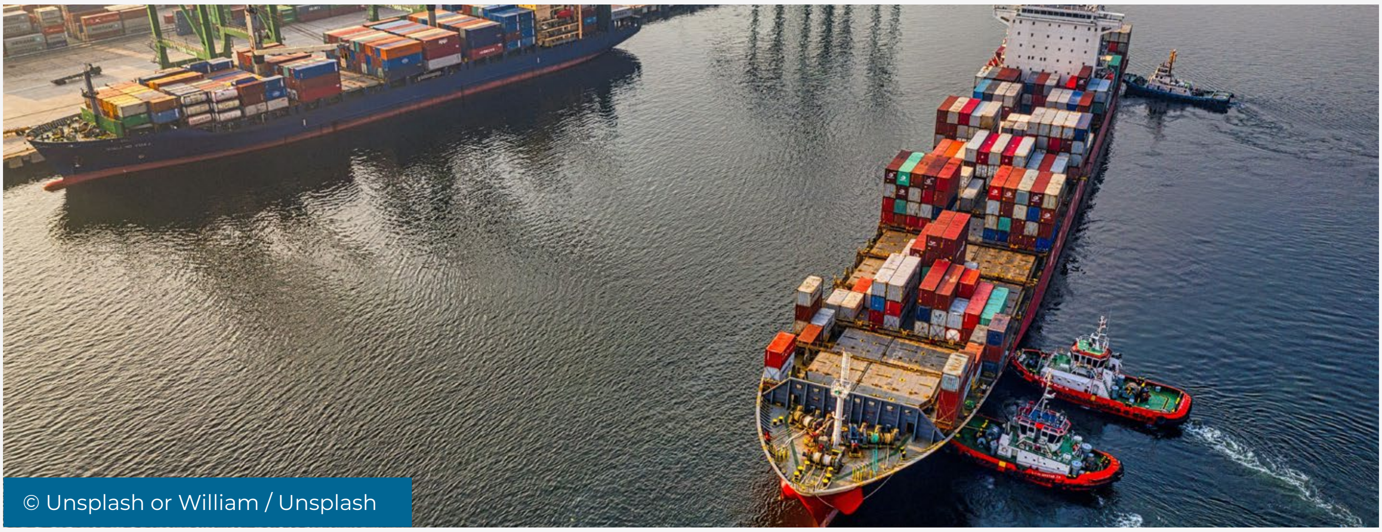
A RULE OF LAW APPROACH TO INCLUSIVE ECONOMIC DEVELOPMENT: SUPPORTING FAIR AND EQUITABLE INTERNATIONAL INVESTMENT AGREEMENTS IN LEAST DEVELOPED COUNTRIES

IDLO
Creating a Culture of Justice
International Development Law Organization



Key Points

- As a driver of inclusive economic development, the rule of law enables the design and implementation of legal and policy frameworks that are fair, transparent, coherent, and supported by predictable enforcement mechanisms.
- International Investment Agreements (IIAs) are a key policy tool to attract Foreign Direct Investment (FDI) as a source of financing for development. However, they entail significant risks for Least Developed Countries (LDCs) due to their traditionally unbalanced and sometimes unpredictable nature, which can prevent FDI from contributing to LDCs' development objectives.
- Adopting a rule of law approach to IIAs negotiation and management can help LDCs minimize the risks associated with these agreements. Such an approach is geared towards increasing the coherence, predictability, and transparency of negotiation and application of these agreements, as well as achieving a fair and equitable balance of rights and obligations for the parties.
- As the only global intergovernmental organization exclusively devoted to promoting the rule of law to advance peace and sustainable development, the International Development Law Organization (IDLO) supports LDCs in implementing a rule of law approach to IIA negotiation and management.
- Through the Investment Support Programme for LDCs (ISP/LDCs), IDLO provides technical assistance and complementary capacity building to governments and private sector entities on investment-related matters, including IIA negotiation. The programme has provided technical assistance to institutions in The Gambia and Uganda.

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BACKGROUND

The importance of FDI[1] for the achievement of broader sustainable development objectives finds recognition in a wide variety of international documents. The Brundtland Report, Addis Ababa Action Agenda and Agenda 2030 – in particular through SDG 10.B – all recognize the vital role of FDI as a source of financing for development. FDI can support the creation of new jobs, improve outputs and productivity, as well as increase technology transfer to domestic firms and reinforce domestic supply chains.

Securing FDI is especially important to sustain LDCs' development efforts. The need for FDI has become even more crucial in recent years, after a series of external shocks – such as the COVID-19 pandemic and the war in Ukraine – have caused severe setbacks to LDCs' development and recovery efforts, risking erasing a decade of progress toward the achievement of Agenda 2030. One of the policy tools available to the LDCs to seek to increase levels of FDI are International Investment Agreements (IIAs).[2]

[1] Foreign Direct Investment (FDI): cross-border investment made by an investor of one state (the foreign investor) with the objective of establishing a lasting interest in an enterprise in the territory of another state (the host state).

[2] International Investment Agreements (IIAs): treaties that provide substantive protection (e.g., guarantees against expropriation, fair and equitable treatment, non-discrimination etc.) to the investments made by the foreign investor in the territory of the host state. When entered into between two states, they are sometimes referred to as Bilateral Investment Treaties (BITs).

IIA-RELATED RISKS AND CHALLENGES: AN LDCs PERSPECTIVE

IIAs afford foreign investors a standard set of substantive protections, as well as guarantees of a stable and predictable business environment. Yet, IIAs can also pose significant risks:

- **Significant financial resources to pay damages:** IIAs' specific enforcement mechanism – that is, ISDS[3] – can result in the award of damages to foreign investors in the range of millions of dollars, the payment of which may be prohibitive for under-resourced LDCs.
- **Inconsistent outcomes:** The interpretation of IIA provisions by arbitral tribunals sometimes leads to widely different results, with unexpected consequences for the host states. For example, IIAs' substantive protections can be interpreted extensively, so much so that they may end up restricting host states' powers to regulate public interest matters, such as, for example, the adoption of climate-friendly policies, if these adversely impact foreign investors' rights.
- **Limited obligations for investors:** As currently structured, most IIAs are very unbalanced, mostly envisaging obligations for states but not for investors. States are usually required to protect investments even when detrimental to their sustainable development objectives, environment, and population.

In addition to general risks, LDCs also face specific challenges when it comes to the negotiation and management of IIAs:

- **Need for specialized expertise:** IIA negotiation and participation in ISDS proceedings require highly specialized knowledge. LDCs may not have capacity to deal with these issues and the cost of hiring external firms is often prohibitive.
- **Limited institutional knowledge:** Many states might not be aware that they have entered into an IIA in the past until they are hit with an ISDS claim. This also impacts cooperation of state authorities at various levels as domestic implementation of IIA obligations relies on the knowledge of IIAs by all actors.
- **Difficulties of engaging in the IIAs policymaking and negotiation processes at the international level:** LDC government officials may find it difficult to engage meaningfully in decision-making processes at the international level. Thus, it might be difficult for them to develop coherent policy positions with stakeholders at home (e.g., ministries and agencies with different priorities, private sector, civil society, and communities affected by specific investment projects). Also, investment negotiations may be decentralized and held simultaneously in many different fora, so it might be difficult for LDC representatives to attend all of them, due to limited resources.

[3] Investor-State Dispute Settlement (ISDS): the enforcement mechanism included in IIAs, whereby foreign investors can bring a claim against the host state before an arbitral tribunal in case of breach of substantive protections.

RULE OF LAW APPROACH TO IIAs NEGOTIATION AND MANAGEMENT

The rule of law requires that laws and policies are applied equally and without discrimination, and shaped in a clear, predictable, and just manner, so as not to leave anyone behind. By doing so, the rule of law plays a key role in anchoring economic and social rights in legal frameworks, also providing means of redress when those rights are not upheld.

Given the challenges outlined in the previous section, it is vital for LDCs wishing to engage in IIA negotiations to do so with caution, by adopting a specific rule of law approach. Such an approach seeks to:

- Remedy the lack of balance and predictability currently affecting the IIA system, by placing the principles underlying the rule of law front and centre in IIA negotiation and management.
- Ensure that IIAs function in a just, transparent, coherent, and predictable manner for both investors and LDCs, by striking a fair and equitable balance of rights and obligations as arising from these treaties.
- Respond to LDCs' national development objectives, by putting them front and centre of IIA negotiation.

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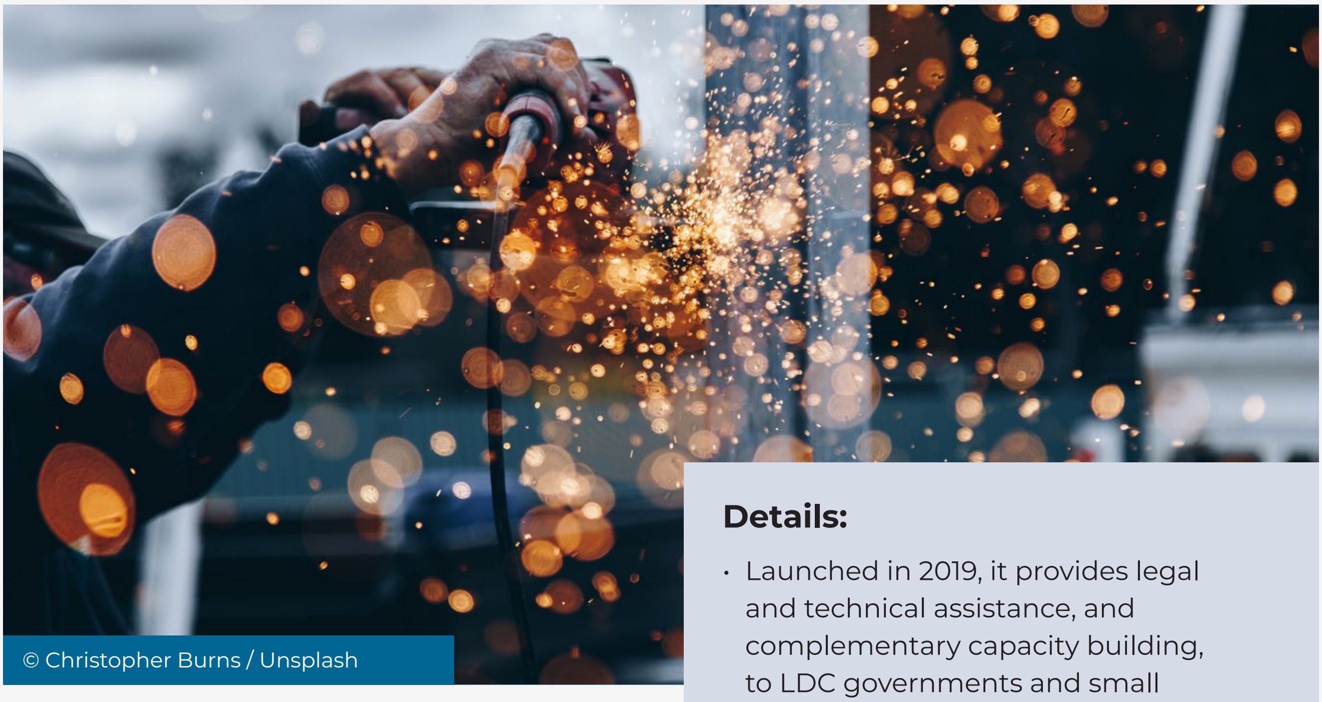
IDLO's INVESTMENT SUPPORT PROGRAMME FOR LDCs



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IDLO's ISP/LDCs helps strengthen the capacity of LDCs to meaningfully take part in IIA negotiations through a rule of law approach. By focusing on technical assistance and capacity development, the programme supports LDCs in the development of fair, transparent, and coherent legal and policy frameworks at both international and domestic levels, in line with the principles underlying the rule of law.

IDLO's ISP/LDCs is designed to support LDCs defining priorities and objectives underpinning IIA negotiations, and to enhance the skills and abilities of LDC stakeholders to effectively engage in the process. It adopts an integrated approach to LDCs investment capacity development, and consistently acts on two complementary fronts, pairing technical support with the responsiveness to capacity building needs, tailored to the situation and demands of each country.

Details:

- Launched in 2019, it provides legal and technical assistance, and complementary capacity building, to LDC governments and small and medium-sized enterprises on investment-related matters, including negotiations and dispute settlement.
- Aims to create a more level playing field between LDCs and foreign investors in negotiations and dispute settlement processes; support LDCs' effort to attract investments that can best serve their sustainable development objectives.
- Developed by IDLO in cooperation with the UN Office of the High Representative for the LDCs, the Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS), as a facility exclusively for LDCs, the ISP/LDCs Programme is financially supported by the European Union and the Kuwait Fund for Arab Economic Development.
- Structured as a public-private partnership with private sector lawyers and experts.
- Provides assistance at no cost to the beneficiaries by private sector lawyers and experts and on express request from the beneficiaries.

CASE STUDY: TECHNICAL ASSISTANCE IN THE GAMBIA

ISP/LDCs Supported the Development of a next-generation Model BIT

In 2021, The Gambia embarked on the development of a next-generation model BIT. A multi-stakeholder Working Group – composed of experts from international law firm K&L Gates, academia, and IDLO – developed a next-generation Model BIT: the Sustainable Investment Facilitation & Cooperation Agreement (SIFCA), which tackles head-on some of the challenges faced by LDCs in IIA negotiations. The SIFCA promotes a more equal sharing of rights and obligations between the parties: it incorporates specific investors obligations on environmental protection, labour and human rights, anti-corruption, good governance, and corporate social responsibility; and breaks with typical practice by allowing the host state to file counterclaims, thereby rebalancing the IIA. Furthermore, the SIFCA introduces investors' business and human rights obligations as a shield for host states in IIAs and ISDS, by creating an express link with the "corporate responsibility to respect" envisaged under the UN Guiding Principles on Business and Human Rights (2011). By doing so, the SIFCA brings together investment protection and business and human rights in an innovative way that bridges two traditionally separate fields of international law and ensures increased alignment of IIA negotiations with national development objectives.

CASE STUDY: CAPACITY DEVELOPMENT IN UGANDA

ISP/LDCs Strengthens the Capacity to Negotiate IIAs

In 2022, in partnership with a team of experts from the international law firm Curtis, Mallet-Prevost, Colt & Mosle LLP, IDLO delivered capacity building support to various institutions within the Government of Uganda, to improve understanding of IIAs and strengthen the government's ability to develop investment policymaking strategies at the international level. The diverse pool of participants helped break down institutional barriers and improve inter-agency coordination in IIA policymaking, addressing one of the traditional challenges faced by LDCs. The training included critical assessment of typical IIA risk factors and challenges. It reviewed advanced examples and best practices on how to address them, ensuring that IIAs are aligned with national sustainable development policies in their social and environmental dimension. Overall, it provided government officials with an avenue to discuss, analyse, and vet options internally before deciding whether and how to engage in IIA negotiations. By doing so, the training contributed to strengthening the Government of Uganda's ability to formulate and analyse investment policies conducive to meeting the needs of the country's economy and population.

25 government officials trained

7 different institutions involved

4 days of training

75% capacity increase

RECOMMENDATIONS FOR LDCs

Define a coherent negotiation strategy

Identifying clear objectives for IIA negotiation is the first step to engage meaningfully in the process. Developing a rule of law national IIA negotiation strategy is an essential process that can lead to greater coherence with development objectives.

Review existing IIAs for alignment with national development objectives

Many old-generation IIAs might be incompatible with the host state's development objectives. LDCs should undertake a critical assessment of their IIAs, consider risks and challenges posed, and assess potential ways forward, such as renegotiation or termination. This can also result in greater coherence, predictability, and fairness in line with the rule of law.

Follow existing best practices and guidance on (re-)negotiation

LDCs should rely on best practices and tools to support stocktaking, law and policymaking efforts, including UNCTAD's IIA Reform Accelerator and the Model International Agreement on Investment for Sustainable Development developed by the International Institute for Sustainable Development.

Learn from the experience of others

LDCs should look at state and regional practice for insights and suggestions on how to approach IIA reform, including the EU's proposal for the establishment of a Multilateral Investment Court.

Make use of international support available

Negotiating fair and equitable IIAs may be a difficult task for LDCs. However, international support is available to the LDCs, which should strive to make wider use of existing initiatives and programmes. These include IDLO's ISP/LDCs, as a facility exclusively dedicated to the LDCs. From its side, IDLO remains committed to supporting LDCs in the achievement of their development objectives. their respective interventions.

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Investment Support Programme for Least Developed Countries

Website: www.idlo.int/Investment-Support-Programme-LDCs

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