UNCTAD's High-level IIA Conference, 9-11 October

Statement by Mr. Rifat Parvez

Pakistan

Monday, October 09, 2017

Good afternoon to all,

First of all I thank you very much for giving me an opportunity to speak to this august forum. I am also thankful to the IIA Section of Investment and Enterprise Division of UNCTAD for conducting a detailed study and analysis of Pakistan's BIT template.

Pakistan, as you all know, is the pioneer of BITs and the first ever BIT was between us and Germany; currently we have concluded 53 BITs.

At the global level, general perception is that BIT's have not been as instrumental in getting FDI. The actual determinants of FDI are the other factors – such as market size and growth, the availability of natural resources, and the quality of hard and soft infrastructure. Thus if we want to make the IIAs a tool for the sustainable development, then we are bound to reform it.

Governments around the world are facing pressing and controversial questions relating to their IIAs, and are rethinking their approaches to those agreements. We, in Pakistan are also facing similar situation. We are pursuing a three pronged policy in the context of IIAs:

A. To negotiate for revoking ISDS provision from selected BITs;

B. To stop further process on the existing under process BITs;

C. To design a new BIT template for future BITs.

It is interesting to note that with regard to revoking ISDS provision, we took up the matter with the selected ten (10) countries, with which we had a minimum volume of bilateral investment for revoking ISDS Clause from their BITs. Only three countries have responded. One has dis-agreed with our proposal and went a step ahead and terminated their BIT with Pakistan because they were already in process to terminate all their BITs; another country has not agreed to our proposal and insisted to continue with the existing one, whereas only one country responded positively and proposed some amendments in the ISDS clause of the BIT.

Regarding our under process BITs, we have stopped further negotiations with the concerned governments.

With regard to development of a new BIT template, currently we have engaged experts at different levels to conduct studies on Pakistan's BIT regime. UNCTAD has developed a wonderful report, titled, **"Review of International Investment Agreements (IIAs) and Comments on the 2008 Model BIT".** The report offers two pronged approach as way forward for Pakistan: formulating new, more modern treaties, and modernizing existing treaties. Whereas Columbia Institute has submitted its initial report titled, **"Cost and Benefits of Investment Treaties and Investor State Dispute Settlement for Pakistan",** wherein they have made a detailed analysis of advantages and disadvantages of BITs in the context of Pakistan.

We are in process of developing a model text on the basis of the above research with assistance of Law & Justice Division, which will ensure protection to investment on reciprocity basis and that model BIT will replace the existing to possible extent while all new BITs will be negotiated on new templates.

In the end, I'll say despite significant progress in terms of global IIA reform activities, much remains to be done. Comprehensive reform requires a two-pronged approach: formulating new, more modern treaties, and modernizing existing treaties. Dealing with the existing stock of IIAs remains the key challenge. IIA reform will require enhanced collaboration and coordination between treaty partners to address the systemic risks and incoherence of the body of existing treaties. Along these lines, we can consider moving towards addressing the needs for reform identified in its existing stock of treaties. In this regard, we could again be guided by UNCTAD's Roadmap for IIA Reforms. This forum would be of great help to define the contours of phase II of IIAs Reforms.

Thanks once again

UNCTAD's High-level IIA Conference, 9-11 October

Statement by Mr. Rifat Parvez

Pakistan

Wednesday, October 11, 2017 Statement

Thanks a lot Mr. Chairman,

From the deliberations of the last two days, it is crystal clear that no country in the world (with a few rare exceptions) succeeded in attracting responsible and sustainable investment in view of its BITs. Then the question arises as who the ultimate winner is, in this whole scenario. It is none other than the foreign enterprise most of whom had the appetite to earn money without caring the CSR, the employment generation or economic development of the host government. This earning profit is in fact at the cost of local enterprise and the host government. The irony is that the local investor is discriminated against the foreign investor and the luxury of strong protection is available only to a foreign investor. Today the local investor is at disadvantage to the foreign investor. It is also a hard and undeniable fact that in past and in some of the developing countries even today the BITs are used just for photo shoot of the foreign dignitaries to show their statesmanship and the success of their visits. Now, I believe, the era is over, we need to look into the architecture of these BIT in their true perspective. Thanks to UNCTAD, and the global community who realized the issue and today we are sitting here to discuss as how to change the chemistry of our already signed and ratified BITs to make them tools for the prosperity of a country and profitability of an enterprise.

As you all know, Pakistan is the pioneer of Bilateral Investment Treaties and the first ever BIT was between us and Germany; currently we have concluded 53 BITs (out of which, 32 are in force).

Today, governments around the world are facing pressing and controversial questions relating to their IIAs, and are rethinking their approaches to those agreements. The general perception (specifically by the developing countries and LDCs) is that BIT's have not been as instrumental in getting the much needed FDI. Unilateral termination is not unknown now. Research has established that the actual determinants of FDI are the other factors – such as market size and growth, the availability of natural resources, and the quality of hard and soft infrastructure. Today these factors tend to be far more important to the genuine investors (against the treaty shoppers) when making decision to invest or not to invest. This explains as why, for example, investment flows between the US and China are high despite the absence of an investment treaty, and why Brazil has continued to be a major destination for foreign investment despite having ratified no investment treaty. Similarly, it helps explain why countries that have stepped away from investment treaties do not appear to have suffered losses of FDI. We have to draw a line between treaty shoppers and the genuine investors.

In case of Pakistan during the period 1990-2013 total FDI from only two countries; US and KSA was 51%; against 49% from the rest of world from the treaty as well as non-treaty partners; with both of whom we didn't have any investment agreement.

Thus if we want to make the IIA a tool for the sustainable development and to attract FDI, then we are bound to reform it. The old generation BITs of 60's till 90's were drafted keeping in view the major concern of foreign investors from developed countries at that time who considered expropriation and nationalization as the main political risk when investing in the developing countries. But today the world priorities have changed; direct expropriation and nationalization are the subject of past; countries are now more concerned about attracting responsible and sustainable investment than just foreign investment.

The scope of current BITs is narrow and their provisions are broad, covering investment protection without addressing the broader agenda of development policy necessary for a more inclusive economic growth. Due to loosely drafted provisions in the old generation IIAs, host states cannot freely take actions or measures in the public interest that could be harmful to foreign investors. This can make it more challenging for states to implement new policies or reform existing ones in pursuit of economic growth and inclusive development. The fact is that the BITs were intentionally or unintentionally designed not to increase the FDI inflows into host countries, but rather to provide a stable and predictable legal framework for selected foreign investors.

Today, the ISDS claims brought under these treaties have been on the rise, involving ever-more novel and wide-ranging claims, and often seeking staggering sums in damages for alleged breaches of vaguely worded and open-ended treaty standards. As of July 31, 2017, 817 known ISDS claims had been filed, and at least 114 states had faced formal claims. This is particularly surprising given that the first ISDS case was filed only 30 years ago and fewer than 50 cases had been filed before the year 2000. This means that the implications of investment treaties and ISDS have really become apparent in the last 15 years.

Today, states are focused on attracting investment that will help propel their sustainable economic growth and development and, in that context, are evaluating the policies and tools that are effective and efficient in advancing that aim. As part of that evaluation, they are reassessing whether investment treaties do in fact help increase investment flows (and whether any potential benefits in terms of investment flows outweigh costs of these treaties in terms of litigation expenses, potential liability, and reduced policy space), and whether there are other policies that are better tailored to meet their investment attraction and development objectives.

In Pakistan, we have stopped signing and ratifying BITs with other countries. We are now designing a new legal framework for our future BITs and a roadmap for the existing ones. In this regard we are thankful to the IIA Section of Investment and Enterprise Division of UNCTAD for carrying out in-depth analysis of issues with our existing BITs and providing a roadmap for our future IIAs.

Some three years back we started work on it. We wanted to modify all our BITs; however we took up amending provisions relating to ISDS of our existing BITs with only ten selected countries with which we had very little bilateral investment. It is interesting to note that, in response to our proposal, none except only one country, showed interest to amend the said provision. Pakistan, for the moment, is reviewing the template of BITs and one of the primary points under review is the dispute settlement. We are rather apprehensive of settlement through ad hoc tribunals and are giving a serious thought to an alternative to that. We tend to subscribe to the idea of a multilateral dispute settlement system as proposed by EU. Though we are not totally averse to improving the current system but the predominant view is that it now has limited scope for that and it could be more practical to replace it. We also emphasize here that prior to multilateral dispute settlement there should be a system of arbitration at domestic level. Alternate dispute resolution (ADR) methods like arbitration, mediation and conciliation needs to be formalized and their decisions made enforceable. ADRs have been very successful due to their low cost and less time in resolution of disputes.

Taking advantage of this gathering I would also like to state as a developing country that under a multilateral dispute settlement a support may be made available to us as to access and to use the system. A system similar to the current Advisory Centre for WTO Law (ACWL) is a system that seems very advisable and has been great support to developing and LDC members. Moreover, ancillary to dispute settlement we need cooperation and assistance in building capacities for investment promotion and investor facilitation.

Since we are now entering the second phase of IIA reforms on modernizing the existing stock of old generation BITs, it is not only challenging rather a lengthy, complex and cumbersome process. IIA Reforms will require enhanced collaboration and coordination between treaty partners to make them tools for facilitation, promotion and protection of investment with more focus on facilitation and promotion.

In view of global practices and our own experience we propose the following road map for 2nd phase of IIA Reforms.

1- UNCTAD may vigorously pursue the 2nd phase of these reforms; and hold intensive and extensive sessions with the stakeholders.

2- UNCTAD may assist the developing countries and LDCs in building their capacities and drafting BIT templates for them.

We believe the recommendations of this forum would be of great help to define the contours of phase II of IIAs Reforms.

Thanks once again.