



World Investment Forum 2014: Investing in Sustainable Development

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I. Need for reform – substance or procedure?

The current debate on the investment dispute settlement mechanism has been prompted by different factors; factors in which policy and legal technicalities are heavily entwined.

A source of concern from the institutional perspective, in a discussion on true reform, is the apparent inability to separate the substantial and the procedural issues in the debate, and the difficulty to accept or communicate clear facts associated with the current dispute settlement systems. The preconceived notions concern a perceived lack of transparency, the characteristics of the users of the current system, and the statistics on the outcome of cases, just to mention a few.

Decisions on reform must be based on a proper understanding of the functioning of the current system for investment dispute settlement at large, and not be dictated by strong opinions stemming from individual cases, and numbers need to be put into perspective. Contributions from independent research bodies, such as UNCTAD, are important and can contribute to a levelled playing field for a constructive dialogue.

The international community should focus on safeguarding the valuable tool of neutral and non-political dispute resolution, in cases where states are involved, as represented by international arbitration.

To foster dialogue and the communications of facts relating to investment dispute settlement reform, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has taken a number of initiatives, including seminars, bilateral meetings and the recently launched ISDS-blog.

II. Opportunities for sustainable development

The current focus on reform of the IIA Regime, also provides a valuable opportunity for international investment law to enhance actions to mitigate climate change, while at the same time encourage and support FDI and economic development.

By combining best practice from the procedural features of the current IIA Regime with visionary drafting of future substantive provisions, a new IIA Regime can be achieved with a potential to truly make a difference for sustainable development.

(i) International environmental law is not enough
International environmental law largely lacks efficient tools in matters of sustainable development and mitigation of global warming; there are simply very limited enforcement mechanisms available to put force behind the words of its international conventions.

The problems associated with upholding environmental goals at a global level caused by the lack of efficient enforcement mechanisms in international environmental law are widely recognized.

(ii) FDI and investment protection can play a key role in building low carbine economies
Business and private investments play a key role in promoting a low carbon economy, both as direct purchasers and producers of renewable energy and new technology for sustainable development.

UNCTAD has also noted that foreign direct investment plays a key role in building low-carbon economies, by bringing in capital and green technology. (Cf. UNCTAD Investment Advisory Series, Series A, Number 7.). At the same time, inconsistent and short-term energy policies appear to constitute barriers to investments in renewable energy at scale.

Hence, a modern IIA Regime with efficient provisions on investment protection, targeting i.e. low carbon investments, may play an important role in contributing to climate change mitigation.

(iii) IIA can make a difference to mitigate climate change
The use of IIA which includes an investor-state dispute settlement mechanism illustrates how international law has evolved in a direction by which states now will be held accountable for state obligations under international law.

And in contrast to international environmental law obligations, the IIA Regime contains efficient enforcement mechanisms. States have, through the IIA Regime, effectively developed a system by which states which fail to fulfill their international obligations may be held liable for damages, by the procedural back-up of substantive provisions known as investor state dispute settlement (ISDS). Most ISDS procedures will be in the form of international arbitration.

Enforcement of arbitral awards, also against states, are safeguarded by one of the most successful legal instruments of international law, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as well as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention).

The evolution of international law in this area means that we now stand before a historic opportunity to put force behind the words of international environmental undertakings on state level.

As new IIAs are being negotiated, the catalogue of investment protection obligations in the new agreements could be drafted to explicitly support environmental measures, including e.g. provisions which specifically encourage FDI in low carbon technology, research in new renewables, or other mitigating measures from a climate change perspective.

At the same time, such investments will contribute to the economic development of the host state, thus connecting climate change measures with economic incentives and transfer of technology.