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Topic: Investment agreements and the regulatory chill: an analysis on impact of investor-state arbitrations towards sustainable development.

Outline:

1. Overview of International Investment Agreements (IIA) Regime
2. Emerging needs and the role of IIAs - Reform Agenda
3. Investor-State Dispute Settlement System (ISDS) and regulatory chill - Global trend
4. Case law
5. PNG today and beyond
6. Recommendations

1. Overview of International Investment Agreements (IIA) Regime

IIA: “...is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory”, UNCTAD, 2022.

3,280

International Investment
Agreements

1,190

Investment Dispute
Settlement Cases

Known treaty-based ISDS cases:

Total: 1190

Pending: 368

Concluded: 809

Unknown: 13

Concluded original arbitration proceedings:

60%

of ISDS cases are decided
in favour of the investor



US\$125 million

is the average amount
awarded to investors in cases
won against the state

4 years

On average, an ISDS case
lasts four years and costs the
government defending the case
US\$4.7 million in legal fees.

Source: [Business & Human Rights Resource Centre \(business-humanrights.org\)](https://business-humanrights.org)

Emerging needs and the role of IIAs:

1. The COVID-19 pandemic has exposed and entrenched the imbalances of power in global economy. At the same time, it has demonstrated the inadequacy of existing non-binding tools to hold corporations to account.
2. Growing pressure on countries to implement climate policies, creating potential implications for Investor-State Dispute Settlement
3. Sustainable Development Imperatives – While environmental protection provisions have featured regularly in modern IIAs, they have typically focused on state obligations

Reform Agenda:

- In light of current and emerging global movements, there is increasing interest in reshaping investment treaties towards achieving sustainable development.
- - OECD is convening governments, stakeholders and experts from member and non-member countries to examine whether new or alternative content would lead to better outcomes.
- - Among the defining paradigms in recent international investment treaty practise is the widely accepted consensus to recalibrate Bilateral Investment Treaties (BITs) and other International Investment Agreements (IIAs) to embrace the Sustainable Development imperatives.
- Ref: http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf

Investor-State Dispute Settlement System (ISDS):

1. The ISDS mechanism exists in more than 2800 trade and investment agreements
2. ISDS was originally conceived as a means through which international investors could claim compensation if their assets were expropriated by a foreign government
3. Guarantee for stable investment environment, greater protection against direct/indirect expropriation

The Regulatory Chill:

Trade and investment agreements typically contain many of the provisions below, which can be enforced by foreign investors using ISDS mechanism:

1. *Expropriation provision* – limiting the context in which a state is permitted to expropriate asset, and how investors should be compensated
2. Provisions to claim compensation if a regulation is judged to have damaged profits – *indirect expropriation*
3. *Fair and equitable treatment* – allowing corporations to claim compensation on basis of being treated unfairly by host states
4. *National Treatment* – provisions establishing the principle that investors should be treated at least favourably as domestic investors
5. Most favoured nation clause (MFN) – allowing investors to automatically enjoy the advantageous privileges host offers

Case law:

- Asian Agricultural Products Ltd (AAPL) v Sri Lanka, ICSID Case No ARB/87/3 [54]
- ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16
- CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8
- Glamis Gold, Ltd. v. The United States of America, UNCITRAL
- Perenco Ecuador Ltd v. Republic of Ecuador, ICSID Case ARB/08/6, Interim Decision on the Environmental Counterclaim (11 Aug 2015), [319]
- Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12
- PNGSDP Ltd. v. Independent State of Papua New Guinea (ICSID Case No. ARB/13/33)
- Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID/ARB/11/28, Decision on Annulment of December 30, 2015, paras. 86-92
- Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26

PNG today and beyond:

- PNG recognizes investment as an integral part of economic trajectories.
 - Encompassing its investment deals are the number of investment agreements
 - The country currently has signed 6 BITs (of which only 5 are in force) and 3 of which contain Investment Provisions (TIPs). The only BIT not in force is PNG-Malaysia BIT (Signed on: 27/10/1992, but not in force).
1. Japan - Papua New Guinea BIT (2011) - Date of signature: 26/04/2011
 2. Malaysia - Papua New Guinea BIT (1992) - Date of signature: 27/10/1992
 3. China - Papua New Guinea BIT (1991) - Date of signature: 12/04/1991
 4. Australia - Papua New Guinea BIT (1990) - Date of signature: 03/09/1990
 5. Papua New Guinea - United Kingdom BIT (1981) - Date of signature: 14/05/1981

Cont:

- While the rest 4 of the BITs happen to have being concluded during period between 1980s and 1990s, the only BIT that stands out from the rest is that with Japan. The Japan-PNG BIT is a recent undertaking and falls within the new generation treaties.

- The Japan-PNG BIT is a recent undertaking and falls within the new generation treaties. The important aspect of this treaty emanates from the preamble of the agreement which refers to sustainable development as the objective to which investment in both countries should be geared towards.

- Preamble:

...(both countries acknowledge) that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development and that cooperative efforts of the Contracting Parties to promote investment can play an important role in enhancing sustainable development... (Emphasis included)

Recommendations:

- Recognising the risks of the ISDS system, seeking ways to modernise existing treaties would be a valuable step
- E.g. Pakistan, South Africa and Tanzania have gone beyond that to terminate or renegotiating existing agreements containing ISDS
- State can take lead in involving a range of stakeholders in the formulation of trade and investment policy/agreements
- In line with UN Guiding Principles, state can enact binding regulations to ensure companies perform robust due diligence to prevent any social and environmental harm, provide remedy to affected workers and communities when abuse does occur, and adopt environmental targets in line with climate science.