



World Investment Forum 2014: Investing in Sustainable Development

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Investment Protection Treaties (BITs) constitute – together with Double Taxation Agreements and Free Trade Agreements (FTAs) – a key instrument of Switzerland's bilateral foreign economic policy. Switzerland has so far signed 130 BITs with partners around the world, constituting the third largest network of BITs worldwide. BITs concluded by Switzerland focus on the protection of existing investments. Market access for the establishment of investments is covered in a number of Switzerland's FTAs.

International Investment Agreements (IIAs), whether covering protection of existing investments or covering, in addition, market access enhance the attractiveness of a jurisdiction for foreign investments. IIAs increase legal security and predictability of the investment environment, in particular by providing access to international arbitration (Investor-State Dispute Settlement). IIAs being a stimulating factor for companies deciding on where to invest serve a purpose beyond legal security of investment conditions. For governments, they are an important instrument to enhance the attractiveness of economic locations, with a view to promote growth and sustainable development.

In Switzerland's view, IIAs are a proven instrument to promote sustainable development. However, as with any instrument, they need continued examination and adjustment when required by circumstances. Recent developments call for examination in particular of the following three issues:

a) Coherence of IIAs with other policy objectives

While the main purpose of IIAs is the promotion of foreign investment, the relationship with other national and international policy areas needs to be taken into account. As policy environments have become more complex, IIAs should include more explicit language with regard to the objective of coherence between investment policies and sustainable development.

Switzerland has included in the preamble of its more recent IIAs references concerning sustainable development and the protection of environment, labour as well as internationally recognized corporate social responsibility standards. In addition, IIAs recently concluded by Switzerland include provisions providing for the right of governments to regulate in the public interest, and provisions according to which

the parties shall not lower standards, such as for the protection of health, safety and the environment, with the purpose to attract investments.

b) Improvement of investment arbitration procedures

Improving investment arbitration procedures is in the interest of all parties concerned. The new UNCITRAL Transparency Rules which entered into force on 1 April 2014 are a good, example and also an important milestone, in this regard. Switzerland has played an active role in developing the UNCITRAL Transparency Rules and is already integrating them in its treaty practice by including a provision in the agreements making the application of the UNCITRAL Transparency Rules mandatory for all investor-state arbitration proceedings, including proceedings under ICSID.²

In Switzerland's view, there are further aspects of the arbitration procedures that should be adjusted. Particularly the introduction of an appeals facility should be examined in this regard. This would best be done, similar to the transparency rules, at the multilateral level.

c) Developing investment protection standards

Switzerland continuously develops its IIA practice in order to take into account ongoing discussions at the international and the national level as well as developments of the jurisprudence (arbitral awards). In the light of IIA arbitral awards, Switzerland adapted in its IIA approach, for example, the definition of "investment".

Given the thousands of bilateral and plurilateral IIAs in existence, it is inevitable that different wordings of investment protection standards (e.g. relating to "fair and equitable treatment"), and different interpretations and applications of such standards by tribunals have evolved, often lacking consistency.

Exchanges and policy dialogues among experts and treaty negotiators help to enhance understanding of such differences and may contribute to a more coherent treaty practice as well as enhanced predictability with respect to the application and interpretation of treaty standards in arbitration proceedings. Switzerland participates actively in such dialogues in various fora.

How best to develop and adjust IIAs?

As there is not a universal system or overall regime of IIAs, and no such systemic regime is likely to evolve in the near future, systematic "strategic regime reform" does not seem to be a realistic approach for the time being. "One size fits all"-discussions would almost necessarily remain without much effect on practical ways forward in individual treaty practice.

However, there is need to adjust treaty practice and arbitration proceedings. Recognizing this fact implies that neither the status quo, nor disengaging by walking away from IIAs and/or withdrawing from international arbitration conventions (such as ICSID), constitute constructive contributions to addressing the challenges of IIAs and their application.

Therefore, the most realistic way forward seems to be an evolutionary approach. Such a step by step approach would update the treaty practice on a bilateral level by the parties to the agreements, taking on board concepts such as "policy coherence", "right to regulate", "transparency of arbitration proceedings", etc..

This evolutionary approach should be supported by multilateral fora (UNCTAD, OECD, UNCITRAL, ICSID), treating overarching issues (such as the examination of an appeals facility). A recent good example is the negotiation of the new UNCITRAL transparency rules, which serve as a standard for other investor-state arbitration proceedings.

UNCTAD and other fora could provide additional support to the evolutionary approach through analytical work, technical assistance and by providing a platform for policy dialogue.