

UNCTAD Expert Meeting on Taking Stock of IIA Reform

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Turkey

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Distinguished Participants, Ladies and Gentlemen,

I would like to start my speech by thanking the UNCTAD team for the organization of this event, and giving me the opportunity to share the views of my country, Turkey, with this esteemed gathering.

Today I will summarize Turkey's experience with regard to upgrading its IIAs in the light of latest developments in the international investment law as well as our general view with regard to IIA reform.

As Turkey, we think that the need for IIA Reform is inevitable. While underlying the significance of International Investment Agreements (IIAs) for global investment flows, we have highlighted the necessity to reform the current IIA regime, including Investor to State Dispute Settlement (ISDS) system, during both 2014 and 2015 UNCTAD Expert Meetings.

Today, a wide web of nearly 3300 BITs and Free Trade Agreements (FTAs) with investment provisions constitutes the backbone of the current IIAs regime. In this fragmented structure, it is not surprising that many parties are dissatisfied with the current regime and asking for urgent reforms. Expiration of more than 1,500 bilateral treaties by the end of 2018 will provide a window of opportunity to evaluate reform options.

In this connection, I would like to point out some pressing reform issues from the perspective of Turkey, which is a country that has signed 98 BITs so far and started to conclude Investment Chapters under FTAs, first examples of which were signed with Korea and Singapore in 2015.

Both as an FDI importing and exporting country, Turkey believes that **BITs and Investment Chapters under the so called "ambitious" Free Trade Agreements should adopt a balanced approach** between protecting regulatory rights of the host countries in one hand, while the rights of the investors are protected on the other hand.

With this perspective, Turkey revised its model BIT in 2010 and has been making some fine tunings since then by redrafting the provisions of “Scope and Definition”, “Transfers”, “Expropriation”, “General Exceptions”, “Denial of Benefits” and most importantly “ISDS” by taking into account the best practices of other countries and recent arbitral decisions.

In this framework, Turkey’s new BIT draft has the following features: In line with the policy objective of not to provide protection to short term, speculative types of investments through IIAs, it includes an investment definition based on “the Salini Test”

Turkey’s new draft also standardized “Fair and Equitable Treatment” and “Full Protection and Security” in its IIAs by giving reference to “international law minimum standard of treatment”. Besides, Annexes covering detailed provisions on full protection and security and international customary law have been added to Investment Chapters under the FTAs signed by Turkey.

With regard to more policy space for hosting countries, there must be exceptions for the protection of human, animal or plant life or health, or the environment; conservation of living or non-living exhaustible natural resources that are applied on non-discriminatory basis. In this connection, Turkey also brought clarification to “Expropriation” article by defining the conditions that are not considered as indirect expropriation, such as non-discriminatory legal measures taken for public health, security, environment concerns in its BITs.

With regard to ISDS mechanisms under the current IIAs, Turkey believes that defining the scope of investor’s access to arbitration in treaties is significant to prevent frivolous claims being submitted to arbitration as well as to prevent non-party investors and domestic investors from going to arbitration against their own state party. In this connection, having “denial of benefits” clause and the prevention of using MFN principle for ISDS mechanisms must be underlined.

Finally, I would like to summarize Turkey’s general approach to ISDS mechanisms in IIAs. It is clear that the whole credibility of the current system based on IIAs depend on the creation of an objective, effective, and reliable ISDS mechanism.

In this respect, EU’s new proposal to include investment court system (ICS) under TTIP and other FTAs is a positive move in this direction. However, establishing such court systems may not be very effective if the Treaty partners are not equal in their capacity to nominate qualified and skilled arbitrators.

Consequently, it may be beneficial to establish a standing, permanent investment court with an appellate mechanism based on a new international convention for the settlement of investment disputes.

Such a permanent investment court may be composed of independent judges nominated by each member of the Convention while having the structure of an international organization with its own secretariat. The awards given by this Court should be implemented directly without being subject to recognition in the member states. Financed through its member states, such a permanent international court may enable small and medium sized enterprises and entrepreneurs to pursue their claims against states with reasonable costs.

To summarize my speech, we believe that, **there is an urgent need for a comprehensive IIA reform** based on a new system of ISDS mechanism, such as a new permanent investment court that I mentioned above.

In this connection, the Roadmap prepared by the UNCTAD for IIA reform may serve as a starting point of all of us who believe in the IIA reform. In addition, the less developed and developing nations may benefit from UNCTAD's roadmap in the short term as a reference tool in their efforts to revise their IIAs or negotiate new ones. In this connection, I must underline that Turkey supports UNCTAD's guidance in its efforts to reform the existing IIA regime in order to create an effective and reliable ISDS mechanism to the benefit of all parties.

Thank you very much for your attention.