



World Investment Forum 2014: Investing in Sustainable Development

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I would like to start my presentation by raising the following question: How do we move forward in our attempt to achieve a “new generation” IIA aimed at protecting foreign investors, as well as providing our States with the policy space to implement measures necessary to pursue environmental, health, and other legitimate public objectives?

In trying to provide a response to that question, I would like to share Peru’s negotiating approach in recent FTAs and BITs as a way to introduce our thorough reflection on the choices we can undertake to move forward in the process to accomplish the negotiation of what we consider a modern IIA.

If we review Peru’s experience in the negotiations of IIAs, we can see how our approach has evolved over time. It has been a “living” process shaped by our country’s priorities and objectives in pursuing an IIA negotiation; as well as by the lessons learned from the development in the interpretation of IIA provisions made by arbitral tribunals.

We have acknowledged that the phrase “one size does not fit at all” is applicable in the field of investment negotiations. A model which might suit the interests of one country could not be the right fit to all of us. In order to find the model that suits our own country’s interests, the question to be raised then is: what are our country’s objectives in pursuing an IIA negotiation? And most importantly, what are the features that we need to include in the IIAs we negotiate to achieve those objectives?

Since the early 1990s, Peru has embarked on a series of economic reforms of which setting up a stable and predictable framework conducive to attract foreign investment has been one of its components. The negotiation of IIAs has been a key element through which Peru has accomplished stability and predictability for foreign investors.

Today, it is unquestionable that foreign investment has been a primary driver in our economic growth. In the last years, Peru has been experiencing a substantive economic growth, along with political and social stability. Nowadays, we continue our engagement with the promotion of foreign investment while seeking to put in place policies aimed at achieving a sustainable long-standing investment.

We firmly believe in the benefits that openness to trade and investment brings to developing countries. From a negotiator's standpoint, our objective should be focused on striking the adequate balance between the protection of foreign investment and the policy space our States need to regulate in the public interest. Regulation and openness should not be envisioned as contradictory features. We consider that – if implemented correctly- they are part of a same set of policy tools to pursue our path towards development.

To this respect, we would like to point out some specific elements included in our recent IIAs where the attempt to strike a right balance between investment protection and regulatory policy space is present.

As a step forward in providing an explicit guidance to arbitral tribunals on how to balance investment protection with legitimate objectives, we consider that a modern IIA should include a provision stating that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives do not constitute an indirect expropriation.

In the wake of the recent worldwide economic crisis, a second element is related to the inclusion of safeguards to prevent and mitigate financial crisis by preserving the State's ability to adopt temporary measures in the event of serious balance of payments or external financial difficulties; or where in exceptional circumstances, payments and capital movements cause or threaten to cause serious difficulties for macroeconomic management.

It is important to highlight that with the purpose to strive a middle ground between protection of investors and the necessity to tackle the surge of financial crisis, we have considered important to list certain conditions under which those measures should be implemented. It is our view that those conditions should entail, among others, both a temporary and non-discriminatory character of the measures to be implemented, as well as a transparency requirement to notify our counterparts with the implementation of such measures.

Further to the elements we have already outlined, we have considered that the inclusion of soft-law features linked to corporate social responsibility is a signal of our commitment in the promotion of voluntary principles and regulations for responsible business conduct. Our objective to include this feature on a "best endeavors" basis is to emphasize the enhancement of the protection of investment while ensuring that such investment is developed in harmony with public policies, to strengthen the basis of mutual trust between enterprises and the societies where they operate, and helping to improve the climate for foreign investment.

Having said that, I would like attempting to respond the question I raised at the beginning of my presentation. How do we move forward? We consider that our choice to move forward in the attempt to achieve a "new generation" IIA will be guided by our own country's priorities and objectives in pursuing a specific negotiation. Once those priorities and objectives have been clearly identified, we, as IIAs negotiators, are confronted with the challenge to reflect such priorities and objectives in a single instrument. Protection for investors? Policy space for the States? We think that both objectives can be achieved in the negotiation of an IIA through the inclusion of carefully drafted features. We think that openness to investment and regulation are two sides of the same coin: our path towards development.

To close my remarks, I would like to extend my sincere gratitude to UNCTAD for organizing this Conference and for its valuable support in providing a balanced analysis of issues that may arise in the context of international approaches to investment rule-making and their impact on development. Peru is really appreciative of UNCTAD's work on IIAs through the World Investment Report and the Investment Policy Framework on Sustainable Development. We consider that UNCTAD, as the UN focal point on investment and development, is well placed to help countries chart out reform paths and roadmaps towards the future. On behalf of Peru, I would like to say that Peru has enjoyed collaborating with UNCTAD for the study on alternative dispute resolution mechanisms (ADR) and the design of dispute prevention policies (DPP), and we very much look forward to continue collaborating with UNCTAD for the forthcoming WIF to be hosted in Peru.