

### **Preliminary remarks**

- ✚ Foreign direct investments have been the main vector for the international development of large French companies. In this context, IIA prove a major tool for securing these investments abroad.
- ✚ IIA mean legal certainty and predictability for foreign investors. They guarantee a core set of substantive rights and the access to swift remedies in the event a major investment has put been at risk by severe policy development. The ISDS branch of IIA brings the opportunity to open a structured dialogue with host state and to finally seek remedies if challenged measures turned in breach with substantive rights and to have prompted a loss for the company.
- ✚ Therefore, French companies have always been advocating for the conclusion of numerous investment treaties with non-EU countries if possible, in conjunction with free trade agreements and investment liberalisation measures.

### **Large French companies' views on the ISDS reform**

- ✚ Old-generation IA with « classical ISDS » based on ad hoc arbitration have long proved satisfactory for French companies.
- ✚ But, in the light of discussions that have been triggered by the CETA and TTIP negotiations, we have to acknowledge that the implementation of existing BITs and other regional instruments has revealed a number of functional issues that have to be fixed on the mid-run : lack of consistency of adjudications (especially when panels make awards on the basis of the same treaties) with possible diverging interpretation, need for improving and clarifying the involvement of non-disputing parties, uneven degree of transparency, need to prevent conflicts of interest and to equip disputing countries with legal competence and expertise.
- ✚ Therefore, large French companies do support the on-going process towards modernising ISDS notably under UNCITRAL and ISCID framework that includes work on codes of conduct for adjudicators, strengthening of rules for selecting and appointing adjudicators, efforts on capacity building.
- ✚ That being said, French large businesses are insisting and vigilant that on-going modernisation preserves key assets of ISDS as an efficient tool for investment protection. To itemize some of them: again, legal certainty and predictability, independence and high qualification of panelists from host states and non-State disputing party, speediness of proceedings and enforceability in phase with investment cycles and due safeguards to ensure business confidentiality, especially regarding trade secrets.

- ✚ These assets of existing ISDS schemes are really the overarching principles upon which companies will make a judgment on various paths/directions for reforms.
- ✚ As far UNCITRAL framework is concerned, the initial debate has been partially focused on whether ISDS reform should consist only in (a) upgrade to arbitration procedures by resorting to specific measures adopted in the context of modernising existing IA or so called « structural reforms » that might result in concluding a new multilateral instrument or/and the set-up of standing arbitration bodies if not a multilateral investment court at least at an appeal stage.
- ✚ French large companies are not necessarily inclined to take a side and to back a specific institutional set-up against another. But they really request that ISDS reform maintains these overarching principles and, therefore, it may turn out that several proposals put forward by the Parties are not compatible or hardly compatible with these objectives.
- ✚ 4 concrete examples can illustrate how business objectives interplay with directions debated in the reform:
  - ✚ Overall Legal predictability: the reform should not be a pretext for terminating existing IIA and leaving new investment unprotected. Whatever the model chosen, the shift towards revised ISDS schemes should be transitional and accompany businesses in these changes, notably via effective sunset clauses. Similarly, discussions on the framing of substantive rights should not be either a pretext for instauration new clauses with the effect of denying ISDS.
  - ✚ Duration of proceedings and independence of the adjudicating body: The exhaustion of domestic remedies is clearly running against the objective of a speedy/independent adjudication on a case (our companies have exactly the same concern with the decision to terminate BITs within the EU).
  - ✚ By the same token, the introduction of appeal procedures (resorting to another panel or to a permanent body) would certainly increase the level of legal predictability and consistency but could also result in proceedings being much delayed in comparison with current terms. Our companies really cherish the existing possibility to conclude a dispute within a space of 4-5 years that matches with cost recovery and investment planning. Therefore, appeal should be limited to legal matters excluding factual assessments and subject to time constraint.
  - ✚ Businesses also advocate for interim measures by adjudicators that have been clearly overlooked so far (both on freezing potential further measures and to grant temporary/ partial adjudication).
  - ✚ Selection and appointment of arbitrators : regardless of the option taken (ad-hoc tribunal versus standing bodies), selecting and appointing procedures should maintain a balance between disputing parties (in this regard, rosters or standing bodies only appointing by states would run against that principle) and allow for a sufficient degree of expertise in the field.
  - ✚ Finally, as Afep wishes to also convey some specific priorities for SMEs, ISDS reform should also take due consideration for their own difficulties to launch ISDS proceedings. Apart from funding and human resource capacity, they might also be



better accompanied with strong emphasis on mediation. A proper dispute settlement should of course not be limited to amicable remedies and should include a full-fledged resolution tool but mediation and contact points should be encouraged as well.

**AFEP** is the Association of French Large Companies. It represents 115 of the largest companies operating in France. It takes part in public discussions by providing pragmatic solutions to foster the development of a competitive French and European economy.

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