



World Investment Forum 2014: Investing in Sustainable Development

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The main issues in International Investment Agreements (IIA) and in dispute Settlement that need to be addressed are: i) the consideration of a more balanced IIA and ii) the increasing perceived deficit of legitimacy of the investor - State Dispute Settlement.

Colombia is working in both concerns first of all, revising its public policy regarding International Investment Agreements including the Colombian model, and secondly considering the establishment of an appellate mechanism for investor – State Dispute Settlement.

IIA: Colombian public policy

Through the Directorate of Foreign Investment and Services, the Ministry of Trade, Industry and Tourism is preparing a policy document which will be submitted to the Consejo Superior de Comercio Exterior (which is the “advisor instance” for the Government in trade matters). Such document includes the possibility of re-negotiation some IIA already in force and the review of the Colombian IIA model. The objective is to “update” some IIA to the new developments in international investment arbitration, considering the inclusion of more detailed provisions regarding the standards of protection of investors and arbitral proceedings and the consideration of a new generation of investment provisions related to sustainability and responsible investments. This policy might also consider a political mandate for the negotiation of IIA only as investment chapter in Trade Agreements. The objective is to obtain a deeper and more complete economic integration in relation with international investments. Finally, on the other hand, the Colombian government is looking to a new perspective regarding investment, which includes not only attraction of FDI but also the promotion of Colombians investments abroad (OFDI) as a manner to improve the internationalization of Colombian enterprises.

As a consequence of this new policy, Colombia will have to work in strategic reforms of its BIT Model in order to reflect a balance between the protection granted under the agreement and the legitimate objectives of the State. We are working on that in our BIT model, but we need it to be discussed also in a multilateral forum since the major obstacle that Colombia has detected in negotiating IIA including a new generation of investment provisions such as sustainable investment or corporate social responsibility is the lack of interest of trade and investment partners in considering to include such provisions in IIAs.

In 2006, Colombia started to include provisions related to sustainability in its IIA model. One of the first developments of the Colombian model was to recognize the regulatory power of the State in cases of public purposes, such as the protection of the environment, public health and the financial stability. The revised model of 2006, also included specific provisions drafted after careful consideration of ISDS awards from that time, interpretations from the NAFTA Free Trade Commission and consultations with UNCTAD officials. Such provisions include detailed guiding criteria about the meaning of indirect expropriation, Fair and Equitable Treatment and, the rejection of the Maffezini Doctrine, -not application of MFN to jurisdictional matters. Before these changes, the Colombian BIT Model 2003 was based on the OECD model characterized by short clauses following the typical European model.

Latest revisions of the Colombian IIA model took place in 2008 and 2012, including updates and current debates and discussions on IIAs. The most recent changes include a new generation of investment provisions related to sustainable investments and corporate social responsibility. Our ultimate goal is to grant an adequate protection to foreign investments under IIA and at the same time, to obtain the major benefits of the investments protected for the Colombian economic development and growth.

Currently the Colombian BIT Model includes most of the UNCTAD's IPFSD recommendations or policy options for IIA. For example, the preamble includes a reference to the objective of attracting and fostering foreign investment that contributes to sustainable development. In addition, it refers to the State's right to regulate and protect legitimate public welfare objectives such as health, public order, and environment. On the other hand, the definition of investor (companies) requires to have its seat in and carry out substantial business activities in the territory where it was incorporated, and the temporal scope of the Colombian BIT Model does not cover disputes from acts or facts that took place before the entry into force of the Agreement.

Regarding some of the sensitive provisions such as fair and equitable treatment, indirect expropriation, etc., the Colombian model is addressed to include very detailed criteria for its interpretation and application. For example, to avoid an unqualified and uncertain provision of Fair Equitable Treatment, the Colombian model links the standard to the customary international law and provides a guideline for its content. It also specifies that the fair and equitable treatment "*shall not be construed as to prevent a Party from exercising its regulatory powers in a transparent and non-discriminatory manner and in accordance with due process*".

In relation with the indirect expropriation clause, the Colombian model includes a detailed provision aimed to provide sufficient criteria for the determination of whether or not there is an indirect expropriation. Such provision establishes that that decision needs a case-by-case study, taking into consideration specific criteria on the impact on the investment of the measures taken and the interference of such measures with the investor's legitimate expectations, among others.

Also, in line with the IPFSD recommendations, all Colombian IIAs reserve the government rights to limit or prevent transfers in some circumstances such as serious difficulties in the balance of payments or external financial difficulties, or in cases where movements of capital cause or threaten to cause serious difficulties for macroeconomic management, including the case of serious balance of payments difficulties. In addition, establishes provisions allowing the government to adopt, maintain, or enforce any measure that it considers appropriate to ensure that investment activities are done in accordance with environmental and labor law and recognizing that a rise to the bottom policy is not appropriate to compete for FDI.

Regarding the procedural provisions, the investor – State dispute settlement section of the Colombian model, includes a series of measures addressed to provide a more detailed rules for the consultations and negotiations process as well for the international arbitration. Such measures take into account the different needs of the State in order to grant an adequate management of international investment disputes. For example, the time line of the procedure before the international arbitration (consultations and negotiation process and the so called "cooling-off period") is good enough to allow the State to coordinate internally its position with the state authorities involved in the dispute and to prepare for the

arbitration.

Further, the Colombian BIT Model has a special provision to discourage investors to submit frivolous claims. The provision establishes that before studying the merits, the tribunal shall rule on the preliminary questions of competence and admissibility and if it finds that the claim is frivolous, it will finish the process and award cost against the claimant. Additionally, as a general policy, Colombia does not include “umbrella clauses” in its IIA.

Finally, regarding sustainability of IIAs, I would like to highlight the Colombian commitment in considering provisions regarding sustainable investments and corporate social responsibility in IIA in order to pursue the major benefits of the investments in favor of the economic development and growth of our country. In some of the latest IIA, Colombia had proposed and agreed on provisions such as Corporate Social Responsibility, Investment and health, environment and labor measures, and a joint Committee on Investment and Services, through which the countries would implement measures to ensure and enhance the investment climate and investment opportunities. Nonetheless, the effectiveness of such provisions is still very weak, provided that it seems that our countries are not ready to assume binding commitments in these fields.

Appellate Body

As mentioned at the beginning of my intervention we are also working on ways to deal with the perceived decline of legitimacy of the ISDS regime. Taking advantage of the space brought by the Group of Experts in Investment of UNASUR that is creating an alternative Investment Dispute Resolution Centre, Colombia and Argentina proposed the establishment of an appellate mechanism within this framework. The objective of the mechanism, which is still in negotiation, is to contribute to a coherent interpretation of awards that would foster trust in the system, promote legitimacy, avoid contradictory decisions and create a sort of unified awards or the requirement to subsequent tribunals to follow the authoritative pronouncement of the appeal facility, bringing the opportunity and space to correct errors in arbitral decisions. The appellate body would take the form of an appellate ad hoc Commission that would revise the awards for legal errors and possible fact errors in the interpretation of the evidence.

Final message

Strategies aimed to a new generation of investment policies needs the permanent support of international experts and organizations. Colombia is confident that there are tools for granting a better economic development and growth for our countries, we just need the political will of our partners and the support of the experts. Ideas such as the limitation of the scope of ISDS mechanism to investments with a minimum level of sustainability may be an unexplored solution.