CONCEPT NOTE
for a policy advisory group seminar on
South Africa, Africa, and International Investment Agreements

Stellenbosch, South Africa
17-18 February 2014

Co-organised by the Centre for Conflict Resolution (CCR), Cape Town, South Africa
and
the Department of Trade and Industry (dti), Tshwane, South Africa
Introduction
The Centre for Conflict Resolution (CCR), Cape Town, South Africa, in collaboration with South Africa’s Department of Trade and Industry (dti), will hold a policy advisory group seminar at the Devon Valley Hotel, Stellenbosch, South Africa, from 17 to 18 February 2014 on “South Africa, Africa, and International Investment Agreements”. The seminar builds on three key policy seminars convened by CCR in the past two years: “The African, Caribbean, and Pacific (ACP) Group and the European Union (EU)” held in Cape Town in October 2012; “South Africa in Southern Africa” held in Cape Town in November 2012; and “Post-Apartheid South Africa’s Foreign Policy After Two Decades” held in Cape Town in July 2013. The Stellenbosch seminar in February 2014 will also build on the expertise of South Africa’s dti in relation to the challenges and impact of international investment agreements.

At a time of great change in the global economy, the meeting will engage in an intensifying and widening debate on the implications of international investment agreements (IIAs) – including bilateral investment treaties (BITs) – for development efforts in Africa. The principles that underpin these international agreements, which were conceived in the immediate post-colonial era and in the context of the Cold War, are increasingly at odds with emerging economic challenges confronting developing countries. In Africa, the terms and conditions imposed by these accords threaten to constrain continental economic programmes to effect the structural transformation required to achieve sustainable development. In response to concerns about the limited benefits of bilateral investment treaties and the extent to which these agreements can impede national fiscal and regulatory actions to advance the public interest, South Africa introduced a “Promotion and Protection of Investment Bill” in November 2013 to replace these treaties, and has terminated others as they have come up for renewal.

Seminar Themes and Objectives
The February 2014 Stellenbosch policy advisory group seminar will bring together about 30 mostly African policymakers, scholars, and civil society actors to present and discuss 12 policy papers in four broad topic areas:

1. **Foreign Direct Investment (FDI) and International Investment Agreements**, with a focus on the range of approaches adopted by policymakers in relation to foreign direct investment, and the policy perspectives embedded in international investment agreements;

2. **The Provisions, Settlement, and Impact of International Investment Agreements**, including a critique of these treaties in relation to their structure and core provisions; the measures for settling disputes between states and investors emanating from the agreements; and the relationship between such treaties and FDI flows;

3. **Government Responses to International Investment Agreements**, including how states are reviewing and addressing the legal and policy implications of their commitments under agreed and proposed treaties; and

4. **International Investment Agreements and Africa**, with a focus on how these instruments relate to the continent’s emerging agendas for structural transformation and sustainable economic development, and how African governments and regional institutions can shape the current and next wave of international investment agreements accordingly.

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The Stellenbosch meeting aims to draw lessons from the debate on the impact of international investment agreements and bilateral investment treaties for Africa’s economic development strategies. It will also seek to contribute to a body of knowledge that can inform policymaking responses to these agreements, examining case studies such as South Africa, Nigeria, Kenya, and Brazil, and the range of political and legislative approaches that have been, and may be, taken towards negotiating international investment agreements. In particular, the seminar aims to strengthen the capacity of key decision-makers in Africa to address the challenges and maximise the benefits of these treaties more effectively.

1. Foreign Direct Investment and International Investment Agreements

Foreign direct investment can play an important role in economic development, as it is associated with a long-term commitment to the host country that generates inflows of capital and finance; technology; managerial best practices; and access to global markets. However, views of the impacts of FDI vary widely. Some governments emphasise the benefits of all such investment for enhancing growth and development, and consequently seek to attract such investment by providing strong protections to foreign investors; liberalising investment regimes; and reducing or limiting the regulations and conditions on investors. International investment agreements embody and promote this perspective which represents the ideology of the “Washington Consensus”.

An alternative view acknowledges the contributions that FDI can make to sustainable development, but recognises that the benefits of such investment to host countries are not automatic. Governments that adopt this view believe that regulation is necessary to balance the economic protections sought by investors against the benefits that incoming investment is expected to bring to national development strategies and objectives. Such governments will seek to promote a regulatory regime for FDI that sets clear conditions on issues like technology transfer; managerial best practices; skills development and research; and support for national economic goals.

The latter perspective reflects the variable impacts of FDI more accurately than the former. Although FDI has been shown to enhance economic development in some cases, the way in which it has been used has also contributed to significant environmental damage, created distorted enclave-type development, and threatened the balance of payments in some countries. In fact, international investment agreements are not designed to address environmental and developmental issues, but merely to provide favourable terms for foreign investment. The treaties impose legal obligations on governments to provide wide-ranging protection to investors, which can constrain the ability of legislatures to fulfil their regulatory mandate in the public interest. For example, investors may seek to block tax regimes such as levies on mineral exports, which promote national development by redirecting resources from primary sectors to support industrialisation efforts. In addition, under the dispute settlement provisions of these agreements, only investors – often big international corporations – can initiate legal cases in the event of disputes, while African governments have no recourse to challenge errant behaviour by foreign investors.

Furthermore, foreign investors can challenge any measure by African and other governments that they perceive to be diminishing their subjectively defined expectations of appropriate returns on investment under these agreements. For example, government measures aimed at protecting public health or the environment may be challenged if they are seen to damage the value of an investment. American tobacco giant, Philip Morris, has initiated two such cases under separate international investment agreements in Australia and Uruguay against anti-smoking legislation. These agreements can thus discourage or restrict the impact of government policy-making, as well as legislative and regulatory authority in important areas. As a result, the debate on the future of international investment agreements has increasingly centred on rebalancing the relationship between investor protections and government rights to regulate in the public interest.


International Investor Agreements Provisions and Arbitration

Many international investment agreements, particularly early-generation treaties, contain imprecise provisions that leave wide scope for inconsistent and unpredictable outcomes when subjected to international arbitration. Definitions of “investor” and “investment”; “fair and equitable treatment”;
protection against “expropriation”; and “indirect expropriation”, have all been the subject of extensive legal wrangling, varying interpretations, and conflicting arbitration awards.4 Expansive definitions of “investment” can provide protection to any “asset” in the other signatory’s territory, whether such investment constitutes part of a productive enterprise – as in the case of traditional FDI – or not. Using this broad definition, investors and investment tribunals continue to interpret the provisions on “fair and equitable treatment” and the right to a “stable and predictable regulatory environment” to circumscribe the authority of African governments, including their power to change taxation rules. Similarly, the definition of “expropriation” has been extended to include not only direct expropriation, such as taking over property, but also “regulatory takings”, which can cover any new policy measures that affect potential investment revenues and profits. International investment agreements can also constrain requirements for investors to transfer technology and skills, enter into joint ventures with domestic firms, and enhance local content in production processes.

Meanwhile, the investor-state dispute settlement (ISDS) system under which investors can bring cases against governments is fragmented. A range of venues offer arbitration, each with its own history, culture, and rules of procedure. The three arbitrators on each of the panels convened to hear cases are chosen in a relatively ad hoc manner. The system lacks an institutional framework that enshrines the principles of judicial accountability or independence, and arbitrators can award damages without having to apply the various limitations on state liability that have evolved in domestic legal systems. In the absence of an appellate process that ensures consistent and appropriate application of international law, these panels have sometimes produced contradictory interpretations and awards in cases that address the same provisions and similar facts. The system’s inconsistency, which has grown as dissent among the arbitrators has increased, has thus created great uncertainty about the meaning of key obligations under existing and proposed treaties.5 In addition, great concerns have been raised over the legitimacy of these arbitration bodies to assess Acts of state, particularly on sensitive public policy issues.

Nevertheless, the investor-state dispute settlement system has become a multi-billion-dollar industry. The number of cases and the sums of money involved have surged in the past two decades, as litigation in this area has become part of the business model for international investors and lawyers. On average, each investor-state dispute costs $8 million in legal and arbitration costs, with some cases costing more than $30 million. The industry is dominated by a small group of Western law firms and arbitrators. Fifteen arbitrators have decided on 55 percent of disputes. Furthermore, the same group of lawyers rotate between representing claimants, representing respondents, and sitting on arbitration panels – raising serious concerns over conflicts of interest.6

Imprecise provisions in treaties, the lack of an institutional framework to safeguard their proper implementation, and the perception of bias towards the interests of investors rather than governments have resulted in a crisis of legitimacy in the system, which has been amplified by the rapid growth in investor claims against a growing number of government measures.7 After the first such claim was brought in 1987, 49 further cases were initiated by 2000. By 2012, the total number of claims had grown to 514. Ninety-five governments have faced challenges under the investor-state dispute settlement system, of which 61 (more than two-thirds) have been in developing countries. In 2009/2010, 151 investment arbitration cases involved corporations claiming up to $100 million from states. In addition, the success rate for claims is growing. In 2012, 75 percent of all decisions were in favour of investors, with the largest — against Ecuador — awarding an investor $2.4 billion.

In Africa, 25 percent of reported investor-state arbitrations involve mining, oil, and gas investments – all critical sectors for the continent’s development. Globally, claims have been brought against governments for alleged revocations of licences in mining, telecommunications, and tourism;

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7 UNCTAD, “Recent Developments in Investor-State Dispute Settlement”. 

breaches of investment contracts; irregularities in public tenders; changes to domestic regulatory frameworks for gas, nuclear energy, gold marketing, and currency; withdrawal of subsidies for solar energy; direct expropriations of investments; environmental measures; and new taxation. Several cases have their origins in the financial crisis of 2008/2009 and are aimed at government austerity measures, some of which were introduced at the behest of international financial institutions.

**The Impact of International Agreements on Investment**

The central argument advanced by proponents of international investment agreements is that by granting the robust legal protections sought by investors – and thus sacrificing policy space and some measure of regulatory autonomy – countries will receive greater inflows of foreign direct investment. However, the correlation between the signing of bilateral investment treaties and increased FDI has been shown to be weak. An analysis by the United Nations Conference on Trade and Development (UNCTAD) of data collected from 133 countries between 1993 and 1995, found that the impact of bilateral investment agreements on foreign direct investment was non-existent or marginal, and secondary to the effects of other determinants, particularly market size. A more recent study by UNCTAD in 2009 concluded that these treaties “impact FDI inflows into developing countries only indirectly”.

Some research has found that developing countries that sign the greatest number of bilateral investment treaties with rich countries receive more foreign direct investment. But other research appears to contradict this. For example, a survey of FDI flows from 20 members of the Organisation for Economic Cooperation and Development (OECD) to 31 developing countries between 1980 and 2000, found that countries with weak domestic institutions had failed to receive significant benefits from bilateral investment treaties, although these could promote enhancement of property rights in countries with stronger institutions. The research also showed little evidence that bilateral investment treaties stimulated investment, particularly in sub-Saharan Africa, and, in fact, demonstrated that they sometimes imparted greater rights to foreign investors than those enjoyed by domestic businesses. These treaties also exposed policymakers to potentially large-scale liabilities that curtailed their options for economic development. In addition, these agreements generally failed to encourage greater direct investment in riskier environments, only having a positive effect on investment flows in countries with an already stable business environment, and not in low- and middle-income countries.

By contrast, some leading economic powers receive substantial FDI although they have signed few or no bilateral investment treaties. Japan, the second largest source of foreign direct investment in the world, has only four such agreements. Washington does not have a bilateral investment treaty with Beijing, although China is the largest developing country destination for American FDI. Brazil, a recipient of substantial foreign investment, has refused to ratify any bilateral investment treaties on the basis that its Congress regards these accords to be unconstitutional. A 2010 study on international investment agreements across the world concluded that “Countries that refuse to sign BITs [bilateral investment treaty], or who allow their BITs to lapse, will probably not see a meaningful reduction in investment flows…. If developing countries wish to attract foreign investment, they probably need to do something other than sign and ratify BITs.”

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3. Government Responses to International Investment Agreements
As the “second generation” of bilateral investment treaties negotiated in the 1990s have expired, they have been critically reviewed by governments. National policies on such agreements have been significantly changed to mitigate their inherent shortcomings and risks, as well as the drawbacks of the investor-state dispute settlement system. The changes sought in the next generation of treaties vary between capital-exporting and capital-importing countries, and also according to whether there is confidence that a government’s right to regulate can be assured through appropriate reform of the dispute system. Inconsistencies and overlaps in the multifaceted and multilayered regime of international investment agreements have been addressed. Some countries appear to have pushed for international accords that support inclusive growth and sustainable development objectives, notably through the strengthening of the right of governments to regulate in the public interest. In addition, some attempts have been made to locate the investment protection afforded by these treaties within broader human rights frameworks.

Actions that countries are pursuing to address the challenges posed by international investor agreements include: clarifying the meaning of treaty provisions through authoritative interpretations; revising agreements through amendments; replacing older treaties through renegotiation; and terminating and/or consolidating agreements either unilaterally or by mutual consent. The end of 2013, more than 1,300 bilateral treaties may have been terminated or renegotiated. By 2018, a further 350 bilateral agreements will have reached the end of their initial terms.

After a three-year review of its treaties in 2010, South Africa decided to revise its national legislation protecting investment, and to terminate existing agreements while offering the possibility of renegotiating them on the basis of a new Southern African Development Community (SADC) Bilateral Investment Treaty Model. This sub-regional template sets out provisions that mitigate the risks of earlier treaties, and seeks to provide recourse to procedures for settling state-to-state as well as investor-state disputes. In Latin America, several countries have withdrawn from the International Centre for the Settlement of Investment Disputes and are withdrawing from international investment agreements. At the same time, they are seeking to establish a regional alternative for dispute settlement under the Union of South American Nations (UNASAR). In 2012, Australia decided to exclude the investor-state dispute settlement system in future investment accords, although this decision may be reversed.

Over the past decade, reviews have also been undertaken in Canada, Norway, the United States (US), Sweden, and, more recently, the EU and India. The US and Canada have revised their model investment treaties, making modest and not always successful efforts to adopt interpretative statements; redraft certain key provisions and clarify others; and grant greater authority to governments to interpret the meaning of the obligations undertaken. The EU is also rethinking its traditional approach to these agreements, as the competence for negotiating investment accords has moved from its member states to the regional body under the 2009 Lisbon Treaty. Although Brussels is likely to continue to resort to the investor-state dispute settlement system, it has proposed new approaches to enhance transparency of process, the independence of arbitrators, and the predictability of the agreements themselves, including through the possibility of binding interpretation by the parties involved. The EU has also mooted an appellate mechanism to ensure greater consistency in arbitration.

4. International Investment Agreements and Africa
Recent changes in the global economy have been accompanied by significant improvements in Africa’s economic prospects. The continent is growing faster than any other, and offers the highest return on investment of any region. Six of the ten fastest growing economies in the world between 2000 and 2010 were in Africa. The continent’s growth has been driven by a boom in mineral exports,

combined with expansion of the agriculture, transport, telecommunications, and retail sectors. Africa has enormous reserves of raw materials, 60 percent of the world’s unused arable land; a young, increasingly urbanised population; and a growing middle-class with considerable purchasing power. These factors and the continent’s steady improvements in economic governance indicate that Africa could become the next leading source of global growth.

Africa’s most important economic objective, however, is to move from a growth path based on consumption and commodity exports to one of sustainable development using the continent’s natural resource base as a platform for diversification and industrialisation. African governments and leaders have committed to this transformation, which will require a range of new policies and regulations including measures to harness the benefits of foreign direct investment.

Meanwhile, the international investment regime exhibits a pro-investor bias, placing their concern to protect their interests above the rights of African governments to regulate in the public interest, thus inhibiting efforts by low-and middle-income countries to promote sustainable development. In light of this, African governments, through the African Union (AU), may consider pursuing a comprehensive review of all their international investment agreements. This review should focus on assessing the risks posed by these accords to policies that seek structural transformation of the continent’s economies. African governments could also consider a moratorium on signing new treaties until this assessment has been completed, bearing in mind that there is no direct or clear link between signing international investment agreements and inflows of FDI, which all countries seek. Indeed, since investors are motivated primarily by the prospects for returns on investment, which are generally high in Africa, they are likely to continue to invest on the continent even without international investment accords. Meanwhile, African governments should focus on strengthening their domestic legal frameworks in order to offer the protections sought by foreign investors.

African countries also need to consider how to deal with the existing international investment agreements that they have signed. Options adopted by countries in other regions to deal with international investment agreements that may not be beneficial have included: termination, renegotiation, and revision. The challenges posed by each of these options could also be a subject for comprehensive review. Consideration may also be given to creating an Africa-wide investment protection framework that mitigates the risks created by the earlier treaties and provides a more appropriate balance between investor protection and the right of governments to regulate in the public interest. Such a framework could include the establishment of an African-based investment arbitration centre. African governments should also participate more actively in the intensifying global debate on international investment agreements and the investor-state dispute settlement system in order to promote their own development agendas more effectively.

Dissemination

Following the Stellenbosch policy advisory group seminar in February 2014, a six-page policy brief and 30-page seminar report will be produced by CCR, and widely disseminated in Africa, Asia, Europe, Latin America, and the US, including to African governments; sub-regional bodies on the continent; diplomatic missions at the AU in Addis Ababa; the African Union Commission; UN missions in New York; key foreign embassies in South Africa and the rest of the continent; officials of South African and other African governments and parliamentarians; African university libraries; and African and relevant past participants at the Centre’s past policy seminars. The dissemination will prioritise key practitioners and scholars in African states. The policy report and brief will also be made available on CCR’s website. Launches of the report will be organised to target key officials involved in investment policy development in African countries and their main trade partners. As part of its post-seminar monitoring and evaluation efforts, the Centre will also systematically employ follow-up communication and meetings with key officials to ascertain how the policy recommendations that emanate from its research can best enhance their work.