



## World Investment Forum 2014: Investing in Sustainable Development

### IIA Conference - 16 October 2014

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#### **The pressing issues in IIAs and investment dispute settlement**

For most economies the main idea that was leading them when they were concluding IIAs was to attract FDIs by granting foreign investors a safe and stable legal environment and offering them legal protection. However, the result of this endeavor after decades of concluding such agreements is somewhat disappointing because up to day there has been no clear evidence that the number of concluded IIAs has any correlation with the growth of foreign investment. On the contrary, there is a clear growth of investor to state disputes with many evident flaws.

Even if we disregard the huge costs of arbitration for the respondent state (especially in case of frivolous claims to which some states are exposed together with lately popular third party funding claims) and reduced policy space, both of which represent a big concern for most states, we cannot disregard the fact that the system we have created is far from legal certainty and stability - what we have today is a number of contradicting awards, problems with enforcing such awards, un-transparent proceedings and insufficient appellate mechanism.

#### **The available ways and means to address these issues**

Having identified so many pressing issues in the system, it is clear that the system is unsustainable and requires some kind of reform.

Many states are aware of this issue and are already trying to find some solutions and UNCTAD has already identified five main reform paths for the ISDS regime (Promoting alternative dispute resolution; Tailoring the existing system through individual IIAs; Limiting investor access to ISDS; Introducing an appeals facility; Creating a standing international investment court). All those solutions do resolve some of the issues concerned, but we are afraid that solving one issue at a time and having various individual approaches by different states might create even bigger chaos when the existing rules and systems start to interfere with the new ones. For example, introducing some limitations to the existing agreements, like qualifying standards of protection or introducing binding interpretations might help and improve states' position, but until one state eliminates or amends every single agreement it has, there will be no full impact of such reform (today we are aware how "mighty" the MFN clause may be).

We believe the approach to the reform should be more systematic and comprehensive. The way we see it all comes down to two basic approaches - either to promote alternative dispute resolution or to create a stricter institutional platform for resolving disputes such as standing international investment court and/or appeals facility.

Each of these paths has advantages and disadvantages, depending on the goal one wishes to achieve.

Alternative dispute resolution might be more convenient, efficient and less costly for both investor and the state. However, by promoting alternative dispute resolution we are not contributing to either transparency or legal certainty. Alternative mechanism may result (and that is often a case) with a settlement or solution that is not so straight forward in legal terms. It is aimed to resolve one particular situation for one investor and is not necessarily in line with general policies of the state, but rather creates an exception only for that one particular investor. Also, there are many state policies and fields which are not negotiable and where this kind of resolving disputes is not acceptable (certain public policies, human rights, taxation).

As we believe the goal of any reform of current IIA/ISDS system should be more transparent, more predictable and more unified system, we consider that creating standing international investment court and/or appeals facility might be the right long-term solution.

Perhaps more unified and coherent system could also be achieved through other means by creating some kind of widely accepted guidelines for interpretation of certain standards of protection and certain provisions of the agreement that are common in most BIT models. The provision on binding interpretations being introduced recently in some of the treaties is a step in that direction, but it only works bilaterally- it would be useful to have such an instrument on a global level.

We already have an example of such “guidelines” in international law, such as OECD and/or UN Commentaries for Double Taxation Conventions, which clarify in detail each provision of their model conventions – so when parties agree to have a certain provision in the agreement, they already have a clear picture about their commitments with respect to this particular provision. These are not legally binding, but they are widely accepted by courts in interpretation of double taxation agreements (in some cases the parties even agree to give those Commentaries the binding effect).

### **Mechanisms and platforms needed to facilitate the reform**

Creating something similar for BITs, would require a huge amount of expert analysis, discussions and deliberations before reaching a consensus on commonly accepted interpretations and therefore a multilateral focal point and platform for reaching such a goal would be essential.

Having in mind the significant amount of efforts, expertise and experience that UNCTAD has gained in this field through years and all the tools already developed by UNCTAD to facilitate the discussions and knowledge sharing on IIAs and ISDS, we believe that UNCTAD has the capacity of being a focal point in facilitating the necessary reform process, whether in the form of creating guidelines/other interpretation tools or in the form of creating new institutions/facilities for international investment disputes.