

UNCTAD High-level conference on International Investment Agreements (IIAs)

Geneva, Switzerland – November 13, 2019

Opening Plenary

Comments of Shaun Donnelly, Vice President, U.S. Council for International Business

- ❖ Mr. Chairman, Excellencies, honored guests, thank you the opportunity to participate in this important conference and for including me, as a representative of business, of those who actually invest internationally, on this Kickoff panel.
- ❖ In beginning I want to commend UNCTAD, and you, Mr. Chairman personally, for the valuable work it does on investment statistics, and policy analysis. We rely on UNCTAD for much of the basic data that underlies policy discussion on IIA and FDI.
- ❖ Although the topic today is IIAs and I agree IIAs are very important, I think it's important not to lose track of the real objective here. The objective of IIAs is not great agreements, or particular words, or concepts. The objective is more and better Foreign Direct Investment (FDI) flows, more investment, more support of the UN's Sustainable Development Goals, more development, more jobs, more economic growth, better lives.
- ❖ We on the business side agree that Investment, FDI, is important, for growth and progress in both developing and developed economies. And strong IIAs are a key tool to promote more and better FDI.
- ❖ FDI can be very risky, certainly perceived as riskier for the investors than investing at home in their own home countries. Investing abroad involves investors leaving behind their well-established legal, regulatory, and political protections and putting their resources at risk in a foreign country where they may have limited protections. Legal protections and underlying rule-of-law cultures may be significantly lower in some foreign countries. All these factors cause investors to seek legal protections, often in the form of IIAs, as they evaluate cost/benefit and risk assessments for potential FDI projects.
- ❖ So we are here today talking about, debating very important issues related to investment and FDI, all based on the importance of IIAs.
- ❖ I also want to just highlight briefly how much the issue of FDI had changed over the past twenty years. In the 1950 and 60s, as investment agreements were taking form, investment was one-directional, from private investors in the developed "North" and flowing to developing economics in the "South." I believe most experts looking dispassionately at the issue would say private FDI flows have played important roles in many developing and emerging economies. I certainly feel that way. Not that every FDI project has succeeded or that investment works perfectly. But the net impact has clearly been positive.

- ❖ But today's FDI has changed markedly from that of the 1960s when UNCTAD was born
  - It's no longer one way – significant FDI flows from developing economies into the “North”, including the U.S., Europe and other OECD economies.
  - FDI comes in many new, creative forms - joint ventures, licensing, supply chain partnerships, State-owned Enterprises (SOEs), hedge fund and other investment vehicles.
  - Government regulatory capabilities have increased significantly.
- ❖ IIAs have worked but, like other legal instruments from 40 or 50 years ago, they do need to be checked from time to time and updated as necessary. That has certainly been the practice in the U.S. system which I know best. Business, civil society, the legal and academic communities have been involved in the periodic reviews of US investment agreements, the “U.S. Model BITs.”
- ❖ Responsible business does not challenge host government sovereignty or its right to regulate. We simply ask that sovereignty and regulatory authority be exercised wisely, impartially and without discrimination. Cultures of rule-of-law and transparency/anti-corruption are essential building blocks for modern economies at any level of development. The right to regulate is not a right to discriminate or abuse foreign investors. IIAs are key for many investors in providing the necessary legal basis for a win-win partnership.
- ❖ It is also important that IIAs and the governments which write, honor and enforce them, should avoid sectoral carve-outs, discrimination, or political correctness, for example against sectors like energy, chemicals, pharmaceuticals, or agricultural biotechnology. Nobody wins when politics “trumps”, please pardon the pun, economics in investment policy.
- ❖ It is also important to recognize that IIAs are not all created equally. Many U.S. IIAs are, I believe, among the best, most balanced, most updated. Some other nations' IIAs are, in my view, less modern, less comprehensive, less balanced. Don't condemn all IIAs simply because some have not been updated. Don't throw the baby out with the bath water.
- ❖ Some skeptics or critics of IIAs and of FDI are serious, substantive advocates. I may disagree, indeed disagree fundamentally, with them but they deserve to be heard, to join the debate and to challenge business. But I fear some other critics of investment agreements are more political, more polemic and seem to me to be attacking FDI and IIAs as part of broader, more polemic agenda – anti-foreign, anti-business, anti-capitalist, anti-MNC, or anti-American. Let's all have a serious debate today about economic policies, not anti-business campaigns.
- ❖ I'll end where I started, thanking UNCTAD and all of you government delegates for including business, the organizations that actually invest, in this dialogue. We look forward to participating actively, forcefully and constructively and to listening to and learning from all of you.
- ❖ Thank you again for this opportunity to participate and to speak on this opening panel.

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Breakout Session 1.B – “Reforming Investment Dispute Settlement”

Comments of Shaun Donnelly, Vice President, U.S. Council for International Business

- ❖ Thank you, chairs, and special thanks to UNCTAD for including two business (i.e. investor) representatives on this very important panel. I fully support everything just said by my colleague Marc Poulain from AFEP. You will see that my remarks align well with Marc’s, reflecting broadly views and concerns of European and American business on many issues.
- ❖ I noted in my kickoff remarks earlier this morning that strong, comprehensive Investment Agreements are very important for business. I now take it to the next logical step – strong, comprehensive, enforceable dispute settlement provisions, most often in the form of Investor-State Dispute Settlement or “ISDS” provisions, are essential to effective IIAs.
- ❖ I think we need to remember why ISDS was created around 60 years ago. The then-standard practice of state-to-state negotiations, formal or informal, often ad hoc, was clearly not working to resolve investment disputes. Cabinet Ministers, Ambassadors, and in some cases Prime Ministers and Presidents were not investment experts and the absence of agreed legal underpinnings allowed intransigence and power politics to frustrate efforts to resolve those disputes. And, frankly, those political leaders and diplomats had more important things they should have been focused on.
- ❖ ISDS was designed to replace a flawed political process with an apolitical, legally-based arbitration system with respected, independent experts adjudicating disputes, leaving Ministers and Ambassador to focus on other important efforts better matched with their abilities.
- ❖ I will argue that the ISDS system, has generally worked well – not perfectly but quite well. ISDS has provided a system that offers international investors a modicum of legal protection for investments outside of their own home markets and their own established legal and political protections. As foreign investors travel abroad and effectively submit themselves totally to the sovereignty of a foreign government, those legal protections and especially a credible independent dispute settlement process are essential for many investors.
- ❖ ISDS, like other key elements of IIAs, needs to be comprehensive, fair, balanced, and effective. They should also be transparent and efficient. IIAs, including their ISDS provisions, should be reviewed periodically to ensure they are keeping up with the times. Like other laws, regulations, and procedures, ISDS should be reviewed periodically for possible reforms. US IIAs, Bilateral Investment Treaties (BITs) and Investment chapters in free trade agreements, have been reviewed periodically and carefully tweaked as necessary. US IIAs do generally, I believe, continue to meet that work well.

- ❖ I certainly support the underlying thrust behind the review and debate on possible reforms of IIAs currently underway in ICSID and UNCITRAL. It is, I believe, critical that business experts be full partners in those review efforts.
- ❖ We all need to recognize that, like businesses, governments do occasionally do bad things in dealing with foreign investors – discrimination, unfair treatment, even expropriation, and we collectively need a way to resolve the ensuing disputes. In some countries, the local court system offers one alternative channel to resolve those disputes. But, unfortunately, in some other countries, there remain serious questions about the competency, integrity, and independence of the local judicial system. ISDS continues to fulfill a vital function as one possible means to ensure fair treatment of investors.
- ❖ These business/government disputes are not limited to foreign investors and to ISDS cases. For example, every year the U.S. federal government and sub-federal governments are sued in U.S. domestic courts thousands of times, including by foreign investors.
- ❖ I just want to comment very candidly on the comments by an earlier speaker on this panel, the distinguished representative of the European Commission. As a business representative, I have a very different assessment of the EU's Multilateral Investment Court proposal. I would simply urge all government representatives to think long and hard before signing on to throw overboard the well-established ISDS system and follow the EU's call for a court system. I think there are many serious problems with the EU proposal, at least from the business perspective.
- ❖ And please recall my earlier comments that if an IIA and an ISDS system doesn't work for business, then the investment (the ultimate objective of the whole effort) won't flow. Investors are vital partners in the global international economic system and need to be comfortable with investment policies, agreements and especially the dispute settlement provisions.
- ❖ I'll just highlight a few of my concerns with the EU's court proposal – cost, delays, expanding bureaucracy, an expectation that all governments (even the least developed countries who have never been involved in an ISDS case) would have to chip in to pay their "share" of this new system, lost expertise among arbitrators/judges, politicization of arbitrator/judge selection, and a potential built-in pro-government bias among judges seeking reappointment. Basically, I think the EU is offering a political solution to a political problem, public protests over ISDS, when what is needed is some hard, serious work on substantive economic and legal issues.
- ❖ Radical proposals, including the EU's court proposal, to overthrow the established ISDS system are, I believe, ill-advised. Let's all focus on incremental reforms which can help update and strengthen those existing IIAs which need it. Let's not throw out the baby with the bath water.
- ❖ There is one other, sometimes-related, issue I wanted to address briefly, the idea of adding some sort of appellate review body to the existing network of 3000 IIAs. As with governments, business seems still a bit uncertain on such proposals. I am open minded on the issue as are, I think, some

others in business. But I worry about adding cost, delays, and a false sense of precision to an already challenged ISDS system.

- ❖ I do think we all need to be honest in acknowledging that some of the loose language thrown around about simply imposing, even “super-copying” a WTO Appellate Body structure on top of a very, very different ISDS system. Recall that while the WTO’s 164 members have all signed on to a single set of agreed commitments, investment is very different. Each of the 3000 IIAs around the world is unique, language agreed only among those bilateral or regional partners. So the scope for precedential decisions, establishing a corpus of multilateral commitments and shared, binding interpretations just is not there. We can discuss possible appellate bodies formulations but let’s not delude ourselves that WTO offers a simple, easily-replicated model for the global spaghetti bowl of investment agreements.
- ❖ Finally, let me reiterate my appreciation to UNCTAD for including a frank, open discussion of this very important issue of ISDS reform on the agenda for our conference and, especially, for including business representatives on this panel.