World Investment Forum 2014: Investing in Sustainable Development

IIA Conference - 16 October 2014

Ms. Nathalie Bernasconi-Osterwalder
Group Director
Economic Law and Policy
International Institute for Sustainable Development (IISD)

What are the key areas and pressing issues in IIAs and investment dispute settlement that need to be addressed?

Investor-state dispute settlement is arguably the most controversial issue in trade negotiations today—to the extent that it could endanger entire complex trade deals. Why is this? I believe that investment arbitration raises important questions that get to the heart of democratic governance and accountability. But these questions were not properly discussed when the system was put in place decades ago. In fact, only in recent years have they started to become broadly recognized and discussed.

As a consequence, the type of democratic discussion about investor-state dispute settlement happening today is a response to an already engrained system developed over time. With over 3000 investment treaties referring to the scattered patchwork of ad hoc tribunals and about 600 disputes, investment arbitrators do not cease to surprise the world, asserting jurisdiction over issues that states would never have imagined would be subject to international arbitration. Much of this is due to the broad scope and vagueness of the law in treaties, including the definition of their central concern: 'investment.'

There was no discussion of whether nuclear energy policy could be reviewed by three international arbitrators. States did not expect to justify their health or environmental policies in front of an investment tribunal when they wanted to reduce tobacco consumption or protect ground water. There was no proper debate about whether sovereign debt restructuring or other financial issues should fall under the reign of an investment tribunal. And there was no discussion of whether an allegedly grieved investor should not first correct the potential wrongdoing of a civil servant through domestic processes and courts before accusing the state of a breach of international law.

So in response to the question posed by our host today (What are the key areas and pressing issues in investment dispute settlement that need to be addressed?), my response would be: first let's have a good debate about what types of investment disputes should fall under the purview of international courts and tribunals.

As a follow-up to that question, states should also envisage the different forms of dispute settlement, and how different types of disputes might be dealt with in different ways. Here, a fundamental consideration is whether a dispute should be dealt with between the home state and the host state, or whether investors

should be allowed to bring claims directly against the host state in an international forum. Most investment treaties today allow for both types of dispute settlement. Also, free trade agreements—existing or in negotiation—all contain state-state dispute settlement provisions that extend to the investment chapters. So, the decision not to include investor-state dispute settlement does not exclude other manners to settle disputes.

Third, regardless of whether states decide to handle disputes at the state-state or investor-state level, getting the functioning of the adjudication process right is of great importance. The problems with the current system are widely recognized today: lack of transparency, lack of independence of arbitrators, lack of accountability and predictability. Yet, strangely, very little has been done to re-think dispute settlement under investment treaties. Certainly investment treaties have evolved over the years—and improvements have been made—but we remain attached to a model based on commercial arbitration. I would argue that this model has not been the most appropriate for many of the types of issues raised under investment treaties. It is as if we were patching holes of a leaking roof when the structure is decaying. A real discussion on the form and functioning of dispute settlement is therefore needed.

What are the key ways and means to address these issues?

A major reason for stagnation in reform of investment dispute settlement is probably the fact that most negotiations have taken and still are taking place at the bilateral level. Using a commercial arbitration model has been the path of least resistance: no need to identify any adjudicators to ensure a balanced representation and independence; no need to set up any administrative structure; no need to pay a dime upfront. The problems all come down the road, when an investor decides to launch an arbitration against the government. This becomes particularly burdensome for developing states, often caught by surprise when they are challenged.

Again, I think it is time for a proper and open discussion among states to design mechanisms that live up to their expectations and those of other stakeholders for an independent and predictable process that incorporates safeguards to ensure legal and factual correctness in decision making. In my view, a more judicialized system—at the appellate level, at a minimum—would be highly desirable.

What types of mechanisms and platforms are needed to facilitate the reform?

Reform discussions relating to dispute settlement can take place independently of any particular trade or investment negotiation and could have an effect on both existing and future treaties. We have seen such an approach in the UNCITRAL context where states adopted a convention on transparency in treaty-based investor-state arbitration. That convention extends its rules to both existing and future investment treaties in a flexible manner. There is no reason why this could not work for the elaboration of a new process to deal with investment disputes. The U.N. bodies, with UNCTAD taking the lead, could initiate such a discussion. In fact, UNCTAD has already laid out a path for consensus building in this area. Like-minded states could also form their positions and approaches in regional and other forums, such as the Annual Forum of Developing Country Investment Negotiators.

Until mechanisms are put into place that respond to the expectations of governments and other stakeholders regarding dispute settlement, states should consider postponing the inclusion of investor-state clauses in treaties, or at least making their entry into force conditional.