

The Transformation of the International Investment Agreement Regime

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“The Transformation of the IIA Regime: Time for collective strategy and action”

James X. Zhan

**Director, Investment and Enterprise
Team Leader, World Investment Report
UNCTAD**

Excellencies,
Distinguished experts,
Ladies and gentlemen,

It is a pleasure for me to open the UNCTAD Meeting on the Transformation of the International Investment Agreement (or “IIA”) regime. I would like to welcome all experts and stakeholders that have joined our Meeting for the first time. I also recognize many experts in the room that have participated in previous meetings; most recently, in the IIA Conference that took place as part of the World Investment Forum (WIF) last October. We are honoured by the vast interest this Meeting has attracted.

The topic of this meeting is of great importance, and highly complex at the same time. On the one hand, a broad consensus is emerging that there is urgent need to reform the IIA regime and the related dispute settlement mechanism. On the other, it is well recognized that there are no easy solutions or quick fixes. It will require a broad endeavour and intensive work to make progress on the many difficult issues regarding the reform of the IIA regime.

To set the stage for productive and constructive discussions, I will:

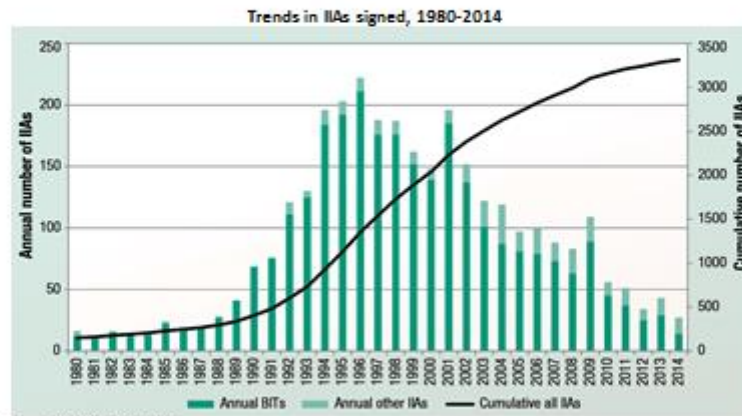
- Briefly present the big picture developments and recent trends in IIAs and ISDS;
- Identify the major challenges faced by the IIA regime; and
- Outline a strategy and process for the transformation of the IIA regime.

I. International investment policy making is at a cross-roads

Allow me to start with the big picture and broader context. In the absence of a multilateral investment system, like the one that exists in the area of trade, the current international investment regime is multi-layered, multi-faceted and highly atomized.

Countries concluded one international investment agreement (IIA) every other week

- In 2014, 27 new IIAs were signed, bringing the total number of IIAs to 3,268



The regime consists of close to 3,270 investment treaties at the bilateral, regional and plurilateral level (by the end of 2014). In 2014, countries concluded one IIA every other week. The overwhelming majority of countries are party to at least one IIA, some even have signed over 100. Furthermore, at least 53 IIAs including mega-regional ones are under negotiations, with the participation of over 100 countries.

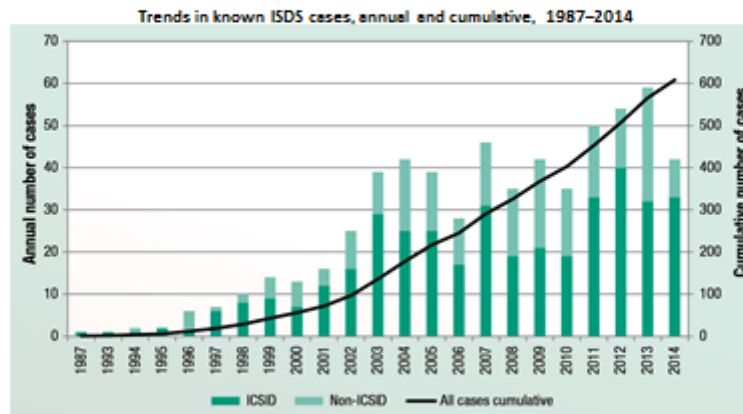
This construct is not only complex but also has a number of systemic deficiencies, including gaps, overlaps and inconsistencies in coverage and content. Moreover, the bulk of the existing treaties were formulated following a model that is several decades old.

In recent years, IIAs have attracted a considerable amount of public attention. Particularly negotiations of so-called mega-regional agreements, such as the Trans-Pacific Partnership Agreement (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), have become increasingly prominent in the public debate, attracting both criticism and support from different stakeholders in the investment and development community.

Arguably, investor-State dispute settlement is the most controversial issue in this debate. Our latest research shows that the total number of known treaty-based ISDS cases reached 608 by the end of 2014. Investors continue to use the ISDS mechanism, with 42 known investor-State arbitrations initiated in 2014. Some of the new cases concern public policies, including environmental issues, anti-money laundering and taxation.

Investors continue to use the investor-State dispute settlement mechanism

- In 2014, 42 new ISDS cases were filed, bringing the total number of known ISDS cases to 608



Source: UNCTAD, ISDS database.
Note: Preliminary data for 2014.



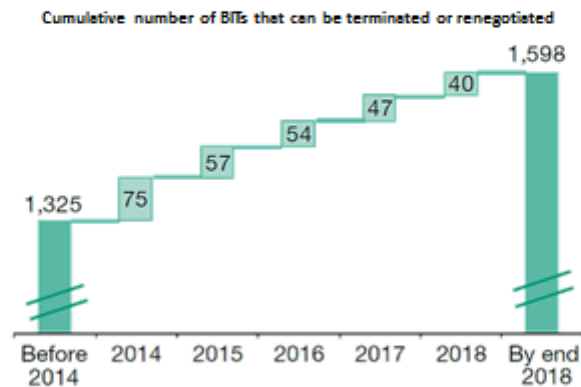
As a response to all of the aforementioned, the IIA regime is undergoing a period of reflection, review and revision. While many countries follow a “wait and see” approach, the IIA reform has already been occurring at different policymaking levels and going in different directions. In 2014, we observed countries taking the following actions:

- Countries continued signing IIAs and they increasingly included sustainable development provisions.
- Some countries continued to disengage from the IIA regime, including by unilaterally terminating their IIAs.
- At least 45 countries and four regional integration organizations are currently or have recently revised their model IIAs.

In addition, as of 1 January 2014, the number of treaties that can be terminated by a party at any time exceeded 1,300. While this creates a window of opportunity to address inconsistencies and overlaps in the multi-faceted and multi-layered IIA regime, and to strengthen its development dimension, countries need to weigh the pros and cons in the context of their investment climate and their overall development strategies.

By the end of 2013, more than 1,300 BITs reached the stage where they can be terminated or renegotiated at any time

- Treaty expiration provides a window of opportunity for improving the IIA regime
- Countries need to analyze the pros and cons of treaty termination and its implication for the overall investment climate and existing investments



Source: UNCTAD, WIR 2013.



At the IIA Conference at the World Investment Forum 2014, many countries considered individual reform efforts to be useful, but also noted that these may not be sufficient in light of the need to address multiple challenges. Some country representatives emphasized that joint and coordinated multilateral efforts can be more effective in bringing about needed reforms. Also, without a comprehensive package that addresses both the substantive content of IIAs and ISDS, any reform attempt risks to remain piecemeal, creating further gaps, complexity and inconsistencies. And it may result in the further fragmentation of the IIA regime, and controversies in international investment policy making more generally. Obviously, all of this calls for some collective vision, collective strategy and collective action.

II. The IIA regime faces three major challenges

The ensuing question is: What are the challenges to the IIA regime that need to be addressed? I will briefly outline the three major ones.

The first challenge is policy space. The root of the current ISDS debate lies in the fact that IIAs grant protection to foreign investors, which can impact the regulatory capacity of host countries. There is growing concern that IIAs, in their traditional form, could unduly restrict policy space. Broad and vague formulation of IIA provisions create a risk that investors may challenge core domestic policy decisions, for instance in the area of environmental, energy or public health policies. The challenge is to strike a balance between creating a stable and predictable investment environment on the one hand, and maintaining certain regulatory flexibility for dealing with key emerging development issues on the other hand.

The second challenge is how to integrate sustainable development objectives into IIAs. Most existing IIAs follow the approach of focusing on investment promotion and protection, while largely neglecting the sustainable development impact of investment. Only recently, have new IIAs begun to illustrate a growing tendency to craft treaties that are in line with sustainable development objectives. Similarly, there is a need to balance the rights and obligations of States and investors.

The third challenge relates to the systemic complexity and the high atomization of the IIA regime, including in respect of ISDS. Investment policies do not exist in isolation, but interact with other policy areas, such as trade policies, competition policies, labour policies, or industrial policies. Any IIA reform needs to take this interaction into account. In addition, it would be desirable that reform has broad multilateral support so as to avoid further fragmentation of the IIA regime.

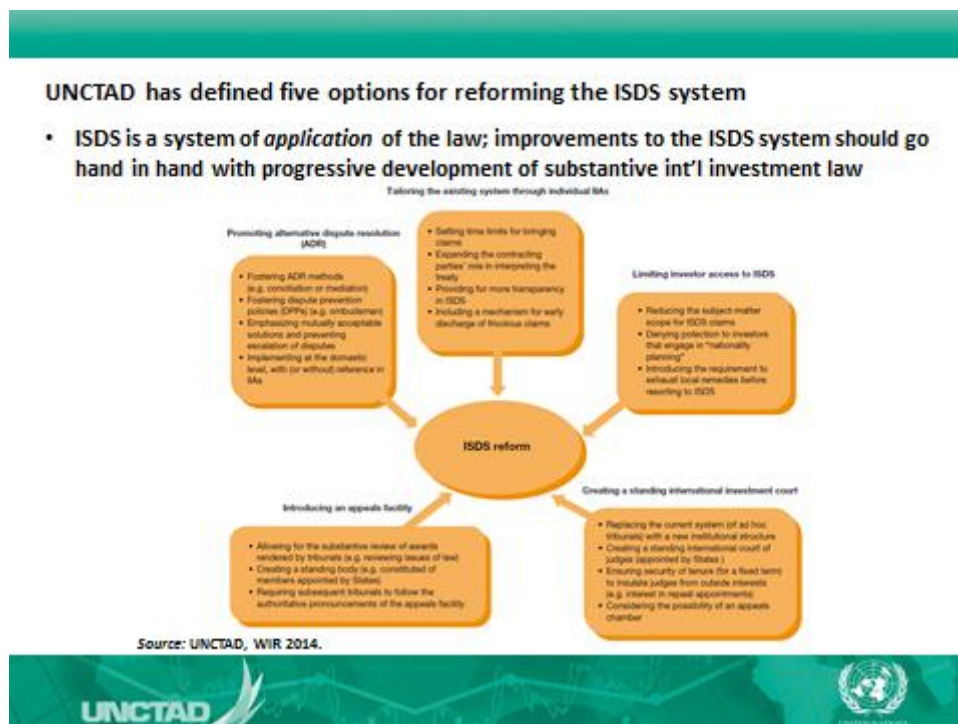
III. The transformation of the IIA regime requires a collective vision and action

There has been broad based and sometimes heated debate on the role and impact of the IIAs. As a result of this debate, a broad consensus is emerging on the need to reform the IIA regime: transformation has become a “must”. The underlying idea is that for the system to be sustainable – instead of becoming fossilized –, it needs to be transformed. And for it to be sustainable, it needs to deliver on sustainable development objectives. We have witnessed a shift towards a development paradigm that calls for the transformation of the IIA regime as well as, more generally, a new generation of investment policies.

At the 2014 IIA Conference, the country representatives and other stakeholders expressed the view that IIA reform should be systematic and comprehensive, albeit gradual and properly sequenced.

With this, the debate has moved beyond the question of “to reform or not to reform” and turned to “how to reform”. Several potential solutions have already been put on the table. In the World Investment Report 2012, UNCTAD’s Investment Policy Framework for Sustainable Development provided clause-by-clause options for negotiators to strengthen the sustainable development dimension of IIAs.

The UNCTAD World Investment Report 2013 summarized five broad options towards reform of investment dispute settlement. These are:




- Limiting investors' access to ISDS and improving procedures in existing international conventions dealing with ISDS, such as the ICSID Convention (Convention on the Centre for Settlement of Investment Disputes) or the UNCITRAL Arbitration Rules;
- Tailoring the existing ISDS system through revisions in individual IIA provisions dealing with ISDS;
- Creating a standing international investment court;
- Introducing an appeals mechanism; and
- Promoting alternative means of dispute resolution, namely conciliation and mediation.

Last year, we identified four diverging paths of action in dealing with the existing IIA regime. These are:

Reform of the IIA regime – four paths of action in WIR 2014

| Path | Policy action |
|-----------------------|---|
| Status quo | Abstaining from substantive changes to IIA policies |
| Disengagement | Eliminating international investment-related commitments |
| Selective adjustments | Pursuing selective changes to integrate selected sustainable development elements and other features into future IIAs |
| Systematic reform | Redesigning IIAs to promote sustainable development, balance rights and obligations and reform ISDS, including in existing treaties |

Source: UNCTAD, WIR 2014.



No doubt, there is a rationale for concerted efforts. We have convened this Meeting to move on to the next steps. A collective vision, collective action and a collective process are needed for the transformation of the IIA regime to take shape:

- (a) The vision should be clear and holistic, addressing the major challenges and sustainable development objectives. For the vision to be collective, it has to take on board all options.
- (b) The actions should be solution-oriented, effective and impactful. They have to be coherent and synergistic, and they need to yield the sustainable development outcomes.
- (c) The process should be properly structured and actions well sequenced. The process should also ensure inclusive approaches as well as coherence and interaction with other policy making processes.

Such a transformation process requires a platform and backstopping. UNCTAD, in cooperation with other stakeholders, including international and regional organizations, could provide a multilateral platform for engagement on these issues:

- The UNCTAD secretariat can offer policy research that is evidence-based, multi-disciplinary in nature and innovative for policy advice.
- It can provide a forum for consensus-building and the sharing of experiences and best practices in an inclusive manner given the universality of its membership.

- It can provide technical assistance and capacity-building to its over 100 developing member states. Over the years, UNCTAD has worked intensively on the reform of the IIA regime and ISDS.

IV. Concluding remarks

The inclusive, multi-stakeholder approach of this IIA Meeting will facilitate an exchange of views with the aim of assembling options, developing an action menu and designing a roadmap for reform – it may also contribute to the development of a collective vision and strategy for the transformation of the regime. The outcome of this Meeting may serve as a tool box for IIA policy makers and negotiators worldwide.

Whatever the formula and approaches, we need to bear in mind that the guiding principles are sustainable development and inclusive growth so as to respond to today's global challenges, notably the Sustainable Development Goals (SDG) imperatives. In short, what we need is a new generation of IIAs that addresses the challenges of investment policies in the 21st century. The IIA reform is a global challenge and UNCTAD is the United Nation's focal point for all investment-related matters. Facilitating the reform process and assisting governments in finding the right solutions is therefore a high priority for us.

Finally, I would like to thank all experts and stakeholders for the great interest in this Meeting. Your wisdom and expertise are key to the success of this Meeting and will pave the way for the reform of the IIA regime. Bring in new ideas into the discussions whenever you can. What we need are inclusive, constructive and solution-oriented debates.

Thank you very much.