

# UNCTAD Expert Meeting on Taking Stock of IIA Reform

Geneva, 16 March 2016

## Slovakia

### **1 Sharing experience from SK IIA reform**

1. General overview of SK investment policy. The Ministry of Finance of the Slovak Republic is responsible for negotiation of BITs. To this moment, the Slovak Republic has concluded more than 50 BITs. Our latest BIT has been signed with Iran in January 2016 and in March 2016 we completed our negotiations with UAE. We currently have only one active negotiation with the Federal Democratic Republic of Ethiopia, due to the forthcoming SK PRES in the Council of the EU in 2016.

2. New Slovak Model BIT. New Slovak Model BIT 2014 is a well-balanced model agreement which on the one hand provides protection to foreign investors and their investments and on the other hand maintains the state's right to regulate. The SK Model BIT is based on the Slovak Republic's past experience with investment arbitrations and BIT negotiations and at the same time follows newly built EU approach towards investment chapters in FTAs. The Slovak Model BIT has been drawn up based on new EU investment policy (implemented in EU agreements with VN and CA), UNCTAD Investment Policy Framework for Sustainable Development as well as other UNCTAD sources, IISD and Commonwealth Secretariat's Model, US Model BIT 2012, Canadian Model BIT, and other respective materials.

3. Content of SK Model BIT. The Slovak Republic introduced number of innovations to make its BIT an effective and reasonable tool of protection and promotion of investments: (i) closed & cumulative definition of investment, (ii) limited FET, (iii) NT and MFN – in like circumstances, (iv) just compensation for expropriation (qualificators such as equitable balance between the public interest and interest of those affected, capital already repatriated, aggravating conduct by an investor etc.), (v) only legal responsible or bona fide investments for ISDS, (vi) notification of third-party funder, (vii) security for cost, (viii) counterclaims, (ix) fast rejection of speculative claims, (x) transparency in ISDS, (xi) code of conduct and conflict of interest rules for arbitrators and their staff, (xii) no punitive damages.

### **2 Lessons learned, do/don't, best practice**

#### Good tips for drafting and negotiation

- good preparation is crucial. We propose comparing several latest IIA texts (e.g. CETA, first EU draft of TTIP text, other guides from reputable sources). Also materials from UNCTAD are very useful (World Investment Report, Investment Policy Framework for Sustainable Development, pink series of UNCTAD)
- focus on balanced BIT. The prevalence of offensive/defensive interest is only temporary and can change over time
- set your priorities – modern BIT is long and you will have to sacrifice less important provisions during negotiations
- prepare examples and explanations for negotiating partners – you will need them
- consult the selection of negotiating partners with relevant ministries
- rather have „living document“ with various options than a rigid one while maintaining your priorities
- be patient, willing to understand the opposite partner concerns and be ready to work on the compromise proposals

### **3 Gaps and challenges ahead**

Therefore we are happy to explore further ideas in promotion of foreign investment through BITs. We prefer to discuss removal of barriers to foreign investors rather than subsidies which distort markets.

### **4 Concrete suggestions for WIF 2016**

Discussing the creation of open Multilateral Court System for investment dispute resolution, including Appellate Mechanism, which is part of the new EU investment policy, with the potential ultimate aim to replace the existing BITs concluded among the countries worldwide and set a new standard of investment protection. We are looking forward to WIF 2016 and we would like to thank UNCTAD for excellent cooperation.