

Policy brief

The expiry of the Uganda-Netherlands Bilateral Investment Treaty (BIT): Proposals for its review

Introduction

In recent years, Foreign Direct Investment (FDI) has grown at an unprecedented rate. There is probably not a developing country in the world that does not work hard to attract more FDI. Political leaders and policymakers know that FDI can bring with it jobs, capital, skills and technology. Foreign investment can also complement domestic investment when the activities of foreign enterprises generate spillover effects to the local economy through joint ventures, competition, local purchases, skills development and technology transfer, labour incomes and other vertical linkages. FDI can crowd in domestic investment hence stimulating local investment.

The debate on how to increase FDI inflows remains high on many developing countries' agendas. However, one of the most popularly used strategies today that has been assumed to guarantee FDI inflows from FDI exporting countries to FDI importing countries are Bilateral Investment Treaties (BITs). A BIT is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory. Currently, Uganda has signed BITs with 15 countries including the U.S, China, the Netherlands and the United Kingdom. The BIT between Uganda and the Netherlands will expire on 1st January 2018 and therefore an analysis of BITs and their implications for both investment levels and the distribution of the gains from the investments is timely.

Uganda's investment policy regime

Since 2010, the amendment of the Uganda Investment Code Act, Cap 92 which is the overarching investment policy framework in the country has been ongoing and is currently in Cabinet. It spells out the legal provisions relating to facilitation, protection and promotion of local and foreign investments in Uganda, including provisions for more favorable conditions for investment. It also establishes the Uganda Investment Authority (UIA).

In addition to the existing national framework, the country has signed a number of investment agreements i.e. BITs and Free Trade Agreements with investment provisions. Globally and even among the EAC partner states, BITs are the most common international investment agreements that have been signed.

The increasing push to negotiate and sign BITs has followed the continued rejection by developing countries to introduce a binding agreement on investment within the Multilateral Trading System. Today, Uganda has signed 15 BITs without a clear guiding document for these negotiations. However, the Government of Uganda under the Ministry of Trade, Industry and Cooperatives has now embarked on a process to develop a more comprehensive Uganda BIT model. The model will act as the guiding document for all future BIT negotiations with third parties. It is also hoped that this process and subsequent document will inform/ guide the review of existing BITs that have reached their expiry. One such BIT is the Agreement for encouragement and reciprocal protection of investments between the Republic of Uganda and the Kingdom of the Netherlands which will expire on 1st January 2018.

Why the urgent need to review the Uganda - Netherlands BIT

The Agreement for encouragement and reciprocal protection of investments between Uganda and Netherlands was signed in 30th May 2000 and came into force on 1st January 2003. This agreement replaced another agreement that had been signed between the two parties on 24th April 1970 and had been in force for 33 years. The current agreement, under Article 14, provides that the Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with, and shall remain in force for a period of fifteen years. It further provides that unless notice of termination has been given by at least one of the Contracting Parties at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for another period of ten years.

If neither Uganda nor the Netherlands make a notification at least 6 months before 1 January 2018 to either renegotiate or terminate this agreement, it will automatically be renewed for a period of 10 years.

The justification for the review of this investment agreement is motivated by a number of issues. Some of these issues include the fact that an analysis of the agreement and other agreements that Uganda has signed over the years reveal a number of gaps as far as the development interests of Uganda and its citizens are concerned. These agreements are largely silent on human rights, gender and environment issues. It provides for the protection of the rights of the foreign investors at the expense of Ugandans' rights. It is silent on performance requirements, local content promotion and undermines the policy space and right of the Ugandan government to regulate and pursue development goals. Given these gaps, such agreements place Uganda and its citizens in an untenable situation when dealing with foreign investors established under the agreements.

80 workers' exposed to poisonous chemicals at a Dutch flower company

An international company, Royal Van Zanten which deals in nursery plants and flowers, established and operating under the auspices of the Uganda-Netherlands BIT was on 25th October 2016 reported in the Daily Monitor to have exposed 80 workers working in the flower farm to poisonous chemicals (Metam sodium) without protective gear. Exposure to this pesticide causes allergic dermatitis and respiratory allergy; and in the long term cancer and mental illness. In addition these workers are also to be working for very long hours, with low pay and unpaid leave, including maternity leave for those that needed it.

The Uganda Horticultural Industrial Services Provider and Allied Workers Union (UHISPAWU) and the Uganda Association of Women Lawyers (FIDA) protested against this mistreatment of the farm workers most of whom are women.

Although efforts have been made by human rights defenders in Uganda to have the women compensated, they have not yet been fully successful. The limitations to this largely emanates from the gaps that exist within the country's legal frameworks, in this case, the Uganda Investment Code and the BIT which do not address issues of workers' rights, health rights and the environment. It is imperative that investors observe minimum human rights, environmental and labour standards, however, protection of these rights and minimum standards must explicitly be provided for in the legal frameworks. Reviewing the Investment Code and renegotiating the BIT would therefore go a long way in addressing this lacuna.

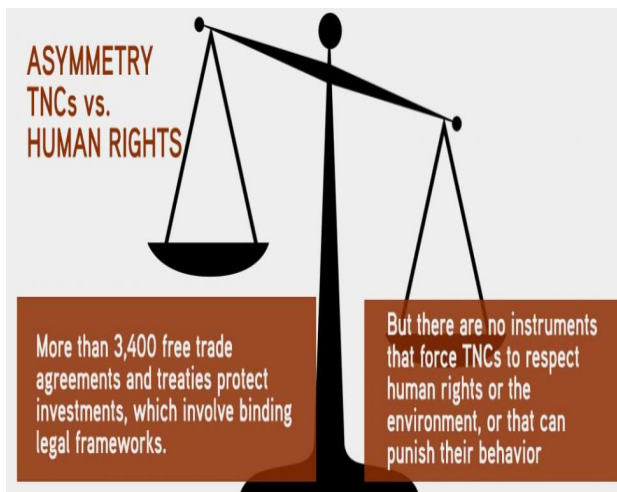
Lessons from other countries on the need to renegotiate BITs

South Africa	India
<ul style="list-style-type: none"> • South Africa's BITs took place in the period 2007-2010 before the country took the decision to terminate and review them. • During this period, an Italian investors, Marlin Holdings, Marlin Corp and RED Graniti SA specifically objected to the application of Black Economic Empowerment (BEE) rules to his business, which the South African government considers sacrosanct in terms of its post-apartheid transformation agenda. Economic empowerment of previously disadvantaged black people is central to all socio-economic development initiatives of South Africa. So the legal challenge to the BEE policy initiative based on historical treaty was highly detested by many stakeholders in the country. • Secondly, a Swiss investors' private game reserve established and operating under a BIT between South Africa and Switzerland suffered poaching, vandalism and theft. This was despite the fact that the BIT provided for protection of Swiss investors in South Africa. The investor opened up a case against the South African government in 2004 demanding compensation for their loss. This put the country in a very awkward situation because it was setting a precedent that any crime faced by external investors had to be compensated for, yet this would not apply to investors who are citizens of the country. ✓ South Africa thus chose to review its BITs after recognizing that the existing BITs extended too far into the policy space needed by the government to influence the implementation of social economic priorities for the country ✓ Some aspects of the BITs were incompatible with the country's constitution and other laws ✓ The review allowed for legal challenges to regulatory changes, which the government considered to be in the public interest. 	<ul style="list-style-type: none"> • In 2012, the Indian government was served 17 arbitration notices by foreign companies, challenging various policy measures and demanding billions of dollars in compensation for the alleged violation of the country's BITs. India had signed BITs with countries such as Mongolia, Serbia, Macedonia and Iceland but the two-way investment flows between India and these countries was not significant. India like South Africa received substantial foreign investments from the US and Canada, countries with which it had no BITs in place. This observation weakened the case of having highly constraining BITs in the name of trying to attract FDI for the country. ✓ The BITs were seen as encroaching on a country's sovereignty in domestic policy making, yet their value to local development was not guaranteed ✓ India also realized that there were no guarantees that BITs would increase FDI flows and No guarantees that FDI would support local development in a way that was desirable ✓ Fear that foreign Transnational Corporations/ Multinational Corporations would monopolize the retail sector in the long term through destroying all small competitors, and then they would be in complete control of prices. ✓ The possibility of FDI distorting the Indian culture was another issue that was put into consideration.

Conclusion and recommendations

In conclusion, an appropriate investment policy framework is important for any country. This is especially important given the increasing cases of human rights violations and abuses by some transnational corporations and other business enterprises. It is for this reason that at the UN level, a legally binding framework to regulate the work of transnational corporations and other business enterprises; and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises has now been proposed. It is also in view of the obligations and primary responsibility to promote and protect

human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations.



In view of the Uganda-Netherlands BIT that will soon expire, Uganda should:

- 1) Urgently pursue the renegotiation of this BIT by officially communicating its intention to the Dutch government to renegotiate the agreement. This should be done by 31st May 2017 with the aim to review the BIT to ensure that the subsequent agreement balances between the protections of investor rights on the one hand and human and environmental rights on the other. The new agreement should also preserve the policy space for government to introduce policies intended to fast track achievement of socio-economic development priorities. Specifically, the new agreement should introduce key provisions such as Performance Requirements; Rights and Obligations of Investors and State Parties; Provision of Information; Environmental and Social Impact Assessment; Right of States to Regulate and to Pursue Development Goals; and Periodic Consultation, review and amendment of the treaty. Provisions such as equitable fiscal treatment and compensation for losses should be eliminated while exceptions and safeguards should be introduced under the provision on guarantee of free assets transfer.
- 2) The above process should further be used as a benchmark to inform the strengthening of policy and institutional coherence and coordination, especially in negotiating investment agreements in Uganda. It should be noted that in dealing with foreign investors established under the auspice of an investment agreement, the investment agreement takes precedence over the national investment policy framework. Therefore, the amended Investment Code Bill should be made coherent with the national BIT model. In addition, all the agreements signed by the Ugandan government should also be reviewed while those being negotiated should be done so in line with the provisions of the Investment Code and the country's national development plan and strategies.
- 3) Finally, these processes should be fully inclusive, taking into account stakeholders' positions through wide consultations. Such consultations are critical as they can provide a platform for national debates on the role of BITs in fostering increased FDI flows; and the role of the latter in facilitating the realization of Uganda's desired economic growth and development.

References

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