

**Talking points for UNCTAD Webinar  
«Taking Stock of BIT Reform»  
16 March 2016**

Belarus attaches significant importance to establishing higher level of protection for foreign investments and is always interested in following the latest trends in the field.

As of today Belarus has signed 61 bilateral investment treaties (BITs). Besides BITs Belarus also participates in a number of multilateral international instruments aimed at protection of investments and investors, including the ICSID Convention, the MIGA Convention, the Commonwealth of Independent States (CIS) Agreement on Cooperation in the Field of Investments, the CIS Convention on Protection of Investor's Rights. As a member of the Eurasian Economic Union (EEU) Belarus is currently negotiating on a number of free trade agreements (FTAs) with other countries, which contain special chapters on investment promotion and protection. Independently from the EEU, Belarus negotiates new BITs or amendments to existing BITs with several countries, including some EU member states.

We would like to draw attention to several problematic issues that in our opinion should be addressed by the UNCTAD and resolved within the BIT Reform.

**1. Eliminating collisions between different branches of international law as well as municipal law.** In order to prevent such collisions, it is necessary to clearly specify in BITs the hierarchy of sources of international and municipal law applicable to disputes. This hierarchy may help to avoid fragmentation of legal regime of investment protection and would provide harmonious interpretation of BITs provisions bearing in mind other international obligations of a host State, for instance, in the area of environment and public health. One more option to prevent legal collisions could be a mechanism of joint interpretation of conflicting treaty provisions by its contracting parties.

**2. Transparency of national investment policies.** National investment policy shall reflect open and transparent strategy. In this regard we would like to ask the UNCTAD to clarify the notion of national investment policy and correlation between transparent national investment policy, right to development and regulative powers of the state. It also may be beneficial to do research regarding how investment policies may be introduced and changed by host states and in which legal form such investment policies may be adopted and published. The question of a fair compensation in case of change of national investment policy could also be studied in this context.

**3. Application of the most-favored nation principle (MFN) to ISDS.** There are some concerns that investors may misuse procedural provisions from third-party investment protection treaties. For instance, paragraph 5 of Article 2 of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration states that the Parties to this Convention agree that a claimant may not invoke a most favored nation provision to seek to apply or avoid the application of the UNCITRAL Rules on Transparency under this Convention. It might be useful

if the UNCTAD could do research and provide some clarifications on the possibility of exclusion MFN principle from application of procedural provisions of BITs in general.

**4. Prevention of parallel litigations and arbitrations.** It is important to include in the BIT Reform the creation of an international legal mechanism preventing possibility of lodging by the same disputing parties identical lawsuits or claims before different courts or arbitral tribunals.

**5. Independence and impartiality of arbitrators and mediators.** Another concern relates to issues of “repeat appointments” of arbitrators and mediators, when some persons gain a reputation as claimants’ or respondents’ arbitrators or mediators and are repeatedly appointed by the same type of party losing by this their impartiality. In this regard the creation international pool of arbitrators may be considered. To regulate their behavior the Code of ethics for arbitrators in investment disputes may be introduced with the rules regulating that arbitrators and mediators may not participate simultaneously or in a short time in multiple legal proceedings and/or serve as legal counsels in other legal processes.

**6. Institutional reform of the international investment dispute resolution system.** It also may be reasonable to consider reforming the institutional structure of the ISDS system. Two options which may be used in doing so. One is the introduction of an appeals facility – a standing or ad hoc body with a competence to undertake substantive review and correct awards. The mechanism of the appeal court of the WTO may be used as an example thereby. Such body shall be able to correct substantive mistakes in the interpretation and application of the law. The other is the replacement of the current system of ad hoc arbitral tribunals with a standing international investment court. It could consist of judges appointed or elected by states on a permanent basis for a fixed term. It could also have an appeals chamber.

**7. Exhaustion of municipal judicial remedies.** A research is needed whether international investment arbitration should be allowed only after exhaustion by investors of judicial remedies available in the respondent state.

**8. Alternative dispute resolution.** At the same time the best way to resolve a dispute is obviously to avoid it altogether or resolve it at an early stage. In this respect a so-called alternative dispute resolution (ARD) may be beneficial. ARD can help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties. ARD could also go hand in hand with improvement of dispute prevention and management policies at the national level. Such policies aim to create effective channels of communication between investors and State.

**9.** One more direction for the reform is organizing a **closer cooperation between the UNCTAD with other international legal bodies** such as UNCITRAL, PCA, etc.