



Investor State Dispute Settlement and COVID-19: Challenges and actions to protect the economic recovery in Africa

Summary of webinar held on 14th December 2020

Introduction

The ODI and the African Union (AU) Commission, with the support of the UK's Foreign, Commonwealth and Development Office (FCDO) organised a webinar aimed at discussing the Investor State Dispute Settlement (ISDS) cases in the context of policies and restrictions adopted by African Governments to address the COVID-19 pandemic and the economic crisis. The online event attracted almost 80 participants from African Union member states and other interested parties.

Background

The COVID-19 pandemic has generated the worst economic and social crisis over the past decades. It has affected the lives of absolutely everyone in the world. It has been a truly global crisis. Governments everywhere reacted to protect the health of the population from the effects of the pandemic, including by introducing several restrictions on the activities of people, firms and institutions.

Africa governments have deployed a wide range of measures to provide adequate healthcare. They aimed at protecting incomes and livelihoods of people affected by the lockdowns restrictions and introduced measures to speed up the economic recovery after such an economic crisis.

These measures were generally designed and implemented with the aim of providing the best immediate response to a social, humanitarian and economic crisis. These responses may have changed the rules and policies affecting (foreign) investors and their investments. Some investors may see this as a violation of the rules that apply to their investments in the countries in which they operate. Many African countries have negotiated bilateral investment treaties (BITs) and International Investment Agreements (IIAs) that include ISDS provisions.

ISDS is a system through which investors (corporations) can take countries to an international trade and investment tribunal to resolve investment-related disputes. Under ISDS, corporates can initiate cases against governments due to practices that may have limited acquired rights or which discriminates against them.

If BITs do not include limitations to the use of ISDS such as the right to regulate, there is a risk that investors may make use of these provisions to request compensation to the host State in cases of additional costs or loss of profits generated by the interventions adopted during the middle of the crisis.

Aims of the event

The event was aimed at discussing the use of ISDS by investors in the current context and assess the impact that it may have on African states. It also explored both the legality of potential claims and the economic assessment of the ISDS actions.

Secondly, the event aimed to highlight the options available to governments to protect their countries and people from these claims. It also discussed the political discussions that can be undertaken with the agreement of counterparts to, for example, suspend the scope of these provisions.

Opening remarks

The event began with opening remarks from high level officials from the African Union and the UK Government. **Mr Hussein Hassam** (Director of Trade and Industry, AUC), representing H.E. Amb Albert Muchanga (AU Commissioner for Trade and Industry), highlighted the challenges that COVID-19 presents to all AU members but also highlighted the important role of the African integration, through the African Continental Free Trade Area (AfCFTA), in adopting a coordinated response and boost the economic recovery.

H.E. Amb Jason Grimes, UK Deputy Permanent Representative to the African Union, highlighted the support provided by the UK to the African continental integration and the different initiatives to increase trade and investment between the UK and Africa.

Panel discussion

The panel discussion was chaired by **Dr Max Mendez-Parra**, Senior Research Fellow at ODI. He set the scene of the discussion providing an introduction to the problem generated by the potential claims that investors may present under ISDS provisions to African Governments as a result of reduction of benefits or increases of costs.

The panel consisted of four renowned African experts on trade and investment law and policy.

Prof. Makane Moise Mbengue (Professor of International Law, Faculty of Law, University of Geneva) highlighted, first, that claims from investors are not an abstract risk and they present a real danger to African countries. Second, he described the main content of the African Union declaration of ISDS and COVID-19. He emphasised that this declaration is not a binding document and it is fully adjusted to International law. The declaration allows for AU member states for a mutual temporary suspension of ISDS. He highlighted that attracting investment remains a key objective of African countries and the actions to suspend provisions should not be seen as a change to this objective.

Dr Suzy Nikiema (Associate, International Institute for Sustainable Development (IISD)) highlighted that it will not be possible to avoid completely the emergence of ISDS cases. African countries need to be prepared. Some options (termination of BITs with ISDS provisions, amendments and joint interpretation) have limited impact as the scope of the original provisions of the agreements could extend further after the changes. The temporary suspension of the ISDS provisions of the BITs appear as the only option which would need to rely on a greater sense of cooperation between the parties. The temporary suspension of clauses is currently being considered in the International Law of Treaties.

Mr Hamed El-Kady (International Investment Policy Officer, United Nations Conference on Trade and Development (UNCTAD)) highlighted the need of a serious reform of the architecture of BITs. These needs precede the COVID-19 crisis but it is also necessary to deal with other global issues such as climate change. He highlighted that solidarity should be a key principle that should guide the reform of IIAs. He also mentioned the actions that UNCTAD is adopting to support countries to address potential ISDS claims.

Mr Prudence Sebahizi (Chief Technical Advisor, African Union Commission) highlighted that the sustainable investment protocol in the AfCFTA will provide a necessary balance between rights and

obligations of investors and States. He also highlighted the different negotiating capabilities between Member States and the role of the AU Commission in supporting them in negotiations. The AfCFTA provides also a strong political signal for a general reform of the IIAs involving African countries.

The presentations were followed by questions and comments from participants seeking to obtain clarifications or reinforce some of the concepts discussed by the panellists. The event closed with the appreciation and recognition to the organisers, panellists, participants and the support received by the FCDO.

Final comments

The reform of the investment protection system has been in the agenda before the COVID-19 pandemic. The reform is aimed to base IIA and BITs on a mutually beneficial relationship with balanced obligations between investors and States, aimed to create an adequate framework for the increase of sustainable investment. The COVID-19 crisis has added additional arguments for such a reform. Many of these elements are expected to be included in the sustainable investment protocol of the AfCFTA. This event has contributed to this process by creating awareness among member states and other interested parties.