
STATEMENT

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I would like to congratulate UNCTAD for its great research and guidance on the IIA reform, and for allowing Spain to contribute to this debate and sharing our experience.

Spain has considerable experience in Investment Arbitration. We have a network of more than 70 IIAs that cover 27% of our stock of outward FDI. According to the number of known cases as of end of 2015, Spanish investors have participated as claimants in 34 cases, and Spain is respondent in more than 30 cases, most of them under the ECT.

Our recent experience from the energy cases shows that.

- 1) Tribunals do incorporate the right to regulate of states in their decisions.
- 2) There is a need for further reform in 3 areas:
 - a. More precise definitions of investor in order to prevent treaty shopping, round tripping, and limiting the incentives of company to restructure exclusively to profit from IIAs
 - b. More precise definitions of protection standards, particularly FET and indirect expropriation, in order to reduce uncertainty for investors and States
 - c. Improving efficiency in the resolution of disputes between invertors and states and reducing possible conflicts of interests of arbitrators.

Part of these reforms are already underway in the new agreements that are being negotiated. Now the real challenge of the second phase of reform is how to implement deeper reforms in a coordinated and in a multilateral way.

One particular reform that could be very successful at the multilateral level is the creation of a multilateral investment court that could bring several advantages:

- 1) A permanent court with an appeal mechanism would facilitate a consistent interpretation of investment principles and therefore increase certainty for investors and States.
- 2) It could increase efficiency of procedures by introducing:
 - a. Limits to the costs of procedures
 - b. Limits to the duration of procedures in all phases, but specially in the constitution of the tribunal.
 - c. Requirements of the availability of judges, or alternatively using a closed list with automatic allocation of judges to cases could be very useful to reduce the duration of the constitution of the tribunal.

- d. Strong qualification and requirement of judges and a code of conduct to avoid conflicts of interest
- e. New criteria for the selection and also for the removal of judges
- f. Specific criteria to reduce costs and duration of proceeding for SMEs.

A second path towards multilateral reform is to identify specific areas of consensus and apply the example of the UNCITRAL Convention on Transparency to apply the reforms to new and existing agreements.

The international organizations such as UNCTAD, OECD and UNCITRAL could analyze current trends in IIAs to identify possible landing areas, especially at the regional level which already incorporate consensus among several countries. There are several issues that could be explored:

- Clear criteria to guarantee that only foreign investors benefit from the protection of IIAs and not national of shell companies.
- Clear criteria of what is to be considered a “Substantial Business Activity.
- Clear definition of what constitutes FET and indirect expropriation when an agreement does not specify the content of these protection clauses (which is the common practice in most existing agreements)
- A common understanding on the right to regulate and how it should be applied by tribunals when the agreement does not clearly specify it or when the right to regulate is not explicitly mentioned in the text.

I am confident that the UNCTAD analysis will be able to provide clarity on many of these issues. Thank you very much.