

EU - Myanmar Bilateral Investment Treaty

On March 5th 2013 President Thein Sein was the first-ever Myanmar President to visit Brussels. Thein Sein was warmly welcomed because of the reform process that has been put in place since he took office. *“The EU and Myanmar are turning a page in their relationship. More dialogue, more and better aid, more trade and investment”*, said European Commission chief Jose Manuel Barroso. Brussels said it was also now ready to explore the feasibility of a bilateral investment treaty.

In March 2014 the European Commission received the negotiation mandate from the EU member States to start negotiating an Investment treaty with Myanmar.

What is a Bilateral Investment Treaty?

A **Bilateral Investment Treaty (BIT)** is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state. This type of investment is called foreign direct investment (FDI). In the case of the possible EU-Myanmar Investment Treaty it would be a treaty between the European Union and the Government of Myanmar. Since 1959 more than 3,000 BITs have been signed, mostly in the past 15 years and mainly between developed and developing countries. A Bilateral Investment Treaty is an International Investment Agreement (IIA). Other IIAs for example are Taxation Treaties, or the investment chapters in Free Trade Agreements, or multilateral agreements such as the Energy Charter Treaty which regulates investments in the energy sector.

BITs originated from the desire of developed countries to secure financial and legal protection for their investors and their investments in developing countries.

A BIT is usually valid for at least 10 years. They are often automatically renewed unless a partner asks for cancellation in due course. Investor protection provisions remain in place for decades after the expiry of the investment treaty for investments that began when the treaty was still in force. This represents a barrier to renegotiating more balanced agreements.

What are key elements of a BIT?

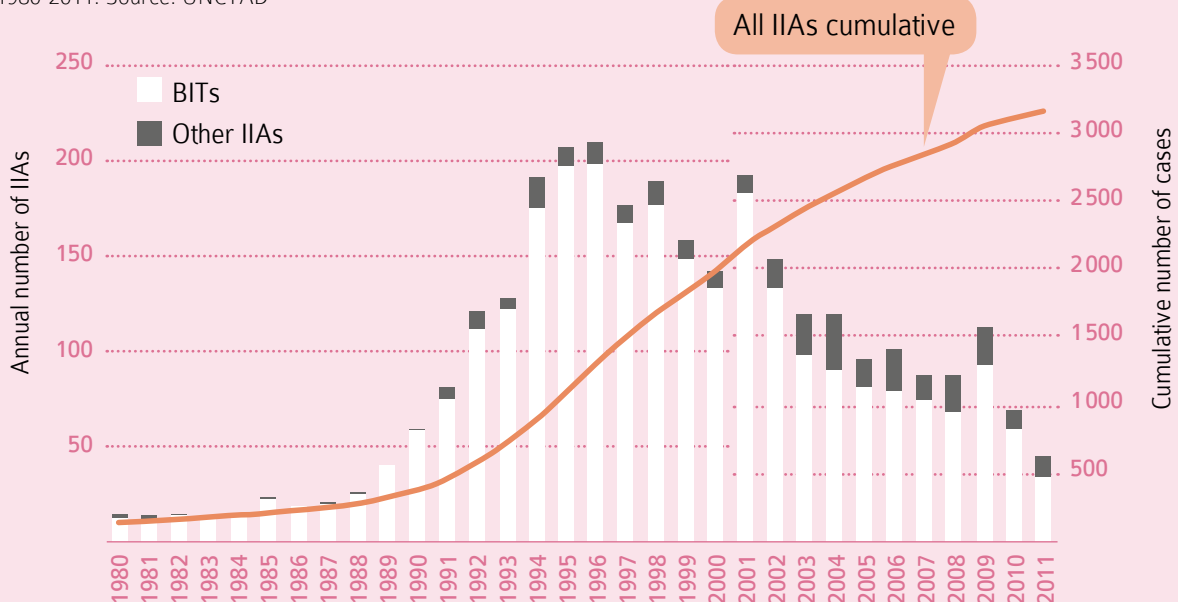
Most BITs grant investments made by an investor in the territory of the other a number of guarantees. By including broad definitions of terms like “investor” and “investment” these agreements offer very broad protection to foreign investors, including rights under contract, their rights of establishment and entry as well as its operations and exit. Under many bilateral investment agreements all sectors of the economy are covered unless explicit reservations are made in the agreement’s annexes.

The most important element in almost all BITs is that they allow for an Investor to State Dispute Settlement (ISDS) mechanism, whereby an investor can go to an international tribunal, by-passing the host state’s national judicial system, such as the ICSID (International Center for the Settlement of Investment Disputes).

Companies can claim compensation for actions by host governments that they perceive as damaging to their investments, either directly through expropriation, or indirectly through regulations of virtually any kind. ‘Investment’ is understood in such broad terms that corporations can claim not just for the money invested, but for the loss of future anticipated earnings as well. Through ISDS, foreign investors have many more rights than communities or governments, who cannot file cases against investors at the same international tribunals when for example the

Trends of BITs and “other IIAs”

1980-2011. Source: UNCTAD



environment is polluted or human rights (or public health or labour rights etc.) are violated by the investor. International Investment Law is therefore often referred to as “Hard Law” while human rights are seen as “Soft Law”.

The number of investment arbitration cases, as well as the sums of money involved, has surged over the last two decades from 38 cases in 1996 (registered at ICSID, the World Bank’s body for administering such disputes) to 518 known investor-state cases at the end of 2012. The amount of money involved has also grown dramatically. In 2009/2010, 151 investment arbitration cases involved corporations demanding at least US\$100 million from states.

Some emblematic investor-state disputes

Corporations versus public health – Philip Morris v. Uruguay and Australia: On the basis of bilateral investment treaties (BITs), tobacco giant Philip Morris is suing both Uruguay and Australia over their anti-smoking laws. The company argues that compulsory large warning labels on cigarette packages prevent it from effectively displaying its trademarks, causing a substantial loss of market share.

Corporations versus environmental protection – Vattenfall v. Germany I & II: In 2009, Swedish energy multinational Vattenfall sued the German government, seeking €1.4 billion (US\$1.9 billion) plus interest in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case was settled out of court after Germany agreed to water down the environmental standards, exacerbating the effects that Vattenfall’s power plant will have on the Elbe River and its wildlife. In 2012, Vattenfall launched a second lawsuit seeking €3.7 billion (US\$4.6 billion) for lost profits related to two of its nuclear power plants. The case followed the German government’s decision to phase out nuclear energy after the Fukushima nuclear disaster. Both actions were taken under the Energy Charter Treaty, which includes BIT-like investment protection provisions.

Corporations versus black empowerment – Piero Foresti and others v. South Africa: In 2007, Italian investors sued South Africa over its Black Economic Empowerment Act which aims to redress some of the injustices of the apartheid regime. It requires, for example, mining companies to transfer a portion of their shares into the hands of black investors. The dispute (under South Africa’s BITs with Italy and Luxembourg) was closed in 2010, after the investors received new licenses, requiring a much lower divestment of shares.

Corporations versus action against financial crises – CMS and 40 other companies v. Argentina:

When Argentina froze utility rates (energy, water, etc.) and devalued its currency in response to its 2001-2002 financial crisis it was hit by over 40 lawsuits from investors. Big Companies like CMS Energy (US), Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain) demanded multimillion dollar compensation packages for revenue losses.

How does ISDS work?

The exact course of an investor-state arbitration case depends on the relevant rules and the institution administering the case. The majority of known cases are handled by ICSID. The second most used rules are those of the UNCITRAL. The Permanent Court of Arbitration (PCA) in The Hague, the London Court of International Arbitration (LCIA) as well as the Paris-based International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC), both business organisations, also regularly handle disputes.

Despite procedural differences, an investment arbitration case looks roughly like this:

The arbitration process starts when a foreign investor sends a notice of arbitration to a state. Both, the investor and the state will be assisted by lawyers (counsel) during the proceedings.

The investor and the state jointly select the arbitration tribunal. Usually each party picks one arbitrator and both jointly appoint a third to serve as chair.

The proceedings last years and mostly take place behind closed doors, with scant or no information at all released to the public, sometimes not even the fact that a case is on-going.

The arbitrators ultimately determine if an award is justified and the type and size of the remedy. They also allocate the legal costs of the proceedings. Opportunities to challenge tribunal awards are very limited and awards are rarely challenged by governments.

States have to comply with arbitral awards. If they resist, the award can be enforced almost anywhere in the world, for example, by seizing the state’s property elsewhere. (CEO/TNI 2012 Profiting from Injustice, www.tni.org)

Examples of key provisions in Investment law:

The investment protection chapter “should cover a broad range of investors and their investments [...] whether the investment is made before or after the entry into force of the Agreement”.

What it means in practice

Definitions of “investor” and “investments” are key because they determine who/what is covered by the chapter. A broad definition not only covers actual enterprises in the host state, but a vast universe ranging from holiday homes to sovereign debt instruments, exposing states to unpredictable legal risk. Broad definitions also open the door to mailbox companies abusing the treaty via “treaty shopping”, allowing, for example, a Myanmar firm to sue Myanmar via a Dutch mailbox company.

Investors have the right to a “minimum standard of treatment” (MST) and “fair and equitable treatment” (FET), “including a prohibition of unreasonable, arbitrary or discriminatory measures”.

A catch-all provision most relied on by investors when suing states. In 74% of the cases won by US investors, tribunals found a FET violation¹. According to leaked draft text from other negotiations², the EU usually advocates a broad version of the clause, protecting what an investor considers its “legitimate expectation” from unpredictable policy change.

The agreement should guarantee the “free transfer of funds of capital and payments by investors”

This provision would allow the investor to always withdraw all investment-related monies, reducing the ability of countries to deal with sudden and massive out- and inflows of capital, balance of payment and other macroeconomic crises

Investors should be protected “against direct and indirect expropriation”, including the right to compensation.

The agreement should also include an “umbrella clause”

From a certain, investor-friendly view, almost any law or regulatory measure can be considered an ‘indirect expropriation’ when it has the effect of lowering future expected profits.

Allows investors to claim compensation as a result of a regulation, law, policy measure, or other government decision that has the effect of *reducing* the profit-making opportunities. Since almost any government measure can fit that definition, legitimate public policies have faced investor-state lawsuits globally.

This would bring all obligations a state assumed with regards to an investment under the BIT ‘umbrella’ (like a contract with one investor), multiplying the risk of costly lawsuits.

Is ISDS a neutral system?

The international investment arbitration system was justified and put in place by Western governments with the argument that a fair and neutral dispute settlement system was needed to protect their corporations' investments from perceived bias and corruption within national courts. Investment arbitrators were to be the guardians and guarantors of this regime.

A recent report concludes that the arbitration industry, instead of acting as fair and neutral intermediaries, has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments and sovereign states. (CEO/TNI 2012 Profiting from Injustice, www.tni.org). They have built a multimillion-dollar, self-serving industry, dominated by a narrow, exclusive elite of law firms and lawyers whose interconnectedness and multiple financial interests raise serious concerns about their commitment to deliver fair and independent judgements.

Arbitrators themselves have stated that they "do not normally see themselves as guardians of the public interest". A known professor in the field noted, "Most arbitrators are experts in "anything but" human rights law" (<http://www.globalarbitrationreview.com/news/article/29527/arbitrators-human-rights/> [7-11-2012]).

There is a dark irony in this situation. While public concerns do not seem to be the arbitrators' forte, many documented legal claims brought by corporations involve issues that arise out of governments implementation of

policies to defend the public interest. Indeed, corporations can and have challenged environmental regulations, tax increases, monetary policies, and the re-nationalisation of public services and natural resources (http://www.iiapp.org/media/uploads/unique_powers_of_investment_arbitrators.pdf [7-11-2012]).

In many of these cases, it is within the arbitrators' discretion to weigh broader public interest when interpreting the treaty rules. For example, when Argentina argued "state of necessity" to justify the measures that it took during the 2001-2002 economic crisis which led to over 30 lawsuits by investors, arbitrators could have accepted this defence. Among the cases decided so far, most arbitrators chose not to. (The George Washington International Law Review, Vol. 41, pp. 109-747.)

The boom in arbitration has created huge profits for investment lawyers paid for by taxpayers through public budgets. Legal and arbitration costs average over US\$8 million per investor-state dispute, exceeding US\$30 million in some cases. Elite law firms charge as much as US\$1,000 per hour, per lawyer – with whole teams handling cases. Arbitrators also earn hefty salaries, amounting up to almost US\$1 million in one reported case. These costs are paid by taxpayers, including in countries where people do not even have access to basic services. For example, the Philippine government spent US\$58 million defending two cases against German airport operator Fraport; money that could have paid the salaries of 12,500 teachers for one year or vaccinated 3.8 million children against diseases such as TB, diphtheria, tetanus and polio.(CEO/TNI 2012 Profiting from Injustice)

How many BITs does Myanmar have?

CONFÉRENCE DES NATIONS UNIES SUR LE
COMMERCE ET LE DÉVELOPPEMENT



UNITED NATIONS CONFERENCE ON
TRADE AND DEVELOPMENT

Total number of Bilateral Investment Agreements concluded, 1 June 2012

Reporter	Partner	Date of Signature	Date of entry into force
Myanmar	China	12-Dec-01	21-May-02
	India	24-Jun-08	8-Feb-09
	Lao, PDR	5-May-03	---
	Philippines	17-Feb-98	11-Sep-98
	Thailand	14-Mar-08	---
	VietNam	15-Feb-00	---

Are there any ISDS cases against Myanmar?

So far there are no cases against Myanmar. In the case of the Myitsone Dam the Chinese investor could sue the Burmese government when the suspension would turn into final cancellation. The investor could claim the actual costs of the investment plus the expected future profits.

By far the largest number of the 518 known disputes which had been initiated by the end of 2012 worldwide were launched by US investors. They have filed 24% (123) of all cases. Next in line are investors from the Netherlands (50 cases), the UK (30) and Germany (27). EU and US companies have used these lawsuits to challenge green energy and medicine policies, anti-smoking legislation, bans on harmful chemicals, environmental restrictions on mining, health insurance policies, and measures to improve the economic situation of minorities amongst others.

Through an EU-Myanmar BIT Myanmar could become vulnerable to treaty shopping. The Netherlands for example has 95 BITs. Many transnational companies have been using Dutch BITs to sue host country governments for alleged damages to the profitability of their investments. Many transnational companies choose the jurisdiction of the Netherlands as the base for their global operations because of its favourable tax regime. The majority of these companies are so-called mailbox companies, companies with no actual economic activity in the Netherlands or employees. These mailbox companies could use the EU-Myanmar BIT to sue Myanmar.

Do BITs attract Foreign Direct Investments?

BITs are often presented as development instruments: because they offer protection to investors they will attract investment. However, there is little proof that this is indeed the case, let alone that BITs promote productive and sustainable investments. Different studies find a weak correlation between the signing of BITs and changes in FDI flows.

Japan has only 4 BITs. The US does not hold a BIT with China, despite the latter being the largest destination for US FDI. Brazil does not hold any ratified BIT agreements. Similarly, numerous countries that have ratified BITs are

having difficulties attracting FDI, particularly in sub-Saharan Africa. A BIT is not a necessary condition to receive FDI. (EU Investment Agreements in the Lisbon Treaty Era: a Reader SB network 2010. www.tni.org)

New York convention: does it mean Myanmar has to sign on to BITs?

On March 6th 2013 Myanmar signed on to the New York Convention: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. According to the Myanmar Daily the *New Light of Myanmar* approval in the parliament came after six lawmakers weighed the pros and cons of signing the Convention. Aung San Suu Kyi and other MPs also urged the signing of the Convention, saying it was a "prerequisite" to attract foreign investment. (www.newyorkconvention.org/news/myanmar-to-sign-new-york-convention-7-03-2013)

Having signed on to the New York Convention however does not imply Myanmar now also has to sign on to BITs.

Do all countries sign up to BITs?

Some countries have started to realise the injustices and inconsistencies of international investment arbitration and have initiated a retreat from the system. Bolivia, Ecuador and Venezuela have terminated several investment treaties and have withdrawn from ICSID. Argentina, which has been swamped with investor-claims related to emergency legislation in the context of its 2001-2002 economic crises, refused to pay arbitration awards. South Africa is engaged in a thorough overhaul of its investment policy to better align it with development considerations and has just announced that it will neither enter into new investment agreements nor renew old ones due to expire, including those with EU member states, that have ISDS. The Union of South American Nations (UNASUR) has discussed setting up an arbitration centre that could replace ICSID. Ecuador has started to audit its BITs – through carrying out a careful cost-benefit analysis of their existing BITs. India is questioning investor protection in the investment chapter of the Free Trade Agreement with the EU which it is currently negotiating.

Conclusions and recommendations:

BITs potentially undermine a countries' long-term economic and social development. BITs provide rights to investors and obligations on host states.

BITs offer investor protection and rights to foreign investors irrespective of whether the investors actually contribute in any meaningful or positive way to the host state's development.

BITs prioritise foreign investors over local investors. For a country such as Myanmar, it's important to strengthen it's local small and medium enterprises.

BITs favour investor's rights above those of communities and governments. Communities can't go to the same international tribunals in case their human rights or environment are affected by investments.

BITs limit policy space of governments to put in place policy in the public interest. They also have a chilling effect on policy.

The reform process in Myanmar is still in its early stages. New laws and policies still need to be developed and existing laws improved in order for Myanmar to embark on a sustainable development trajectory. This would highly be limited by ISDS or make the exercise of democratic rights very costly.

Myanmar could take advantage of the fact it enters the global economy and global investment frameworks at this stage. It still has a choice. It can learn from the experiences of other countries with BITs and take a well-considered decision.

There are alternatives available to investors if they wish to protect their investment; such as private insurances. This way Myanmar would not give a blank cheque to all foreign investors.

There is a need for the Burmese government, Members of Parliament, ethnic stakeholders, civil society and the business sector to do a cost and benefit analyses of ISDS in the future EU – Myanmar BIT.

Yangon/Amsterdam, March 2014

Published by Paung Ku and the Transnational Institute

Endnotes

1 <https://www.citizen.org/documents/MST-Memo.pdf>

2 <http://www.tradejustice.ca/wp-content/uploads/2013/08/CETA-Draft-Investment-Text-Nov21-2013-203b-13.pdf>



This publication was made financially possible by EC funding through the project "Making EU Investment Policy work for Sustainable Development". The ideas expressed are those of the contributing organisations and not necessarily that of the EC.



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The unique authority of international investment arbitrators - www.iiapp.org (September 2011)



The Paung Ku Forum is a place to discuss aid, civil society, and development in Myanmar. Paung Ku began in 2007 as an initiative to support and learn from local organisations in Myanmar. This Forum began in 2010 as an internal discussion site and then was opened up more widely in 2012. www.facebook.com/PaungKu



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