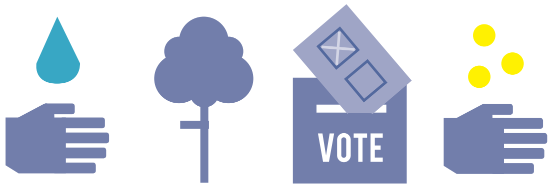
INTERNATIONAL INVESTMENT AGREEMENTS: AN ADVOCACY GUIDE FOR CSOs

1 INVESTMENT AGREEMENTS: THE BASICS



WHY BOTHER WITH INTERNATIONAL INVESTMENT AGREEMENTS (IIAS)?

International investment agreements can impact on the lives of millions. The protection of citizens' health, access to energy, water and sanitation, workers' salaries, protection of the environment, action on climate change and the growth of democracy itself are just some of the things that have either been affected by investment agreements in the past – or could be in the future. Several governments have woken up to their implications and are either terminating them or seeking major changes to them. Nevertheless, powerful interests continue to push for their expansion.

The most common form of international investment agreement is a **Bilateral Investment Treaty (BIT).** Unbeknown to most of us, recent decades have seen many African governments sign multiple BITs with other countries (typically with European countries and the US). Now there are plans for a whole new generation of investment agreements to be negotiated in Africa (under the Economic Partnership Agreements with the European Union, for example).

WHY DO GOVERNMENTS SIGN INTERNATIONAL INVESTMENT AGREEMENTS?

Some claim that IIAs are a good thing for a country's development because they encourage foreign companies to invest and so contribute to economic growth and job creation. Often however political considerations and vested interests play an important role in how investment is regulated. IIAs offer companies special protection through a so-called Investor to State Dispute Settlement (ISDS) mechanism which allows them to sue governments for financial compensation when new national regulations or policies are perceived to threaten their profits. In this way, investment agreements are supposed to provide companies with the financial confidence to invest in countries that they might not have otherwise invested in. Or so goes the theory.

In reality, evidence indicates that investment agreements rarely if ever determine whether a company invests in a country or not. The availability of raw materials, the quality of roads and transport links, and the proximity to markets are amongst the more important factors. Indeed some countries that have attracted huge amounts of foreign investment such as Brazil have never ratified any international investment agreements.

IN A NUTSHELL:

- A Bilateral Investment Treaty (BIT) is an agreement between two countries. It is a type of International Investment Agreement (AII)
- A BIT promotes and protects the investments made by companies from those two countries in each other's territory
- There are 3,268 International Investment Agreements (IIAs) globally, of which 2,926 are Bilateral Investment Treaties (BITs)
- There is also a trend to include investment chapters in trade agreements such as the Economic Partnership Agreements between 47 African countries and the EU (negotiation of investment chapters may begin in 2016)

IIAs have been criticised for:

- Offering foreign companies excessive rights with no obligations in return
- Restricting governments' space to make their own policies without foreign or commercial interference
- Undermining governments' right to regulate the activities of companies in order to protect things like citizens' health and the environment.

In the past, few companies ever used international investment agreements to sue governments, with only three known cases submitted by the end of 1994. But by the end of 2014, the figure had grown to 608. Successful settlements have become extremely lucrative not only for the companies investing in a country but also for the small, secretive group of lawyers representing them. Recent studies suggest that the huge financial gains involved are fuelling this sharp rise in investment treaty disputes.

WHAT DOES THE RISE IN COMPANY CLAIMS MEAN FOR ORDINARY CITIZENS?

The sheer threat of legal action by companies can exert what is known as a `chilling' effect, whereby national governments refrain from introducing new regulations or policies of benefit to their citizens - for fear of triggering a compensation claim from one or more foreign companies. In this way, investment agreements are undermining the sovereign right of elected governments to set their own national policies.

`IIAs may make it difficult for countries to achieve essential public policy objectives, including their development goals and the maintenance of environmental, human rights and labour rights standards.'

Veniano Qalo, Acting Head of International Trade
Commonwealth Secretariat

EXAMPLES OF RECENT COMPENSATION SETTLEMENTS AS A RESULT OF INVESTMENT AGREEMENTS

The Ecuadorian government was ordered to pay $1.77 billion to US company Occidental Petroleum. Interest and legal costs increased the penalty to $2.4 billion – equivalent to Ecuador's annual spend on health care for 7 million people.

In 2012, French company Veolia filed a claim against the Egyptian government over the introduction of a new minimum wage.

The Tanzanian government was ordered to recalculate an electricity tariff, increasing costs to users of the electricity.

WHAT CAN WE DO?

African civil society organisations should demand a fully transparent negotiation process regarding any future IIAs - to ensure their governments do not sign new agreements that threaten citizens' rights and public interests. Specifically, African CSOs should call on their governments to:

- initiate participatory reviews all of their existing international investment agreements and monitor the performance of investments already in place;
- refrain from signing new investment agreements that contain an Investor State Dispute (ISDS) clause and explore alternative mechanisms for resolving disputes with foreign companies;
- ensure that any future investment agreements signed contain binding clauses obliging investors to respect human rights and public interests;
- strengthen weak legal systems to ensure that are able to effectively regulate investment in the public interest (e.g.labour legislation), as well as handle investment disputes.

HOW DO COMPANIES USE IIAS TO SUE GOVERNMENTS?

1 **Under the ISDS clauses, companies can sue governments on the vague grounds of `unfair treatment' or because a government regulation is considered to harm their profits (known as `expropriation'). The broad definition of `investor' means the company does not even need to have significant presence in a country to be able to sue.**

2 **Companies can bypass national courts and go directly to private international arbitration tribunals such as:**

o The World Bank's International Centre for the Settlement of Investment Disputes

o The London Court for International Arbitration

o The International Chambers of Commerce in Paris

3 **The cases are heard behind closed doors by a panel of three commercial lawyers. No independent judges are involved. The lack of transparency makes it impossible to know the precise number of cases being brought by companies.**

4 **The international arbitration tribunals are controlled by a handful of for-profit law firms that have been known to charge $1,000 an hour . The average legal fees for an arbitration case are $8 million, according to the OECD.**

5 **Studies suggest the judgements of international arbitration courts tend to favour the investor companies over governments . Cases are treated from a commercial point of view, with little regard for the broader public welfare aspects of a dispute.**

2 KEY FACTS AND FIGURES ON INVESTMENT AGREEMENTS

MONEY

58M ..is the legal fees paid by the Philippine government when defending two cases against German airport operator Fraport. This could have paid the salaries of 12,500 teachers in the Philippines for one year or vaccinated 3.8 million children against diseases such as TB, diphtheria, tetanus and polio.[i]

118M ...is the amount Tanzania was ordered to pay to Standard Chartered in 2014 regarding a dispute over electricity tariffs.

1.15BN ...is the amount Argentina was ordered to pay to 40 foreign companies after the government introduced policies to deal with its financial crisis in response 2001-2002.

1.17BN ...is the amount Ecuador was ordered to pay to US company Occidental Petroleum over a dispute regarding mining rights. Interest and legal costs increased the total to $2.4 billion. This is equivalent to Ecuador's annual spend on healthcare for seven million people.

INVESTMENT TREATY DISPUTES

- Around 75% of known investment-treaty disputes have been brought against the governments of developing countries.[v]
- Half of all disputes initiated at the International Centre for the Settlement of Investment Disputes have involved African countries and 16% of known investment-treaty disputes have been brought against governments in Sub-Saharan Africa.[vii]
- Disputes are particularly concentrated in Africa’s oil, gas, mining and electricity sectors. There have also been challenges to government policies in relation to water and sanitation (in Tanzania) and race relations (South Africa).
- Just 15 arbitrators, nearly all from Europe, the US and Canada, have decided 55% of all known investment-treaty disputes.[viii] Only 2% of arbitrators globally are from Sub-Saharan Africa.[ix]
- By the end of 1994 only three investment treaty related disputes had ever been submitted to the World Bank’s International Centre for the Settlement of Investment Disputes [NB This is the figure quoted in TJM `Worried about UK BITs?’ Contradicts figure of 10 by early 1990s mentioned on p.14 of Traidcraft report `international investment agreements under scrutiny.’). By the end of 2014, this figure had leapt to 608.[x]

INTERNATIONAL INVESTMENT TREATIES

- In the 30-year period 1959 - 89, only 386 international investment agreements (IIAs) were concluded around the world. [ii] But in the 1990s there was an explosion in IIAs, with 1,600 concluded over the course of the decade.[iii]
- There are now 3,268 International Investment Agreements (IIAs) globally, of which 2,926 are Bilateral Investment Treaties (BITs)
- African countries have concluded more than 400 BITs with other countries (mainly European countries and the US).[vi]
- In 2011, EU institutions were mandated to start integrating investment agreements into the free trade agreements currently being negotiated around the world. Negotiations over investment chapters of the EU’s Economic Partnership Agreements (EPAs) may begin in 2016.

FORESTI VS SOUTH AFRICA : INVESTORS CHALLENGE BLACK ECONOMIC EMPOWERMENT

South Africa is one country where the Government had to water down policies to address economic inequality as a result of its Bilateral Investment Treaties.

In the immediate post-apartheid era (1994-1998), South Africa concluded around 15 bilateral investment treaties (BITs) – mainly with European countries. At the time, this was a good faith attempt to assure foreign investors that their investments would be secure under the new democratically-elected government. Signing these BITs was also seen as an important diplomatic signal confirming South Africa's re-entry to the international community after years of isolation under apartheid. However, South Africa soon became aware of the challenges posed by international investment treaties.[xi]

In 2006, a group of Italian nationals and a Luxembourg-registered company sued South Africa over the clauses of a new mining law intended to promote Black Economic Empowerment. In order to redress injustices of the Apartheid regime, mining companies were required to transfer a portion of their shares to `historically disadvantaged South Africans.' The foreign investors claimed that this law amounted to an `expropriation' of their profits and a breach of the 'fair and equitable treatment' standard in the relevant Bilateral Investment Treaties which South Africa had signed. In 2010 both parties agreed on a settlement which greatly reduced mining companies' requirement to transfer shares to South Africans.

Against this background, in April 2010 the South African Cabinet concluded that South Africa should:

- Refrain from entering into BITs in the future, except in cases of compelling economic and political circumstances;
- Review all BITs that South Africa signed shortly after the democratic transition in 1994 with a view to terminating them or renegotiating them;
- Strengthen its domestic legislation regarding the protection offered to foreign investors to remove the need for BITs.

STANDARD CHARTERED BANK VS TANZANIA

In February 2014 Tanzania was ordered to pay more than USD$118 million to Standard Chartered Bank by the World Bank's International Court for the Settlement of Investment Disputes (ICSID), following a dispute over electricity tariffs (Standard Chartered had invested in a Tanzanian power plant).[xii] Aside from this being a potentially huge drain on Tanzania's public funds, the main controversy in this case was that the claim was made by Standard Chartered in Hong Kong, using Tanzania's BIT with the UK. There is no BIT between Tanzania and Hong Kong but the company was able to take advantage of Tanzania's BIT with the UK because Standard Chartered Hong Kong is 38% owned by Standard Chartered UK.

In May 2014, Tanzania's High Court ruled that the Tanzanian government did not have to comply with the decision of the ICSID.[xiii]

ARGENTINA : THE PRICE IT HAD TO PAY FOR ITS PAST BILATERAL INVESTMENT TREATIES

The Argentinian government and its citizens have paid a high price for signing Bilateral Investment Treaties. In 2001-02 the Government introduced a series of measures to deal with a major financial crisis (such as reducing consumers' energy bills). These measures triggered a raft of disputes with 40 foreign companies investing in Argentina which the companies pursued through international arbitration courts. The total amount that Argentina was ordered to pay (under the Investor-State Settlement Dispute clauses in Argentina's BITs) by the end of 2008 was $1.15 billion.[xiv]

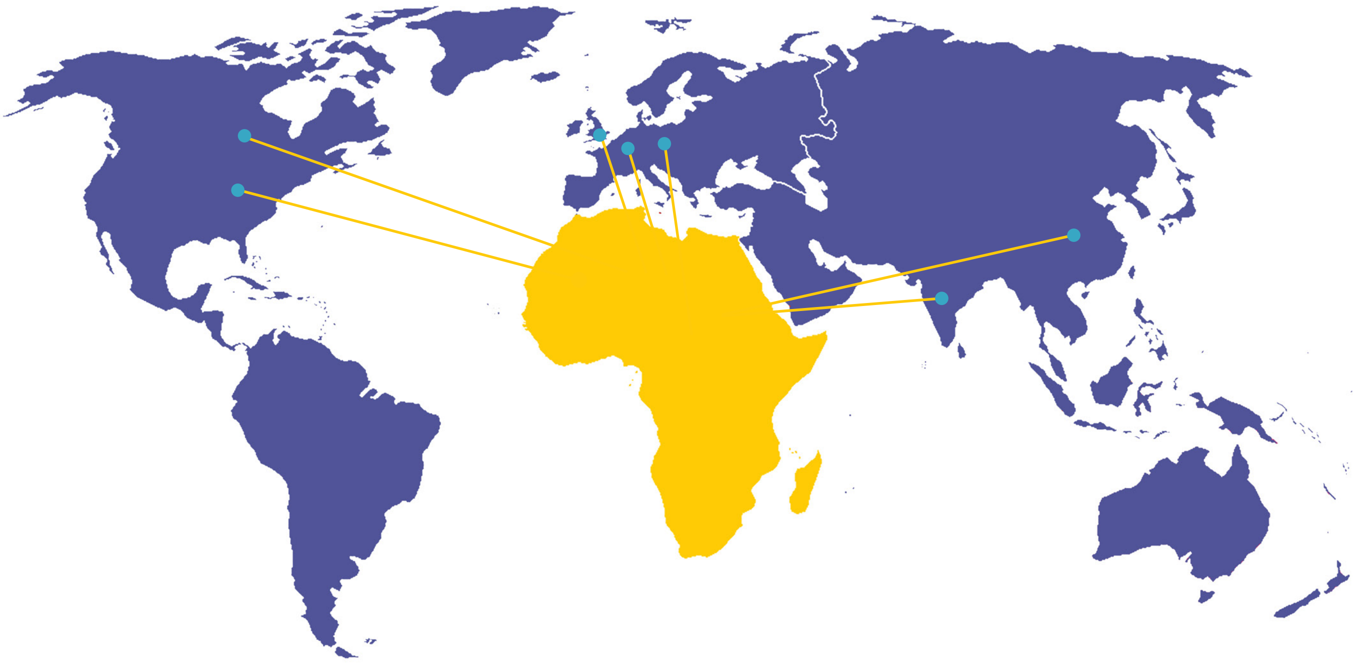
Companies had successfully argued that they were entitled to compensation for the Government's measures in 2001-02 on the grounds that these had affected the returns they were expecting to earn on their investments. For many years the Argentinian government refused to pay, arguing that the companies should initiate legal proceedings in Argentina's domestic courts to claim their awards. The companies refused, asserting that under the terms of Argentina's BITs, the government was legally obliged to enforce the judgements of the international arbitration tribunal (in this case the World Bank's International Centre for the Settlement of Investment Disputes).

However in 2013, Argentina agreed to pay $450 million plus interest to various foreign companies (mainly water, gas and electricity companies). The reason? The outstanding compensation claims had proved a sticking point in Argentina's negotiations with the IMF and the World Bank when seeking further loans to deal with its debt crisis. Some of the companies claiming compensation are understood to have lobbied the US Government to block Argentina's access to World Bank loans until Argentina paid up. Following the settlement of the $450 million, it was announced that the World Bank was considering loans to Argentina of up to $3 billion.[xv]

Argentina is refusing to pay any further awards arising from international arbitration courts.

3 THE AFRICAN INVESTMENT LANDSCAPE

A number of BITS have been signed between African countries and their counterparts from different parts of the world. These include the United States of America (USA), European Union (EU), Canada, Germany, China, and the United Kingdom (UK) among others.



US – AFRICA INVESTMENT RELATED TREATIES

The United States of America (US) is probably the most active country with regard to negotiations and the subsequent signing of investment-related agreements with African countries. The BITs which the US has signed with countries like Cameroon, DRC, Congo Republic, Egypt, Morocco, Mozambique, Senegal, and Rwanda are intended to:

Protect US investments abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements);

encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way;

support the development of international law standards consistent with these objectives.[i]

The US has also signed Trade and Investment Framework Agreements (TIFAs) with countries like Angola, Mauritius, Ghana, Liberia, Mozambique, Nigeria, Rwanda, South Africa, Algeria, Egypt, Libya and Tunisia. TIFAs provide strategic frameworks and principles for dialogue on trade and investment issues between the US and the other parties to the TIFA. With the South African Customs Union, the US signed the Trade, Investment, and Development Agreement (TIDCA) which serves the same purpose as a TIFA.

At the regional level, in 2008 the US signed a TIFA with the East African Community (EAC), which covers Burundi, Kenya, Rwanda, Tanzania and Uganda. The agreement seeks to create a mechanism for further dialogue on the initiatives for expanding trade and investment through enhanced cooperation and more comprehensive agreements. In addition, the US signed a TIFA with the Common Market for Eastern and Southern Africa (COMESA) in 2001. Under this agreement, the parties seek to establish cooperation between the member states of COMESA and the US to:

- Develop and expand trade in products and services;

- Promote the adoption of appropriate measures to encourage and facilitate trade in goods and services;
- Secure favourable conditions for long-term investment, development and diversification of trade.

The US has also signed a TIFA with the West African Economic and Monetary Union (WAEMU) which is similar to the US-COMESA TIFA.

EU – AFRICA INVESTMENT RELATED TREATIES

The European Union (EU) has largely engaged with Africa on investment issues under the Economic Partnership Agreements (EPAs). The EPAs are Free Trade Agreements (FTAs) which the EU has negotiated with the Africa, Caribbean and Pacific (ACP) Countries since 2002 within the framework of the Cotonou Agreement signed in 2000. Under the Rendezvous clause, the EPA commits parties to negotiate on investment within five years of entry into force of the agreement. In 2014, the EU agreed on the EPAs with the Economic Community of West African states (ECOWAS), a regional group of sixteen countries, and with the EAC. Negotiations are on-going with Eastern and Southern Africa (ESA), a diverse group of countries which includes: Comoros, Djibouti, Eritrea, Ethiopia, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia, and Zimbabwe.

OTHER MAJOR COUNTRIES WITH INVESTMENT-RELATED TREATIES WITH AFRICA

Canada has signed a number of Foreign Investment Promotion and Protection Agreements (FIPA) with countries in Africa. A FIPA is a bilateral agreement aimed at protecting and promoting foreign investment through legally-binding rights and obligations. The first African country to sign a FIPA with Canada was Egypt in 1997. This was followed by Tanzania, Cote d'Ivoire, Cameroon, Madagascar, Mali, Nigeria, Senegal, Zambia, all in 2013. The list is expected to grow, given that Ghana, Kenya, Tunisia are currently in negotiations with Canada.

Other major countries which have signed BITs with African countries include Germany (more than 40 African countries), China (more than 34 African countries) and the UK (more than 22 countries). It should be noted, however, that other emerging economies like Turkey, India, South Korea and the Gulf countries are also increasingly approaching and negotiating BITs with African countries.

All these agreements seek to give investors guarantees of:

- A commitment to fair and equitable treatment of investors by states
- The prohibition of the nationalization and expropriation of investments
- The right to transfer profits out of the country
- The right of investors to prosecute states.

4 POLITICAL PROCESSES AND OPPORTUNITIES FOR INFLUENCE IN AFRICA

With the proliferation of Bilateral Investment Treaties (BITs) negotiations in Africa, a number of political processes are on-going across the continent. These processes are at both regional (Regional Economic Communities i.e. RECs) levels and national (individual state) levels. To ensure that the outcomes genuinely promote development for all, it is critical that a wide range of stakeholders participate in and seek to influence these processes – whether parliamentarians, government officials, local communities, private sector, media, trade unions or Civil Society Organisations (CSOs).

As already mentioned in Section 1, the evidence suggests that there is little or no link either between the signing of BITs and the amount of foreign investment which a country receives, or between foreign investment and positive development outcomes. This has prompted countries like South Africa, India, and Ecuador to review their investment policies. It has also provided opportunities for influencing investment policies and agreements in Africa.

EAST AFRICA:

Since 2012, ministers from countries in the East African Community (EAC) have been negotiating a Trade and Investment Partnership (TIP) with the US as part of the EAC-US Trade and Investment Framework Agreement (TIFA). TIP is an initiative intended to support the economic integration of the EAC and to enhance the EAC-U.S. trade and investment relationship. It covers an Investment Treaty, Trade Facilitation, Capacity Building and Commercial Dialogue. To guide negotiations with the U.S. as well as future negotiations with other countries and regions on investment, the EAC has drafted a Model Investment Treaty. Partner States are currently making consultations at the national level to harmonise positions for eventual approval of the model treaty.

In addition, the EAC developed a model Investment Code in 2006 to help Partner States improve their national investment codes and policies by capturing the best international investment practices while also working towards a harmonization of investment policies across the region. The code needs to be reviewed in order to make it genuinely pro-development.

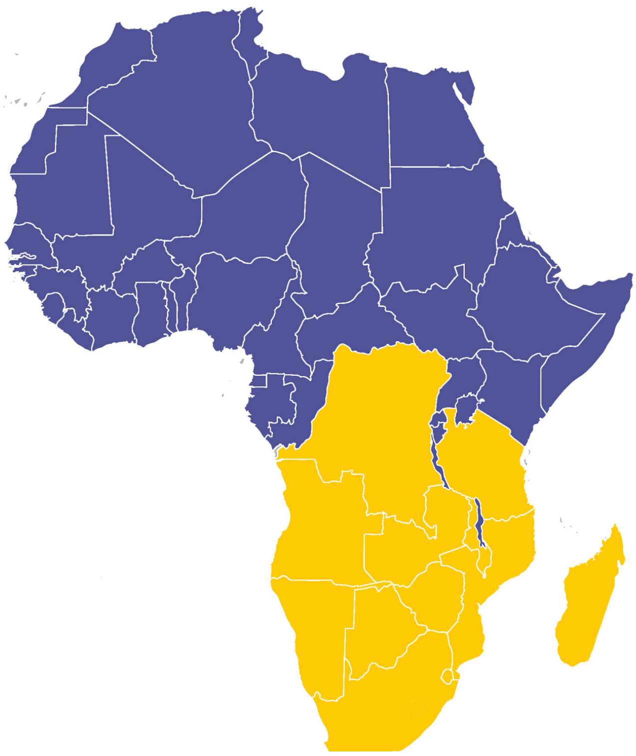
The engagement of civil society organisations in the review of the EAC model investment code and model treaty is crucial so as to ensure the model code and the treaty are pro-development. CSOs also need to monitor the implementation of the code and treaty.

Meanwhile, the Economic Partnership Agreement (EPA), which the EAC agreed with the European Union (EU) in October 2014, contains provisions for negotiations on investment within five years of the EPA coming into force, under the so-called `Rendezvous' clause. Civil society organisations need to engage with key government officials under this clause, since investment is one of the so-called Singapore issues that is not covered by any international agreement (due to the far-reaching implications of investment for development). This means that the EAC will have to negotiate an investment agreement bilaterally with the EU.

If the EPA investment negotiations proceed, the final agreement must support the development needs of the region with clauses/articles that will advance rather than undermine efforts to tackle poverty and inequality.

SOUTHERN AFRICA:

In 2012, the Southern African Development Community (SADC) developed a Model BIT Template . The model provides a comprehensive approach which seeks to promote a pro-development outcome from investment policies. SADC Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide for any given investment treaty negotiation.



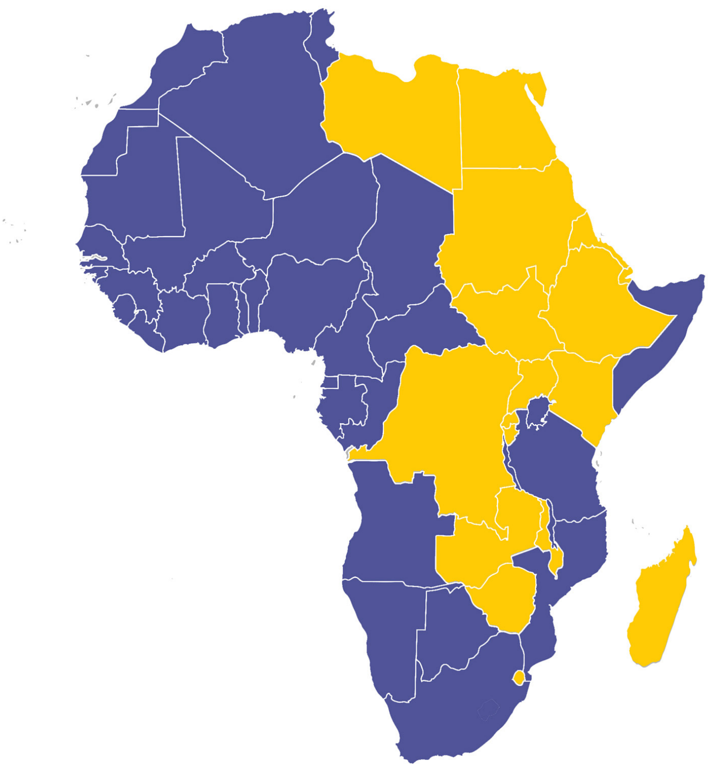
Although it is not legally binding, CSOs are advised to use the SADC Model BIT Template treaty as a basis for their advocacy at both national and regional levels, as the key provisions in the model treaty promote a pro-development outcome.

However, in spite of the progressive Model BIT Template, SADC has also identified the Organisation for Economic Co operation and Development (OECD's) Policy Framework for Investment (PFI) as a reference for developing an Investment Policy Framework (IPF) specific to the SADC region. The SADC IPF aims to facilitate regional co-ordination and maximise investment opportunities by improving investment frameworks and policies across SADC member states. Expected to be launched by the end of 2015, the IPF is supposed to provide a mechanism for knowledge-sharing and policy dialogue around good practices, but it is less helpful than the Model BIT Template. The IPF is being developed around four thematic pillars as follows:

- Lessening the costs of restrictions to foreign investment
- Improving legal regimes and mechanisms to enhance investor protection
- Co-ordinating effective regimes for tax incentives for investment
- Facilitating long-term investments in infrastructure.

These pillars therefore promote more investor rights at the expense of local/community or national development interests.

Civil society organisations need to expedite their advocacy to promote development-oriented policy objectives in the SADC IPF as its current form could jeopardise and undermine development objectives.



AFRICA-WIDE INVESTMENT FRAMEWORK:

At a continental level, there have also been efforts to create a common investment framework. The Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC) have launched the COMESA-EAC-SADC Tripartite Free Trade Area. The establishment of a Tripartite FTA is expected to bolster intra-regional trade by creating a wider market, increasing investment flows, enhancing competitiveness and encouraging regional infrastructure development as well as pioneering the integration of the African continent. In addition, the African Union (AU) in June 2015 launched negotiations for the Continental Free Trade Area (CFTA) . The ultimate objective is to facilitate economic, trade and investment opportunities between African countries in order to enhance inclusive development prospects, industrialization and structural transformation. This is in line with the Abuja Treaty, which provides a roadmap to advancing regional integration in Africa, with the ultimate objective of establishing an African Economic Community by 2028 . The scope of the CFTA negotiations is expected to be broad and cover trade in goods (including rules of origin), trade in services, movement of business persons, intellectual property rights, competition policy, and also investment.

Engagement with the COMESA-EAC-SADC Tripartite Free Trade Area as well as the CFTA negotiations should be central to civil society advocacy on investment at continental levels.

National investment treaties: At national levels, each COMESA, EAC, SADC member country has signed BITs with other countries and many continue to be approached by regions and countries seeking new BITs. In most cases, the negotiations are conducted with little or no participation from civil society actors, trade unions, parliaments or other stakeholders, even though the agreement resulting from these negotiations is legally binding and with potentially major implications for a country's development.

It is important for civil society organisations at national levels to try to monitor these processes as well as engage with relevant government officials, notably the respective ministries of trade, foreign affairs and export promotion agencies, in order to promote pro- development outcomes from the negotiations.

ROLE OF INVESTMENT PROMOTION AGENCIES

With increased foreign investment in Africa, mostly in natural resources, and the focus on attracting further investments, African countries have set up and empowered investment promotion agencies to register investors, coordinate investments and market the countries to potential investors. These agencies are on an aggressive drive to allocate land to investors and set up one-stop investment centres for business registration and licencing etc. The process of attracting investments often ends up side-lining the key objectives of attracting investors in the first place, i.e. job creation, increased productivity, exports and economic stability. It is therefore important for stakeholders to continuously engage with key policy makers and government officials to ensure that these investment promotion agencies comply with their mandate to promote pro-development investments.

WHAT OTHER COUNTRIES ARE DOING TO LIMIT THE IMPACT OF BITs

BRAZIL:

None of the BITs that Brazil signed in the 1990s were ratified. In 2015, due to its growing outward investment Brazil signed three co-operation and investment agreements which are designed to promote and protect investments, as well as limit challenges to new socio-economic, health and environmental laws.

Disputes are to be resolved through a bilateral joint committee should other measures such as a special ombudsman service to assist investors and redress in domestic courts not be successful.ISDS is prohibited.

ECUADOR:

In 2008, the constitutional court of Ecuador declared all BITs which contained ISDS provisions unconstitutional. In 2013, Ecuador established an audit commission to review its investment treaty regime.

To date, the tribunal has recommended the termination of all existing BITs after finding irregularities in the BIT ratification process; evidence of arbitrator conflict of interest and no linkage between FDI inflows and the signing of BITs.

INDIA:

The government of India decided to suspend the signing of new BITs, which contained ISDS clauses and to review its model BIT in 2012 after facing many high value investment treaty claims. The new model BIT completely excludes the most onerous investor protection clauses, restricts others and preserves policy space for India to regulate in areas such as the environment, public health and safety. It requires investors to exhaust remedies available through local Indian courts or administrative bodies before pursuing an ISDS claim.

INDONESIA:

The Indonesian government has recently reviewed its investment regime as a result of an increased exposure to investment arbitration claims. The review body removes automatic recourse to ISDS by requiring the host state and the investor to consent to arbitration after a dispute has arisen, on a case by case basis.

BOLIVIA:

Bolivia withdrew from ICSID, the World Bank body that administers ISDS in 2007. It changed its constitution to require foreign investors to resolve disputes in domestic courts.
By 2013, Bolivia had denounced all of its BITs which contained ISDS provisions. The country then launched a task force to review its investment regime which resulted in a new investment law and model BIT. These require foreign investors to comply with local laws that protect social, economic and tax priorities and protect the country's biodiversity. The new policy has not deterred foreign investors; investment inflows to the country increased steadily and peaked in 2013.

5 TOWARDS PRO-DEVELOPMENT INVESTMENT IN AFRICA: WHAT SHOULD IT LOOK LIKE?

WHAT NEEDS TO HAPPEN WITH INVESTMENT AGREEMENTS FOR THEM TO REALLY SUPPORT DEVELOPMENT IN AFRICA?

For Bilateral Investment Agreements (BITs) to be pro-development in Africa there is a need for key stakeholders including civil society, trade unions, farmers groups, the domestic private sector and academic institutions to participate effectively in the negotiation process. The BITs should be guided by an investment framework that:

- **is in line with a country's /region's development aspirations;**
- **does not constrict a county's policy space to promote development;**
- **balances the rights of the investors and the rights of the host states;**
- **promotes, not undermines, the attainment of people's Economic, Social and Cultural rights (ESCRs).**

Proposals for the specific articles within a BIT which would reflect these aspirations are highlighted below:

OBJECTIVE

The objectives of the investment agreement must include measurable and visible parameters of sustainable development that the investment is expected to influence. This includes the keys issues of job creation, technological transfer synergies with local firms, empowerment of local communities and environmental considerations.

DEFINITIONS OF INVESTMENT AND INVESTOR

Investment agreements must adopt an "enterprise" based definition of investment, where an enterprise is defined as one having "real and substantial" business operations. The investor should be a natural person(s) or enterprise conducting real and substantial business operations in the host country.

SCOPE AND COVERAGE OF THE TREATY

It is important for the investment agreement to stipulate the areas where the Treaty will not apply. Key areas such as government procurement, subsidies or grants provided by a party, or services supplied in the exercise of governmental authority should be put outside the scope of the treaty.

NATIONAL TREATMENT (NT) AND MOST FAVOURED NATION TREATMENT (MFN);

Investment agreements should explicitly set exceptions to National Treatment and agree on a list of exceptions on activities and sectors where NT will not apply, for instance in smallholder farming and micro enterprises.

The MFN clause should be excluded from treaties because:

- it allows a bilateral investment treaty to be applied internationally
- it increases the risk of a legal challenge based on an unrelated treaty signed with another country or region.

FAIR AND EQUITABLE TREATMENT (FET)

The article on FET should also be excluded, given the significant risks and uncertainties that may arise from the broad interpretation of this article.

EXPROPRIATION AND COMPENSATION

Agreements must separate legitimate state regulatory activity in the public interest from those state measures that are deemed to `expropriate' or negatively affect an investor's profits/returns and are therefore liable to the payment of compensation under the investment agreement.

TRANSFERS

The investment agreement must provide for exceptions and safeguards whereby the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or if movements of capital cause or threaten to cause serious difficulties for macroeconomic management. Although most countries now implement open capital accounts, they should retain policy space to regulate the transfer of funds.

PERFORMANCE REQUIREMENTS (PRS)

Performance requirements must be included in all BITs in order to ensure that investments:

- facilitate a growth of industries which then facilitates the growth of other industries (through the supply of products and vice versa);
- generate social benefits;
- strengthen the local private sector.

PRs should include minimum standards on human rights, environment and labour, corporate governance etc. Host countries can use PRs to judge the contribution of Foreign Direct Investments (FDIs) to their development objectives.

DISPUTE SETTLEMENT MECHANISM

The investment agreement should explicitly set the purpose and scope of the dispute settlement article. It should further provide for the exhaustion of local remedies, notices and consultations, and submission procedures of disputes to arbitration. The process of appointing Arbitrators should also be stated. The article should include details pertaining to the conduct and transparency of arbitral proceedings, the prevention of conflicts of interests, burden of proof, awards and counter claims.
The Investor-State Dispute Settlement (ISDS) mechanism must be excluded from any BIT as this mechanism is very costly, sometimes take too long to resolve and usually challenges domestic regulatory measures implemented to promote sustainable domestic development objectives.

ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT

The investment agreement should make it mandatory for investors to make their environmental and social impact assessments public. This should be done in a timely manner to allow stakeholders' input prior to a decision being taken regarding the establishment of the investment. In addition, investors must maintain an environmental management system (EMS) consistent with recognized international environmental management standards (i.e. ISO 14000).

RIGHT OF ENTRY AND ESTABLISHMENT

Agreements must include this article to provide host governments with the freedom and right to regulate the entry and conditions of establishment of investments/ investors. It enables the host country to retain its policy space to direct the entry and establishment of investors/investments towards its national development objectives.

DURATION, TERMINATION AND AMENDMENTS

Agreements must clearly make provisions for the period for which the Treaty will be in force and the provisions for its renewal or termination. Through this clause, a host country will retain its policy space to renew the agreement if it is serving their development purpose or terminate the agreement if it is not contributing to its development objectives.

6 HOW TO WIN THE ARGUMENTS AND DEAL WITH TRICKY QUESTIONS

ARGUMENT 1

INTERNATIONAL INVESTMENT AGREEMENTS HELP TO ATTRACT FOREIGN INVESTMENT

COUNTER-ARGUMENT:

A number of studies have found that there is little relationship between signing a bilateral investment treaty and attracting foreign investment. Other factors such as the availability of raw materials, the quality of roads and transport links, and the proximity of a country to key markets are more important.[i]

The experiences of many countries show that the promise of foreign investment when signing IIAs has not been fulfilled:

- South Africa has not received much foreign investment from countries with which it has BITs whilst it has received investment from countries with which it has no BITs.[ii]
- Ecuador's recent audit of its BITs reveals that most foreign investment comes from countries with which it has no BITs.[iii]
- Brazil receives the largest amount of foreign investment in South America and yet has never ratified a BIT.
- Hungary has no BIT with the US. Yet, over the past 10 years, Hungary has been the highest recipient of US foreign investment in Eastern Europe.[iv]
- Indonesia has decided to discontinue its existing IIAs and has already terminated 17 of them. There were concerns that this decision might scare off investors but 2014 was a record year for foreign direct investment in Indonesia with a high of $78.7 trillion.[v]

The evidence also indicates that BITs have failed to deliver investment in critical sectors for sustainable development, such as water and sanitation.[vi]

ARGUMENT 2

THE SETTLEMENT OF DISPUTES BETWEEN COMPANIES AND GOVERNMENTS USING IIAs IS INDEPENDENT AND IMPARTIAL

The current model of international investment agreements was put in place by Western governments who argued that a fair and neutral dispute settlement system was needed to protect their companies' investments from the perceived bias and corruption in national courts in the countries where they were doing business.

COUNTER-ARGUMENT:

The current model is not fair or neutral. A multi-million dollar international dispute settlement industry has grown up around IIAs. Disputes are settled not by judges but by a secret tribunal of three commercial lawyers hired from private law firms. These three arbitrators have none of the guarantees of independence which judges would have (eg. prohibition on having other paid positions, a ban on practicing law). They do not have a flat salary but are paid per case, earning daily fees of $3,000 and more.[vii]

The international investment arbitration industry is dominated by a small and tight-knit clique of lawyers from Europe and the US. Just 15 lawyers have decided 55% of all known investment-treaty disputes. Several prominent arbitration lawyers have been board members of major multinational companies, including companies which have made claims against developing countries in international investment tribunals.

Governments cannot bring claims to the international tribunals – only investors. This one-sided system creates a strong incentive amongst the lawyers presiding over the tribunals to side with investors as investor-friendly rulings are likely to generate more claims and therefore more income in the future.

Given this context, it is not surprising that arbitration lawyers in investment tribunals tend to favour investors, based on the available evidence.[viii]

ARGUMENT 3

THE SOLUTION IS TO REFORM THE CURRENT MODEL OF INVESTOR-STATE DISPUTE SETTLEMENT IN INVESTMENT AGREEMENTS – NOT SCRAP IT ALTOGETHER.

The European Commission has argued that the current EU investment negotiations with the US provide a unique opportunity for improving and reforming the system – and that this will have a knock-on effect on the negotiation of other international investment agreements in the future (eg. the investment chapters in the Economic Partnership Agreements with African countries).

COUNTER-ARGUMENT:

The EU's agenda for reforming the Investor-State Dispute Settlement (ISDS) mechanism does not represent any meaningful change to the standard model. The EU's proposed `modern' ISDS would still:

- restrict the policymaking space of governments, as foreign investors would still be able to sue governments at private international tribunals over health, environmental, financial and other policies designed to protect citizens' welfare;
- cause `regulatory chill' by discouraging governments from introducing certain policies in the public interest for fear of inciting compensation claims;
- grant special rights to foreign investors by allowing them to sue states in private international tribunals and bypass national courts;
- give for-profit lawyers the powers to make judgements about a government's public policies from a purely commercial, profit-driven perspective;
- only give rights to investors, with no obligations required of them to respect environmental, social, health and safety and other standards.

Instead the EU and its member states should:

- refrain from pressuring developing countries into negotiating or signing IIAs;
- drop ISDS from all EU and bilateral trade and investment agreements and explore alternative mechanisms for resolving disputes;
- initiate participatory reviews of their existing international investment agreements;
- ensure that investment agreements contain binding clauses obliging investors to respect human rights;
- ensure that investment agreements balance the rights and obligations of both the investors and the host states.

ARGUMENT 4

FOREIGN INVESTORS NEED IIAs IN ORDER TO PROTECT THEIR INVESTMENTS IN `RISKY' COUNTRIES

COUNTER-ARGUMENT:

Many question whether the additional investment protection provided by international investment agreements is really necessary. Generally, foreign multinational companies have the same right to seek compensation through domestic laws and national courts as the national companies and citizens in the countries where they do business.

International investment agreements simply grant multinational companies more generous rights than domestic firms, communities or individuals, providing them with a parallel, exclusive system for claiming their rights.

In addition to national laws, there are several other mechanisms which foreign companies can use to protect themselves:

- They can purchase private insurance.
- They can be insured by their home government (eg. through export credit guarantees).
- They can seek insurance from the World Bank's Multilateral Investment Guarantee Agency (MIGA) if investing in developing countries.

7 HOW TO DEVELOP AN ADVOCACY STRATEGY ON INTERNATIONAL INVESTMENT AGREEMENTS

This section provides some suggestions for civil society organisations on how to develop an advocacy strategy on international investment agreements.

THE SIX STEPS TO DEVELOPING AN ADVOCACY STRATEGY ON INTERNATIONAL INVESTMENT AGREEMENTS

1 IDENTIFY THE PROBLEM AND THE SOLUTION

Conduct some research in order to:

- Understand national and regional policies and experiences regarding international investment agreements and their impact on your country
- Identify the solutions: what policies and actions should your government adopt in the future with regard to foreign investment?
- Provide an evidence base for your advocacy – to demonstrate your legitimate case for a change in government policy towards IIAs.
- Understand the implications of the various articles on specific sectors and rights.
- Provide specific alternatives/proposals to the articles.

QUESTIONS TO ANSWER IN YOUR RESEARCH	SOURCES OF INFORMATION
What Bilateral Investment Treaties (BITs) has your country signed and with what countries?	UNCTAD Investment policy hub, available at http://investmentpolicyhub.unctad.org/IIA Ministry in charge of Trade/Commerce and Industry Ministry in charge of Foreign Affairs/International Trade
Have any companies sued your government in the past using the Investor State Dispute Settlement (ISDS) clause in a BIT?	Ministry in charge of Justice Ministry in charge of Trade/Commerce and Industry Newspaper articles
Has the Government had to pay compensation to any foreign companies following legal action taken by a company(ies) under the terms of a BIT? If so, how much?	Ministry in charge of Finance, Planning and Economic Development Ministry in charge of Foreign Affairs/International Trade Ministry in charge of Justice
What could the money spent by the government on settling companies' compensation claims have provided if it had been spent on health, education and other essential services instead? [Collate basic data on human development indicators in your country plus figures for public spending on health, education and other essential services (eg. spending on salaries of teachers, medical staff etc) in order to demonstrate the impact of these compensation claims on the government's duty of care to its citizens].	Ministry in charge of Finance, Planning and Economic Development Government agencizhes in charge of planning e.g. National Planning Authority in Uganda Government agency for statistics e.g. Uganda Bureau of Statistics Other African CSO coalitions and research-based organisations: *See `Useful Contacts and Resources' section for more information.*
Is the Government currently considering or negotiating any new investment agreements with other countries? And what is the current state of these negotiations? **What is the position of the Government with regard to BITs and International Investment Agreements in general?** **Does your country's constitution guarantee rights that could be adversely affected by an investment agreement?**	Ministry in charge of Trade/Commerce and Industry Office of the President/Prime Minister Ministry in charge of Foreign Affairs/International Trade Ministry in charge of Regional Integration
What national legislation exists to protect companies' investments in your country? [In order to demonstrate that companies will be protected even without international investment agreements.] **Should this be reformed in any way?**	Parliamentary Committees on trade and investment Ministry in charge of Trade/Commerce and Industry Investment Promotion Agency

NB. Negotiations over international investment agreements can be very secretive. You will need to piece together the information from all or most of the sources highlighted above.

Consider writing up your research in a short briefing paper (4-6 pages) to present to those whom you are seeking to influence at a national level and to share with other CSOs.

2 ANALYSE WHO TO TARGET AND WHEN

2.1 MAPPING WHERE POWER LIES AND STAKEHOLDERS:

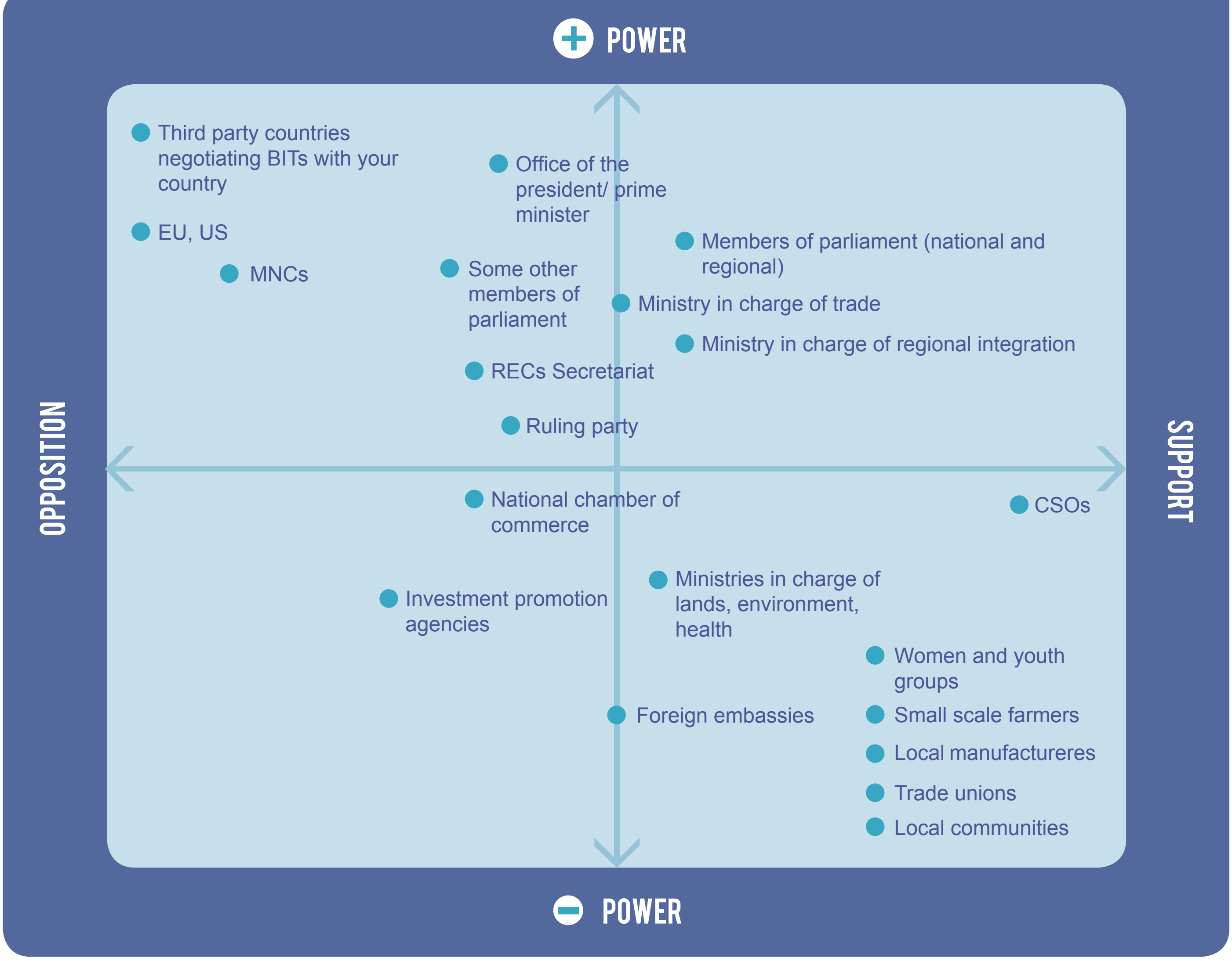
Advocacy is all about influencing powerful actors to bring about the changes you are seeking. So it's useful to identify:

- **The powerful actors in your country in relation to investment agreements**
- **Your potential allies likely to support the solutions and actions you are proposing**
- **Your opponents likely to oppose the solutions and actions you are proposing.**

MAPPING EXERCISE

- Organise a brainstorm within your organisation or network to identify all the actors who a)have some kind of power or influence over foreign investment policy in your country or b)some kind of stake/ interest in foreign investment.
- Note down each actor on a different sticky post-it note or small slip of paper
- Draw the following axis on a large piece of flip-chart paper and place all the post-it notes in the appropriate corner of the axis. Where you place each actor will depend on a)their power/influence and b)how much they are likely to support or oppose your position on investment agreements.

Here is an example from Uganda that might help you. You could also consider the media, academics, religious leaders, NGOs from the north as well as civil society allies working on related topics such as extractives or land rights.



IMPLICATIONS FOR YOUR STRATEGY:

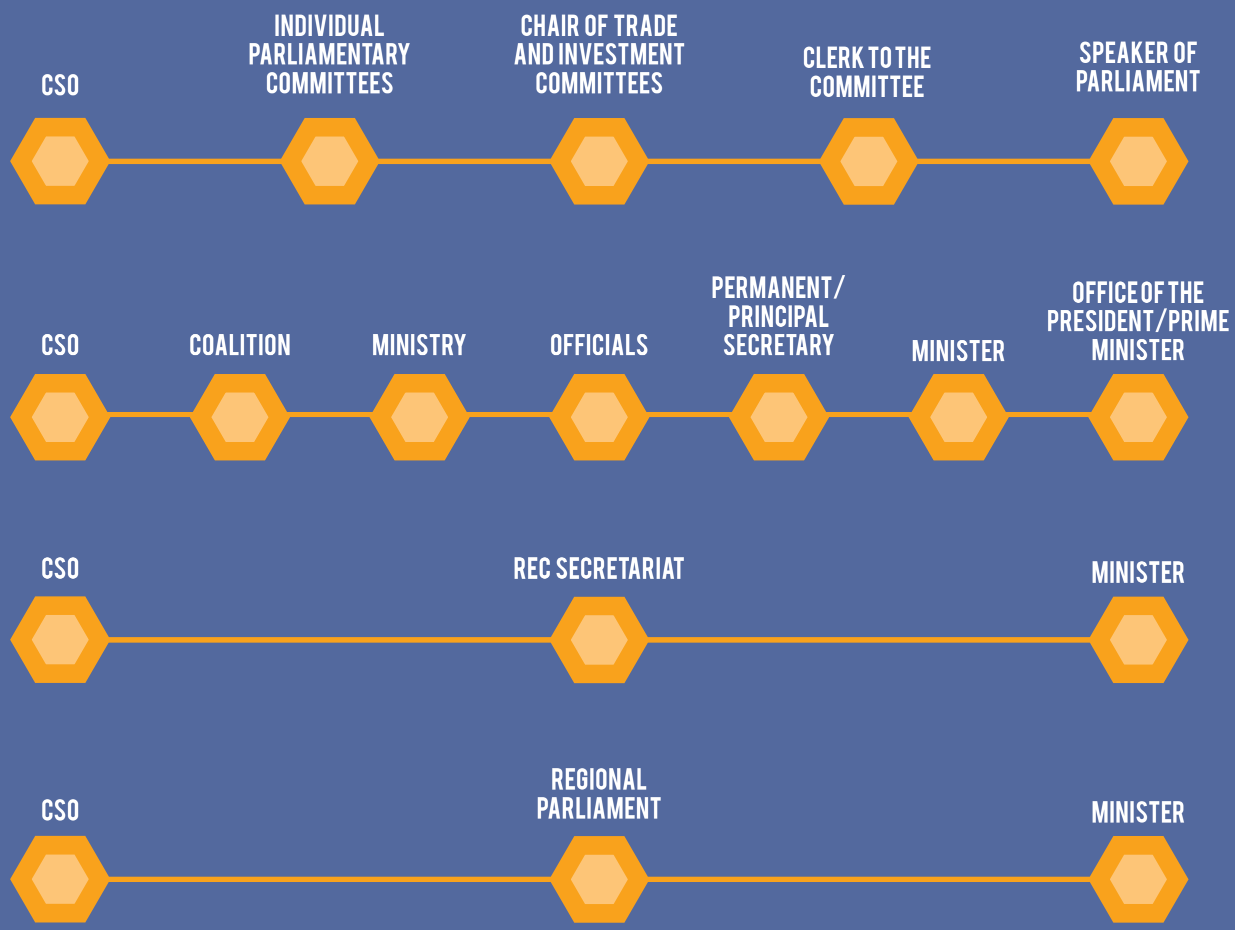
- *Influential stakeholders neutral on the issue:* Persuade them to agree with you.
- *Disinterested allies:* Persuade them that the issue is important.
- *Influential allies:* Build alliances.
- *Allies of low influence:* Build capacity to increase their influence.
- *Opponents of high influence:* Decrease their influence or look for a champion within them.

2.2 IDENTIFYING CHAINS OF INFLUENCE

Once you have identified the key actors to target, you will need to think about chains of influence. CSOs rarely get direct access to the actors whom they most want to influence – and even when they do, the powerful actors may not take action unless other influential actors are calling for the same action.

Who has influence over the most powerful actors? Can we influence these actors in order to influence the most powerful actors?

Some typical chains of influence for influencing negotiations over investment agreements:



2.3 IDENTIFYING POLITICAL OPPORTUNITIES AND RELEVANT PROCESSES

Policymakers are more likely to listen to you if you engage with their agendas and can link your concerns to events and processes that are already on their radars.

Example: Relevant political processes on investment agreements which are already on policymakers' agendas in East Africa:

- Development of the East Africa Community (EAC) model investment treaty.
- EAC negotiations on investment with the US.
- National governments' BIT negotiations with other countries.

3 SETTING YOUR GOAL, OBJECTIVES AND INDICATORS

3.1 YOUR GOAL:

It is helpful to have a vision of the change you want to see.

Possible goals for an advocacy strategy on international investment agreements:

- *The Government maintains the right to implement policies in the public interest without interference from foreign companies and without the threat of international litigation.*
- *National investment policies are consistent with international human rights obligations and require all foreign investors to respect human rights.*
- *The country attracts foreign investment without the Investor-State Dispute Settlement option and by offering foreign investors alternative dispute settlement procedures.*

3.1 OBJECTIVES:

It may take a long time to achieve your goal. So think of short-term, medium-term and longer-term outcomes you will be seeking on the way to achieving your ultimate goal – your interim objectives in other words.

3.2 INDICATORS:

The evidence which will prove that you have achieved your short-term, medium-term and longer term objectives. It's important to set indicators at the start of your strategy – so that you know in advance what evidence you will need to collect to prove your progress. This will help you monitor and evaluate your advocacy strategy.

	OBJECTIVES (ie the outcomes you are seeking)	INDICATORS (ie. the evidence to prove outcomes were achieved)
SHORT-TERM (6 MONTHS?)	New regional advocacy coalition created on IIAs National debate created on IIAs in the national media The government agrees to a dialogue with civil society on investment agreements	MoU with other CSOs in the region; X articles in the press; x items on radio; x blogs on blog sites Minutes of meetings between CSOs and government officials/ministers
MEDIUM-TERM (1 YEAR?)	The Government agrees to conduct a participatory review of its existing IIAs Ministers are convinced of the need to exclude ISDS from any future IIAs they negotiate	Press release from Ministry of Trade and Industry Notes of meetings with officials or ministers; quotes from ministers reported in the media
LONGER TERM (2 YEARS?)	The Government agrees it will not sign any future IIAs that contain ISDS	Government announcement – eg. minister's speech or Press release

4 DEVELOP YOUR KEY ADVOCACY MESSAGE AND RECOMMENDATIONS

4.1 ADVOCACY MESSAGE =

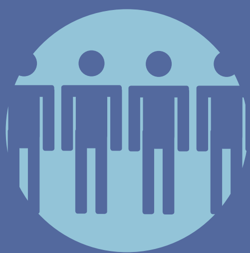
A concise and persuasive statement that conveys:

- What you want to achieve and the change you want to see (*ie. your goal*)
- Why you want to achieve it (*ie. the problem*)
- What action you want the target audience to take

TAILOR YOUR MESSAGE:

Once you have developed your basic message, you can adapt the language and the content to the interests, outlook and values of your target audience (whilst sticking to your basic message). Think too about what you can offer to your target audience as this will enhance your influence. For example, CSOs with expertise in IIAs can provide valuable technical advice and knowledge to national policymakers who may know little about international investment agreements or their implications.

ADVOCACY MESSAGE FOR GENERAL PUBLIC



THE CHANGE WE WANT:
We want our government to introduce policies that will address poverty and inequality without interference from foreign investors – policies that will provide essential services like health, education and transport to all citizens and policies that will protect our environment and respect human rights.

WHY:
The problem is that our government is under pressure to sign agreements with foreign investors that could limit its ability to introduce the policies needed to tackle poverty and inequality in our country. This is because these investment agreements would give foreign companies the power to demand huge sums of public money from our government if it introduces policies which the companies oppose. Instead of using public funds to pay for essential services, it could be forced to give big pay-outs to foreign companies.

ACTION:
Please support our campaign for fair investment in our country. Sign our petition today calling on the Government to conduct a public review of all its investment treaties with other countries in order to ensure that future foreign investment in our country respects the rights of all citizens.

ADVOCACY MESSAGE FOR GOVERNMENT MINISTER

THE CHANGE WE WANT:
We call on the government to ensure that its international investment agreements with third parties do not restrict the government's space to introduce the policies it sees fit to address poverty and inequality in our country and to protect the environment and the human rights of all citizens.

WHY:
We are concerned that international investment agreements which the country has either signed in the past or may sign in the future could expose the country to expensive litigation and compensation claims from foreign companies. We are also concerned that the threat of litigation under the Investor-State Dispute Settlement clause could limit the government's space to introduce the policies required to lift its citizens out of poverty and address inequality.

ACTION:
As a first step, we recommend that the Government conducts an inclusive and transparent review of all its current Bilateral Investment Treaties in order to identify the most appropriate international investment policies for protecting public services and the rights of all citizens in the future.

4.2 POLICY RECOMMENDATIONS

In order to engage directly with policymakers (eg. through lobby meetings and policy reports), you will need some policy recommendations spelling out exactly what action(s) you want policymakers to take.

POLICY RECOMMENDATIONS ON INTERNATIONAL INVESTMENT AGREEMENTS

Extract from *`International Investment Agreements Under Scrutiny: Bilateral Investment Treaties, EU Investment Policy and International Development'* **Traidcraft 2015:**

`Based on the evidence contained in this report we make the following recommendations:

- *The EU and its Member States should refrain from pressuring developing countries to negotiate or sign IIAs.*
- *The EU and its Member States should drop ISDS from all EU and bilateral trade and investment agreements and explore alternative dispute resolution mechanisms:*
- *Using domestic legal remedies should become the norm where possible.*
- *Appropriate multilateral state-state dispute mechanisms could be created, guaranteeing transparency, broad stakeholder participation, and the right to regulate.*
- *Such mechanisms should be composed of independent and impartial judges free from conflicts of interest*
- *The EU and its Member States should initiate participatory reviews of their investment agreements, carry out Human Rights Impact Assessments of all IIAs, eliminate any inconsistencies of these treaties with international human rights obligations and include binding investor obligations in all investment agreements.'*

5 DEVELOP YOUR KEY ADVOCACY MESSAGE AND RECOMMENDATIONS

5.1 YOUR APPROACH:

Questions to help you identify your overall approach and your activities:

- What approach and activities are likely to persuade the person or institution we want to influence to take the action(s) we are seeking, based on past experiences?
- What kinds of activities can we engage in, given our skills and capacity?
- What processes or 'hooks' are coming up, for example national or local elections?
- What are the expectations of our managers, donors, supporters/members?
- What are the concerns of those stakeholders directly affected by the proposed investment agreements and what approach do they want us to take?

5.2 WHO TO INVOLVE?

Think about how you will involve people from communities and sectors that have either been affected by international investment agreements already or could be affected in the future (eg. users of essential services, health workers, communities affected by a company's environmental impact, etc) . This will give your advocacy initiative more **legitimacy** in the eyes of those you are seeking to influence.

Consider **working in coalition** with other organisations, both nationally and in the region in order to maximise the impact of your advocacy. Given that the EU and the US are negotiating IIAs through regional blocs, we advise you to network with CSOs in other countries in your region in order to create a coordinated advocacy initiative.

Contact SEATINI for more information on the relevant civil society organisations and networks in your country/region. See `Useful contacts and resources' section.

6 MONITORING AND EVALUATING YOUR STRATEGY

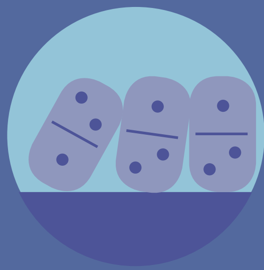
Advocacy monitoring and evaluation should cover the:

- Changes that happened. Were these the outcomes we were seeking?
- Advocacy activities. Are they still the most appropriate activities?
- Resources being invested and whether they are still being used for the right activities.

"Successful advocates know that advocacy plans are at best loose guides… Successful advocacy strategies are characterised not by their ability to proceed along a predefined track but by their ability to adapt to changing circumstances."

(Mark Schmidt and Steven Teles `The Elusive Craft of Evaluating Advocacy')

How can we be sure the actual outcomes were the result of our advocacy? Since it is often hard to prove a direct link between your advocacy and the outcomes, you may find it more helpful to focus on your **contribution**.



HOW TO DEMONSTRATE YOUR CONTRIBUTION TO CHANGE

- Set clear indicators at the start of your advocacy strategy so that you know in advance what evidence you will need to collect to demonstrate progress (see section 3.2 above). Trying to collect evidence of progress retrospectively can be difficult.
- Retain and record all letters and statements from those you are seeking to influence that acknowledge the difference your initiative made.
- If you are advocating as part of a network, make sure you record and continuously reflect on the role and contribution of your organisation to the network, not just what the network as a whole achieved.
- Ask someone external to your organisation to interview a selection of individuals who were targeted by your advocacy about the impact of your advocacy on them. They may speak more freely to a neutral, external consultant.

If you want to walk fast, walk alone.
If you want to walk far, walk together.
(West African proverb)

A spider's web can tie up a lion.
(Ethiopian proverb)

8 JARGON BUSTER: DEFINITION OF TERMS AND ACRONYMS

ANYTIME TERMINATION PHASE:

The phase of an international investment agreement when it can be cancelled or renegotiated.

AU – AFRICAN UNION:

The African Union is a continental-wide body consisting of 54 countries. The only African country which is not a member is Morocco. The AU promotes the political and socio-economic integration of the continent and promotes and defends African common positions on issues of importance to Africa and its peoples. Its headquarters are in Addis Ababa.

BIT – BILATERAL INVESTMENT TREATY:

Type of International Investment Agreement between two countries which is intended to promote and protect the investments made by companies from those two countries in each other's territory. A BIT grants legally binding rights to investors and creates obligations on the part of the host governments.

CAPITAL CONTROL:

Measures adopted by a national government to regulate flows of money into and out of capital markets. Measures can include: exchange controls which prevent or limit the buying and selling of a national currency at the market rate, taxes on financial transactions, or limits on the amount of money that can be removed from a country.

CCIA – COMESA COMMON INVESTMENT AREA:

A proposed alternative model for settling disputes between investors and governments in countries within COMESA (the Common Market for Eastern and Southern Africa).

CETA – COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT BETWEEN EU AND CANADA:

Free trade agreement being negotiated between the European Union and Canada. It includes a proposal for an Investor-State Dispute (ISDS) clause.

CFTA – CONTINENTAL FREE TRADE AREA:

An initiative launched by the African Union in June 2015 to create a free trade area across the whole of Africa. Its stated objective is to facilitate economic, trade and investment opportunities between African countries. The ultimate aim is to create an African Economic Community by 2028. CFTA negotiations will cover trade in goods and services, movement of business persons, intellectual property rights, competition policy, and also investment.

COMESA – COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA:

The largest regional economic organisation in Africa with 19 member states. It has a free trade area enabling member states to trade with each other under preferential terms. It launched a customs union in 2009.

EAC – EAST AFRICA COMMUNITY:

The regional inter-governmental institution for Burundi, Kenya, Rwanda, Tanzania, Uganda with its headquarters in Arusha, Tanzania.

ECOWAS – ECONOMIC COMMUNITY OF WEST AFRICAN STATES:

Regional group of 15 West African countries whose mission is to promote economic integration across this region.

ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT:

The formal process used to predict the environmental and social consequences (both positive and negative) of a plan, policy, project or programme prior to the decision to move forward with the proposed action. Formal impact assessments are generally governed by certain administrative procedures regarding public participation and the documentation of decision-making.

ENVIRONMENTAL MANAGEMENT SYSTEM (EMS):

The management of an organisation's environmental programmes in a comprehensive, systematic, planned and documented manner. It includes the planning and implementation of policy for environmental protection.

EPAs – ECONOMIC PARTNERSHIP AGREEMENTS:

Free Trade Agreements (FTAs) that the EU has negotiated with the Africa, Caribbean and Pacific (ACP) Countries since 2002 within the framework of the Cotonou Agreement signed in 2000.

ESA – EASTERN AND SOUTHERN AFRICAN STATES:

A disparate group of countries with whom the EU signed an Economic Partnership Agreement. It includes: Comoros, Djibouti, Eritrea, Ethiopia, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia, Zimbabwe.

EU – EUROPEAN UNION:

Economic and political union of 28 European countries. It operates a single market which allows the free movement of goods, capital, services and people between member states of the EU.

EXPROPRIATION:

The act of taking privately owned property by a government to be used for the benefit of the public.

FDI – FOREIGN DIRECT INVESTMENT:

An investment made by a company or entity based in one country, into a company or entity in another country.

FET – FAIR AND EQUITABLE TREATMENT:

Clauses in an international investment agreement which require governments to treat investors `fairly' and not upset their `legitimate expectations' by introducing policies or regulations that might affect the returns they were expecting to earn on their investments.

FIPA – FOREIGN INVESTMENT PROMOTION AND PROTECTION AGREEMENT:

The term used by Canada for the Bilateral Investment Treaties which it has negotiated with other countries.

FTA – FREE TRADE AREA:

The region encompassing a trade bloc whose member countries have signed a Free Trade Agreement. Such Agreements involve cooperation between two or multiple countries to reduce trade barriers – import quotas and tariffs – and to increase the trade of goods and services with each other.

ICSID – INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES:

International arbitration centre within the World Bank to which investors can take their claims for compensation for alleged breaches of an international investment agreement by a host government. The ICSID deals with the majority of compensation claims linked to IIAs.

INDIRECT EXPROPRIATION:

Where a government is deemed to have harmed, affected or interfered with an investment through its introduction of a new policy or regulation. Indirect expropriation does not involve the direct seizure of assets (as would be the case with the nationalisation of a private industry, for example) – it can be the indirect impact of a given policy or regulation and is open to broad interpretation.

IIA – INTERNATIONAL INVESTMENT AGREEMENT:

An international agreement intended to promote and protect foreign investments in the countries that sign up to such agreements. An IIA is an umbrella term which covers Bilateral Investment Treaties (BITs) and regional investment agreements.

IPF – INVESTMENT POLICY FRAMEWORK:

Specific to the SADC region. Seeks to promote common investment policies across SADC countries.

INVESTMENT PROMOTION AGENCIES:

Set up by governments seeking foreign investment in order to register investors, coordinate investments and market their countries to potential investors.

INVESTOR:

In the case of IIAs, an `investor' is an individual or company that can claim nationality in one of the countries that are signatories to an IIA. It is often difficult to determine the `nationality' of a multinational company so international arbitration courts will treat `nationality' as having registration or a seat in the country. The definition of an `investor' in most IIAs is very broad. Investors are not even required to have substantial business interests in a country in order to benefit from the protections of IIAs.

ISDS – INVESTOR TO STATE DISPUTE SETTLEMENT:

A clause in international investment agreements which enables foreign investors to seek compensation in special international arbitration courts for alleged breaches of an international investment agreement. Only investors can use the ISDS clause – not the host governments.

LEGITIMATE EXPECTATIONS:

A key element of the Fair and Equitable Treatment (FET) standard used by investors to justify a compensation claim as it allows them to argue that a new law or regulation introduced by the host government has undermined their `legitimate expectations' of the profits they were seeking to earn.

MFN – MOST FAVOURED NATION TREATMENT:

A legal term which represents the status given to one country by another country in international trade. A country gives this status to another country if it is interested in increasing trade with that country. In trade agreements, the MFN obligation prevents a country from discriminating between the countries that have signed the agreement.

MNC – MULTINATIONAL CORPORATION:

A company that has facilities or assets in at least one country other than its home country. Such companies have offices or operations in different countries and usually have a centralised headquarters providing global management of the company.

NT – NATIONAL TREATMENT:

A legal term in international trade agreements which obliges countries not to discriminate against other countries.

NON-DISCRIMINATION:

Legal term applied to international trade relations, linked to Most Favoured Nation Treatment and National Treatment obligations (see MFN and NT definitions above).

OECD – ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT:

International economic organisation of 34 countries, founded in 1961 to promote economic progress and world trade. It is a forum of (developed) countries describing themselves as committed to democracy and the market economy and to coordinating the domestic and international economic policies of its members. Increasingly the OECD seeks to set global standards and norms for taxation and fiscal policies, aid, trade, and investment and acts as technical support body to the G20 group of nations.

PFI – POLICY FRAMEWORK FOR INVESTMENT:

A model investment policy developed by the OECD.

PR – PERFORMANCE REQUIREMENT:

Binding clauses that should be included in international investment agreements requiring investors to comply with minimum international standards on human rights, environment and labour, corporate governance etc.

REGULATORY CHILL:

A common effect of Bilateral Investment Treaties whereby national governments refrain from introducing new regulations or policies of benefit to their citizens - for fear of triggering a compensation claim from one or more foreign companies.

RENDEZVOUS CLAUSE:

A clause in the EU's Economic Partnership Agreements (EPAs) which commits the countries signed up to these agreements to negotiate an investment agreement within five years of the EPA coming into force.

RIGHT OF ENTRY AND ESTABLISHMENT:

A clause which should be included in international investment agreements to ensure that host governments can direct foreign investments towards helping to fulfil the country's national development objectives.

SADC – SOUTHERN AFRICA DEVELOPMENT COMMUNITY:

Inter-governmental organisation committed to socio-economic cooperation and integration as well as political and security cooperation across its 15 Southern Africa member states.

TIDCA – TRADE INVESTMENT AND DEVELOPMENT AGREEMENT:

Cooperative framework or mechanism under which the parties will identify specific trade and investment issues and seek to advance those issues through appropriate agreements. There is a TIDCA between the Southern African Customs Union (SACU) and the USA.

TIFA – TRADE AND INVESTMENT FRAMEWORK AGREEMENT:

Similar to a TIDCA. Provides strategic frameworks and principles for dialogue on trade and investment issues between the USA and other countries.

TTIP – TRANSNATIONAL TRADE AND INVESTMENT PARTNERSHIP:

A comprehensive free trade and investment agreement currently being negotiated – in secret – between the European Union and the USA.

UNGPs – UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS:

Global Standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. They were unanimously endorsed by the United Nations Human Rights Council in June 2011.

WAEMU – WEST AFRICAN ECONOMIC AND MONETARY UNION:

Organisation of eight West African states established to promote economic integration amongst the countries that share the CFA franc currency. Known as UEMOA in French.

9 USEFUL RESOURCES, CONTACTS AND ENDNOTES

BACKGROUND READING ON INTERNATIONAL INVESTMENT AGREEMENTS

International Investment Agreements Under Scrutiny: Bilateral Investment Treaties, EU Investment Policy and International Development, Traidcraft, 2015 https://www.tni.org/files/download/iias_report_feb_2015.pdf

Investors running wild on land: the threats posed by international investment agreements, Traidcraft Briefing note, Jan 2013.
http://www.tjm.org.uk/documents/Investment_running_wild_on_landJan13.pdf

Investment Policy Briefs, South Centre, www.southcentre.int. See the following:

Crisis, Emergency Measures, and the Failure of the ISDS system: The Case of Argentina, Frederico Lavopo, Professor, University of San Andres and University of Buenos Aires, South Centre Investment Policy Brief, No. 2, July 2015
http://www.southcentre.int/investment-policy-brief-2-july-2015/

Ecuador's Experience with International Investment Arbitration, Andres Arauz G., Minister of Knowledge and Human Talent, Republic of Ecuador, South Centre Investment Policy Brief, No. 5, Aug 2015
http://www.southcentre.int/investment-policy-brief-5-august-2015/

Indonesia's Perspective on Review of International Investment Agreements, Abdulkadir Jailani, Director for Treaties of Economic, Social and Cultural Affairs, Ministry of Foreign Affairs, Republic of Indonesia, South Centre Investment Policy Brief, No. 1 July 2015
http://www.southcentre.int/investment-policy-brief-1-july-2015/

India's Experience with BITs: Highlights from Recent ISDS Cases, Biswajit Dhar, Professor of Economics, Jawaharlal Nehru University, New Delhi, South Centre Investment Policy Brief, No. 3, July 2015
http://www.southcentre.int/investment-policy-brief-3-july-2015/

International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa, Xavier Carim, Ambassador of South Africa to the World Trade Organisation (WTO), South Centre Investment Policy Brief, No. 4, Aug 2014
http://www.southcentre.int/investment-policy-brief-4-august-2015/

ISDS and TTIP Quiz, online game to test your knowledge of investment agreements, SOMO http://www.treehugger.nl/dev/videosomo.html

Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Corporate Europe Observatory and the Transnational Institute, Nov 2012
http://corporateeurope.org/international-trade/2012/11/profiting-injustice

South Africa, Africa and International Investment Agreements Policy Advisory Group Seminar Report, Centre for Conflict Resolution, South Africa, July 2014
http://www.ccr.org.za/images/pdfs/V48-IIAs%20Report%20Web.pdf

The obscure legal system that lets corporations sue countries, Claire Provost and Matt Kennard, The Guardian, 10 June 2015
http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid

Unfair, Unsustainable, and Under the Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future, Thomas McDonagh, Democracy Center 2013
http://democracyctr.org/new-report-unfair-unsustainable-and-under-the-radar/

Worried about your BITs? An introduction to Bilateral Investment Treaties, 4-page briefing, Trade Justice Movement, Sept 2014
http://www.tjm.org.uk/trade-issues/related-campaign-issues/bilateral-investment-treaties/353-worried-about-your-bits-short-briefing.html

RECOMMENDED ADVOCACY TOOLKITS AND GUIDES

The Advocacy Sourcebook. WaterAid
http://www.wateraid.org/~/media/Publications/advocacy-sourcebook.ashx

Participatory Advocacy: A toolkit for VSO staff, volunteers and partners, J. Cox, VSO www.vsointernational.org/Images/advocacy-toolkit_tcm76-25498.pdf

Practical Action in Advocacy, G. Gordon, Tearfund http://www.sasanet.org/curriculum_final/downlaods/CA/Books%20&%20Articles/B4%20-%20Practical%20Action%20in%20Advocacy.pdf

Tools for Digital Advocacy Global Voices
http://advocacy.globalvoicesonline.org/projects/advocacy-20-guide-tools-for-digital-advocacy/

Networking for Policy Change: An Advocacy Training Manual
The POLICY Project, The Futures Group International
October 1999
http://www.policyproject.com/pubs/AdvocacyManual.pdf

Developing Effective Coalitions: an eight step guide
Cohen, Baer, Satterwhite, Prevention Institute, http://www.preventioninstitute.org/component/jlibrary/article/id-104/127.html

Monitoring government policies: a toolkit for civil society organisations in Africa
CAFOD/Christian Aid/Trocaire 2007
http://www.ansa-africa.net/uploads/documents/publications/Monitoring_Government_Policies.pdf

Tax Justice for Advocacy: A Toolkit for Civil Society Tax Justice Network, SOMO, Christian Aid, ActionAid, 2011. Contains useful and practical materials for advocacy in general. http://www.christianaid.org.uk/images/completetaxadvocacytoolkit.pdf

ORGANISATIONS AND WEBSITES

Network for Justice in Global Investment, http://justinvestment.org

SEATINI – The Southern African and East African Trade, Information and Negotiations Institute, http://www.seatiniuganda.org/

Trade Justice Movement (UK) http://www.tjm.org.uk/

Trade and Investment Justice project of the Transnational Institute (TNI) https://www.tni.org/en/page/trade-investment-works

Traidcraft, http://www.traidcraft.co.uk/

ENDNOTES

1. Investment agreements: the basics

i. Bolivia, Ecuador, Venezuela, South Africa, and Indonesia have terminated several IIAs. See Traidcraft 2015: `International Investment Agreements Under Scrutiny' , chapter 4. In Africa, the Southern Africa Development Community (SADC) has developed a Bilateral Investment Treaty Template known as the SADC Model BIT. This is a non-binding template intended to assist African states in negotiating bilateral investment treaties which would provide more of a balance than standard treaties between the rights and obligations of companies and the rights and obligations of states to protect the welfare of their citizens. The Investment Agreement for the Community of Southern and East Africa (COMESA) Common Investment Area (CCIA) takes a similar approach to the SADC Model BIT.
ii. See for example Aisbett (2009), Poulsen (2010), and Yackee (2010); UNCTAD 2014: Trade and Development Report 2014: Global governance and policy space for development, New York/Geneva, p. 159
iii. 608 is the number of cases dealt with by the World Bank Group's International Centre for the Settlement of Investment Disputes (ICSID). See http://unctac.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf accessed 04/03/15.
iv. See CEO/TNC: `Profiting from Injustice: How law firms, arbitrators and financiers arefuelling an investment arbitration boom' 2012
v. http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf
vi. Uche Ewelukwa Ofodile: `Africa and the System of Investor-State Dispute Settlement' http://blogaila.com/2014/10/12/africa-and-the-system-of-investor-state-dispute-settlement-to-reject-or-not-to-reject-uche-ewelukwa-ofodile/
vii. Gaukrodger and Gordon, 2012 p.20
viii. See analysis of 140 known cases up to May 2010 by Van Haarten (2012); see also Johnson and Volkov (2014).

2. Key facts and figures on investment agreements

i. Cecilia Olivet (2011), `The Dark Side of Investment Agreements' , p.4.
ii. Vandevelde 2005. Quoted in Traidcraft `International Investment Agreements Under Scrutiny' (2015) p. 10
iii. Traidcraft, Ibid.
iv. Figure quoted in M. Burgstaller and J Ketcherson, `Investment Protection in Africa' Hogan Lovells Dec 2012, http://www/hoganlovells.com
v. UNCTAD 2014: Recent Developments in Invest-State Dispute Settlement (ISDS), IIA Issues Note, No 1, April 1 2014.
vi. Figure quoted in Leo B: `Where are the BITs? How US Bilateral Investment Treaties with Africa and promote development' Centre for Global Development, August 2010, http://www.cgdev.org
vii. Figure quoted in Uche Ewelukwas Ofodile: `Africa and the system of Investor-States Dispute Settlement' based on ICSID Caseload statistics. http://blogaila.com/2014/10/12/africa-and-the-system-of-investor-state-dispute-settlement-to-reject-or-not-to-reject-uche-ewelukwa-ofodile/
viii. `Profiting from Injustice' Ibid.
ix. Ofodile, Ibid.
x. http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf
xi. See Xavier Carim: `International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' South Centre Investment Policy Brief, No. 4 Aug 2015.
xii. Standard Chartered Bank vs The United Republic of Tanzania,ICSID, Case No. ARB/10/12
xiii. `Tanzanian Courts Injunct ICSID proceedings' Herbert Smith Freemills Dispute Resolution, 6 May 2014, http://hsfnotes.com/arbitration/2014/05/06/tanzanian-courts-injunct-icsid-proceedings/
xiv. Figure quoted in `Profting from Injustice' . See also Tony Phillips (2008) `Argentina Versus the World Bank: Fair Play or Fixed Right?' Center for International Policy (CIP). http://www.cipamericas.org/archives/1434
xv. http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx

3. The African investment landscape

i. Office of the United States Trade Representation, Executive Office of the President, Bilateral Investment Treaties, available at https://ustr.gov/trade-agreements/bilateral-investment-treaties

4. Political processes and opportunities for influence in Africa

i. SADC Model Bilateral Investment Treaty Template with Commentary, available at http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf
ii. Investment Policy Framework for the Southern African Development Community, available at http://www.oecd.org/daf/inv/investment-policy/sadc-regional-investment-policy-framework.htm
iii. COMESA-EAC-SADC Tripartite Free Trade Area Launched, available at http://www.sadc.int/news-events/news/comesa-eac-sadc-tripartite-free-trade-area-launched/
iv. Press Release N°05/ 2015; The African Union Assembly launches the Continental Free Trade Area (CFTA) negotiations, available at http://summits.au.int/en/sites/default/files/Press%20Release%20-%20African%20Union%20launches%20the%20CFTA%20negotiations%20in%20Johannesburg_0.pdf
v. Abuja Treaty Establishing the African Economic Community (AEC), available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=173333

6. How to win the arguments and deal with tricky questions

i. See for example Aisbett (2009), Poulsen (2010), and Yackee (2010)
ii. See statement from Xavier Carim, Deputy Director General of South Africa's Department of Trade and Industry at a 2012 WTO Public Forum.
iii. See Andres G. Arauz, `Ecuador's Experience with International Investment Arbitration', South Centre Investment Policy Brief, No. 5, Aug 2015
iv. Olivet C., Vervest P, and Schmitz L (2015) `Central and Eastern European countries at the crossroads: Why governments should reject investment arbitration in TTIP' TNI/IGO/Project for the Future https://www.tni.org/en/publication/central-and-eastern-european-countries-crossroads
v. See AbdulkadirJailani, `Indonesia's Perspective on Review of International Investment Agreements', South Centre Investment Policy Brief, No. 1 July 2015 http://www.southcentre.int/category/issues/trade-and-investment/investment-agreements/
vi. UNCTAD 2014: Trade and Development Report 2014: Global governance and policy space for development, New York/Geneva, p. 159
vii. See CEO/TNI, `Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom' Nov 2012. http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf
viii. See analysis of 140 known cases up to May 2010 by Van Haarten (2012); see also Johnson and Volkov (2014).

SEATINI

Strengthening Africa in World Trade

Established in 2001, SEATINI-Uganda is one of the leading NGOs working on trade and development issues. SEATINI-Uganda focuses on strengthening the capacity of key stakeholders; government officials, CSOs, media, trade unions, MPs, farmers and women groups, to participate in and influence trade negotiations, trade, tax and related policy processes at all levels for sustainable development and improved livelihoods in Uganda and the East African region.

SEATINI-Uganda is part of SEATINI a sub-regional NGO founded in 1996 after the WTO Singapore Ministerial Conference, after realizing that Africa and Third World countries were marginalized in the WTO negotiations and other global processes.

SEATINI Uganda
Plot 69 Bukoto Street
Kamwokya P.O Box 3138
Kampala, Uganda
Tel: +256 414 540856
E-mail: seatini@infocom.co.ug
Web: www.seatiniuganda.org

This guide was written by Munu Martin Luther of SEATINI and Helen Collinson. We would also like to extend warm thanks to Fredrick Njehu from the Kenya Human Rights Commission who acted as a reviewer.

Layout and design by Will de Villiers

TRAIDCRAFT
Fighting poverty through trade

Traidcraft has been working for trade justice for growers and producers in the poorest countries around the world since 1979. Traidcraft is a pioneer of the fair trade movement in the UK, where we jointly founded the Fairtrade Foundation. Traidcraft's policy work, addresses the need for wider structural and policy change through modeling good business practices and mobilising supporters to influence government and corporate behaviour.

Traidcraft Head Office
Kingsway, Gatehead
Tyne & Wear NE11 0NE, UK
Tel: +44 191 491 0591
Fax: +44 191 497 6562
E-mail: policy@traidcraft.org
Web: www.traidcraft.co.uk
Registered charity no. 1048752

Funded by the European Union
This publication was co-funded by the European Union as part of the Making EU Investment Policy Work for Sustainable Development Programme