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The international network of investment agreements and the arbitration rules and institutions that serve it cannot produce results better than what is provided for in the individual agreements.

The sustainability of the International Investment Agreement (IIA) system would be enhanced if the intentions of the Parties to individual agreements were more precisely and clearly reflected into these agreements, especially with respect to the balance between the protection of foreign investment and the preservation of policy space for domestic regulation.

A key component of reform to the IIA system might therefore lie in the negotiators' capacity to precisely and clearly translate the intentions of the Parties into provisions, with respect to both the nature of their obligations and the specific safeguards that they intend to establish in order to retain proper regulatory space.

Precise, clear and directive treaty drafting provides more certainty with regard to the scope and content of States' obligations. This in turn provides additional guidance to tribunals, clarifying the obligations that States intended to adopt through IIAs – and their limits or safeguards – and leaving to tribunals the evaluation of fact situations in light of these obligations.

Canada really began to address these issues relating to precision and clarity twenty years ago in the context of NAFTA. Canada from the start noted that by referring to FET (Fair and Equitable Treatment) it was referring to the Minimum Standard of Treatment (MST) of investors at Customary International Law. It confirmed this intention upon implementation, and then again through the 2001 Free Trade Commission interpretation of the three NAFTA Parties.

Canada also addressed these issues by clarifying that the National Treatment (NT) and Most-Favoured-Nation (MFN) standards account for regulatory differences through the use of the comparator "in like circumstances" which requires a valid comparison of the treatment provided to one investment to that of another operating in similar regulatory circumstances.

As the IIA jurisprudence emerged, Canada continued to pursue more precision and clarity in the statement of obligations, notably by adding an annex on indirect expropriation, confirming the boundaries of that obligation, and by clarifying that investor-State dispute settlement (ISDS) procedures in other IIAs do not constitute treatment for the purpose of the MFN standard.

Canada followed the same path in the recent negotiation of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, by providing a finite listing of States'

behaviors that constitute breaches of the FET standard. The Parties to that negotiation also clarified that any evolution to the list required their joint determination and that tribunals were, as a result, not at liberty to add to the standard.

One of CETA's innovations clarifies that treaty provisions in other IIAs do not, in and of themselves, constitute treatment for the purpose of the MFN standard. The point of this is to ensure that alleged violations of MFN focus on comparison of actual measures adopted by States affecting investments, rather than on alleged differences between standards and obligations in different treaties.

In addition to careful definitions of the substantive obligations themselves, Canada further includes specific safeguards to ensure that the balance it seeks between the protection of foreign investment and the preservation of policy space for domestic regulation in IIAs is respected. Notably, Canada's IIAs provide for:

- reservations for existing and future measures;
- an exclusion for most taxation-related measures;
- a general exception for measures intended to protect human, animal or plant life or health, and for the conservation of natural resources;
- prudential exceptions for measures taken in order to maintain the integrity and stability of the financial system;
- clarification that market access obligations do not apply to measures allowing for the zoning and planning for development and use of the land, or for the conservation of natural resources and the environment (moratoria, bans, number of concessions granted);
- the ability to request early dismissal of frivolous investor-to-State claims; and
- the ability for the Parties to jointly adopt binding interpretations of the Agreement.

Several of the above clarifications, and others, were adopted in Canada's recent negotiations with the European Union, reflecting current 'best practice' in response to issues arising in connection with investment protection and investor-State dispute settlement.

Including clear safeguards along with Parties' obligations provides greater assurance that tribunals will be guided by the balance Parties intended to strike between the protection of foreign investment and the preservation of policy space for domestic regulation. As a result, Parties' general dissatisfaction with tribunals' decisions and, possibly, their consideration of exit from the IIA system will be avoided or at least minimized.

In summary, from Canada's perspective, clear treaty drafting is a crucial and immediate measure that State parties can adopt to build and maintain a more sustainable IIA system. If tribunals are to render decisions that will not substantially depart from the parties' intentions, the rules upon which decisions are based must be drafted in a way that minimizes the likelihood for their broad interpretation. However, that is only one part of a broader solution - States and civil society can and should carry on broader discussions regarding other possible reforms to further strengthen the institutional strength and legitimacy of the system.

Finally, the development of a sustainable IIA system would benefit from the enhancement of policy development and negotiating skills in relation to bilateral investment treaties. In this regard, Canada's Minister of Foreign Affairs announced, in June 2014, the establishment of the Canadian Trade and Development Facility, with the objective of providing timely assistance to Canada's negotiation partners in developing countries to negotiate and implement trade and investment agreements.