based Investor-State Arbitration, which were implemented in April 2014. Similar rules have already become standard features in the most recent U.S. IAs and should become the standard for IAs of the EU.
- **Conflict of interests of arbitrators:**
Even if there is no empirical evidence, critics fear that arbitrators might have a pro-investor bias. According to UNCTAD, of all resolved ISDS cases up to the end of 2013, 43% were decided in favor of the State. Under ISDS rules enshrined in U.S. investment treaties, arbitrators are held to high standards of fairness and impartiality. These rules will and should be further explored and modified in a TTIP investment chapter.
- **Restriction of State sovereignty and undermining of regulatory authority:**
States undoubtedly need adequate policy space and the protection of their right to regulate. The texts of future IAs of the EU should include carve-outs to ensure that the State has the ability to regulate for the legitimate protection of human, plant and animal health, and the environment.
- **No appellate procedure:**
Arbitral decisions are currently final and binding. It would, however, be advisable to establish an appeal mechanism. A broader appeal mechanism could be structured in a way similar to that of the appellate body of the WTO's Dispute Settlement Body.

What are the key ways and means to address these issues?

The international system of traditional IAs is under pressure. Countries terminate IAs, parts of society see the system critically. The EU and the United States are the largest economies in the world. The negotiations for a TTIP investment chapter could be used to jointly develop a new standard for modern IAs. Such a discussion must include as many societal groups social forces as possible and must be managed professionally and seriously. Such a discussion could bring benefits for all parties involved. It could increase the acceptance of society for international investment protection and promote mutual understanding between business, government, and society. Finally, a guided dialogue can lead to establishing a global standard, which can be used as a guideline for future IAs with developing countries and with emerging industrial countries.

What types of mechanisms and platforms are needed to facilitate reform?

Only a standard which is acceptable for all societal groups could sufficiently serve as a global standard for IAs. Currently, however, the international law of investment protection looks like a spaghetti bowl. International organizations should therefore promote modern protection standards. Institutions such as ICSID, UNCTAD, UNCITRAL, or ICC, which deal with ISDS and IAs, should focus their attention on developing new investment protection standards.

In the long run, IAs should become multilateral. The long-term objective of European investment protection policy should be a multinational agreement on the protection of cross-border investments. This kind of agreement would promote global economic integration and growth. It would be a good idea to put investment policy back on the WTO agenda. The development of guidelines for IAs and ISDS could then be initiated in the context of G8/G20 talks.

Background Documents:

- BDI Position Paper "Protecting European Investment Abroad: A Roadmap for Improved International Investment Agreements" http://www.bdi.eu/images_content/GlobalisierungMaerkteUndHandel/BDI_Protecting_European_Investment_Abroad.pdf
- BDI Position Paper "The 'I' in TTIP. Why the Transatlantic Trade and Investment Partnership Needs an Investment Chapter" http://www.bdi.eu/Direktinvestitionen-Lissabon_18755.htm
- BDI Background Information "Facts and Figures. International Investment Agreements and Investor-State Dispute Settlement" http://www.bdi.eu/images_content/GlobalisierungMaerkteUndHandel/BDI_Facts_and_Figures_International_Investment_Agreements.pdf