



World Investment Forum 2014: Investing in Sustainable Development

IIA Conference - 16 October 2014

Technical summary, prepared by the UNCTAD secretariat

The 2014 Conference on International Investment Agreements (IIAs) convened 50 key stakeholders, including chief IIA negotiators of many countries, from North and South, from East and West, senior business representatives, as well as representatives from relevant inter-governmental organisations and civil society and the to voice their opinions and ideas on the current state and the future of the IIA regime and investment dispute settlement mechanisms. The Conference attracted considerable interest from the audience (including ministers and ambassadors), who could also express their views through the interactive survey, organised by the Secretariat.

Participants shared their experiences and developed suggestions for improving global investment governance. They identified pressing issues in IIAs and investment dispute settlement that need to be addressed and ways and means to do this. The focus was on finding concrete and workable solutions.

Participants emphasized that IIAs remain an important policy tool that serves the protection and attraction of FDI by helping to create a stable and predictable business climate. At the same time, a broad agreement emerged on the need to reform both the IIA network and the dispute settlement system. In this regard UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), as well as the paths for reform of dispute settlement and the overall IIA regime were mentioned as offering valuable starting points.

Many participants emphasized that IIAs should not limit countries' capacity to regulate investment for legitimate national development objectives. There was broad consensus on the need for a more coherent and well-designed IIA regime that reflects sustainable development objectives, balances investors' rights and obligations, corresponds to the modern realities such as proliferation of global value chains (GVCs) and offers a higher degree of predictability. In particular, provisions on definitions of investment and investor, fair and equitable treatment (FET), most favoured nation treatment (MFN), indirect expropriation or the umbrella clause were mentioned as needing careful consideration.

With respect to investment dispute settlement, stakeholders' suggestions for reform addressed, among others, transparency, frivolous claims, speculative investors, independence of arbitrators, or an appellate mechanism. Some called for omitting investor-State dispute settlement from investment treaties. Consideration was also given to alternatives, such as alternative dispute resolution (ADR) or contract-based arbitration, as well as the requirement to exhaust local remedies. The need to refine substantive legal obligations applied by tribunals was identified as a key, complementary area of reform. Several country delegates called for more technical assistance and capacity building in this regard.

There were discussions on the concrete steps that countries need to take to start reforming their IIA networks. Some shared their experience in this respect, in particular how they revise their model BITs aiming at re-evaluating each treaty provision; or how they renegotiate treaties that have become outdated. In particular, the recent and ongoing mega-regional negotiations provide a testing ground for new approaches and treaty formulations.

Consideration was also given to the termination of IIAs, the primacy of the local legal system or the search for alternative approaches to traditional IIA models.

A number of participants suggested that reform should be gradual, but comprehensive. Some stressed that reforming the IIA regime should not necessarily mean reduced levels of investor protection but should lead to rebalanced treaties that offer legal precision, preserve policy space and reflect investor responsibilities.

Some countries have also stressed that individually they would be able to undertake only parts of the needed IIA reform. National solutions are useful but, by definition, they cannot be comprehensive. Only a joint, multilateral effort can be truly effective.

Having emphasized the limitations of individual efforts in the reform process, a significant number of countries called on UNCTAD to develop a "roadmap for comprehensive IIA reform". Such a roadmap could provide a common reference point for governments as well as for regional and inter-governmental organisations.

In the same vein, many noted that UNCTAD – by working in cooperation with other stakeholders, including international institutions such as ICSID, OECD, UNCITRAL, should provide a multilateral platform for engagement on investment policy issues. In particular, there is a need to i) provide the infrastructure and institutional backstopping, including for consensus-building activities related to IIAs and ISDS; ii) provide general analytical support, with evidence-based policy analysis and system-wide information to provide a global picture and bridge the information gap; iii) offer effective technical assistance, particularly for low-income countries; and iv) help ensure the inclusiveness and universality of the process.

In sum:

- The 2014 IIA Conference confirmed the relevance of IIAs in the changing world and identified a number of key and pressing issues that need to be addressed, effectively sketching the contours of a roadmap for reform.
- It was broadly agreed that the IIA regime and ISDS system need to be reformed in a comprehensive and gradual way, taking into account the interests of a wide range of stakeholders.
- For the reform to be comprehensive, and in light of the constraints that countries face in their individual actions, there is a need to identify options for a joint or coordinated approach towards IIA reform.
- Many participants called upon UNCTAD to work with other stakeholders and develop a roadmap for IIA reform that offers concrete solutions to make IIAs more supportive of sustainable development.
- UNCTAD was commended for providing a platform and facilitating the process for exchanges and engagement on international investment policy issues. Ultimately, this would assist countries - as the masters of the treaties - to take their policy choices on IIA reform, and implement them.