

Participation in UNCTAD's High-level IIA Conference – Geneva, 10 - 11 October, 2017

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1. Closing Plenary – Final remarks

Thank you very much

We share much of what has been said and proposed as probable next steps. We just wanted to make one suggestion on an additional potential way forward.

The idea is that IIAs need to be alive, the regime needs some sort of new organic structure or flexibility provisions that allow itself to progress when is needed. In fact, a crucial aspect of the problems of the regime is that it is **petrified, excessively rigid**, as everything is enshrined in international laws. And everything is everything: the substantive provisions of protection (where it makes sense to have an international petrified guarantee), but also the most detailed aspects of procedures (where the petrification in an international treaty does not make much sense). It doesn't make much sense that ideas with which everyone agrees, like for example that arbiters need a particular set of qualifications and stricter guarantees against conflicts of interest, that MFN provisions should not allow the import of ISDS provisions from other treaties, need 3000 thousand policy measures to change the 3000 BITs, and 1500 parliaments revising them.

Indeed, when Replacement, amendments, Joint interpretations, consolidation, are all ways to provoke change, to move forward the investment relationship between two (or more) countries, but they are all, as highlighted these two days, very difficult to apply. And, in Addition, we are all changing today, what we all realize now that must be changed. But we don't know in the future. Probably, in ten or 20 or 50 years, it will be almost self-evident something that we don't anticipate today. Lawyers and Tribunals, nobody can deny that, have been quite creative many times, and its impossible for us to anticipate its future ingenuity. So, at that point in time, we will need, again, 3000 thousand new policy measures to synchronize the system with the reality.

So, the system badly needs some sort of flexibility, some provisions for permanent accommodation. There are potential ways to deal with this issue. These are just general ideas, but we believe that much greater attention should be devoted to this topic.

First possible way to deal with the issue: Joint Commissions in every BIT, with an important degree of authority to permanently and easily interpret the treaty. This provides for a structured and permanent mechanism to keep moving without the difficulties of most normal experiences of interpretation.

Bolder still, this Joint Commission should or could be able to modify aspects of the treaty (not everything). Something like the Binding Decisions that most international organizations have.

Or, bolder still, and simpler, a lot of matters should be delegated, in the treaty itself, to a side agreement by the concerned governments. For example, all matters about definitions of investment, all matters regarding procedural aspects of ISDS or SSDS, should not be written in an international treaty, but rather in an intergovernmental agreement for the implementation of the substantive provisions of the treaty

If such a thing existed in our BITs, we would be having probably a third of the problems we are facing today. And we would be focusing on the most challenging aspects of the substantive provision for the protection of investments.

Indeed, there have been cases in which the non – disputing State in an arbitration is bound by levels of protection that it didn't intend and even that it considers inappropriate to its own citizens. States are the owners of their treaties. If there is consensus among the involved parties, if they both agree (or they all agree), they shouldn't be so tremendously limited in its ability to move the treaty forward.

Potentially then, and this is to conclude, in this regard there could be a lighter approach to multilateralism. A multilateral treaty in which countries agree that in all their common BITs, Joint Commissions exist and have the ability to move things forward. One, and only one, mega-amendment, with the benefit that is procedural and every decision will always be tied to consensus among the governments involved in a bilateral or plurilateral relationship.

I don't know the answers, but we would like to suggest as a potential next step the exploration of a movable framework for investment protection.