United Nations TD/472

United Nations Conference on Trade and Development

Distr.: General
23 April 2012

Original: English

Thirteenth session
Doha, Qatar
21–26 April 2012

World Investment Forum International Investment Agreements Annual Conference

UNCTAD XIII

Held at the Qatar National Convention Centre, Doha, on 22 April 2012

Summary prepared by the UNCTAD secretariat

1. The 2012 International Investment Agreements Annual Conference generated a rich debate among a wide range of international investment agreements (IIA) stakeholders (negotiators, investment practitioners, legal scholars and civil society) on how to make IIAs work better for sustainable development. Participants shared experiences and best practices, and developed suggestions for the way forward towards improving global investment governance. Throughout, they noted the valuable contribution UNCTAD's work programme on IIAs and the recently developed Investment Policy Framework for Sustainable Development (IPFSD) could offer in this regard.

2. The conference took the format of an interactive debate without any panellists. The discussion amongst experts was structured along four themes: (a) sharing of best practices regarding countries' overall approach to IIAs; (b) sharing of experiences with disputes touching upon public policy issues; (c) spotlight on the Arab region; and (d) the way forward.

3. Discussions highlighted the challenges the IIA community currently faced and the need to join forces, including in a multilateral context, so that today's multifaceted, multi-layered spaghetti bowl of IIAs worked better for sustainable development. This was particularly the case at a time when international investment policymaking was rapidly evolving with novel elements occurring at a rapid pace (e.g. the 2012 revision of the International Chamber of Commerce Guidelines for International Investment, the new United States Model Bilateral Investment Treaty (BIT), the European Union (EU) and United States Shared Principles for International Investment).

4. The sharing of experiences with respect to countries' approach to international investment policymaking (e.g. Brazil, EU, China, South Africa and the United States) generated a rich debate and many points converged with the ones made by speakers from the Arab region (e.g. Egypt, Iraq, Morocco and Qatar). Together, the interventions highlighted the important evolution occurring in IIA policymaking and helped identify the "way forward". It confirmed that reconsidering a country's approach to IIAs was not a unique case, but part of a larger policy shift across countries.

5. While there were important differences between countries' current practices, several common features emerged. These included (a) strengthening the development dimension of the IIA regime; (b) fostering balance and coherence (e.g. between different norms regulating international investment); and (c) ways to address challenges from specific clauses (e.g. fair and equitable treatment, expropriation, most favoured national treatment transfer of funds and umbrella clauses). Participants agreed that earlier generations of IIAs lacked sustainable development provisions and observed that the new generation of IIAs included innovative treaty language on environmental, labour and human rights related issues. Views diverged, however, on whether today's best practices were actually enough to fully address the challenges. One speaker asked whether IIAs should be clearer in stating that there was no contradiction between investment protection and the right to regulate.

6. Countries' sharing of experiences took place against the background of diverging views regarding the impact IIAs may have on attracting foreign investment. While numerous speakers noted that there was no compelling evidence that signing a BIT would lead to increased foreign direct investment (FDI), others considered IIAs an important tool for attracting foreign investment and protecting outward investment. Related to this was the need for balance between protecting investors abroad and preserving public policy space at the domestic level, a particular challenge for countries that are both important destinations and sources of FDI.

7. Investor–State dispute settlement (ISDS) was considered one of the most topical and most sensitive issues and participants agreed on the need to address challenges emerging from it. The example of the "*Phillip Morris case*" showed the specific difficulties countries could face, and cases challenging public health measures were considered distortions from the original objective of IIAs. The Republic of Korea's investment ombudsman and strengthened after-care services were presented as concrete example of how to avoid an escalation of ISDS cases. Other specific suggestions included the promotion of transparency, mechanisms for ensuring the neutrality of arbitrators and the establishment of an appellate body. The meeting noted the importance of ensuring predictability and coherence, and discussed what rules (e.g. building on principles of interpretation and the Vienna Convention on the Law of Treaties) could be agreed to address the lack of predictability experienced in recent cases.

8. When discussing the way forward for making IIAs work better for sustainable development, there was a hands-on evaluation of each of the principles set out in UNCTAD's IPFSD. In this context, participants agreed on the need to ensure balance between the right of States to regulate and the demands/rights of investors. Participants emphasized the need to consider how to place obligations on investors, including obligations for investors to comply with host State laws, to contribute to sustainable development and to avoid illicit activities.

9. Participants also agreed that IIAs should cater to broader objectives, including sustainable development, human rights and other important shared values (e.g. increasing the living standards of people with regards to social equality and creating employment). Along these lines, several participants highlighted the need to give more attention to the quality of FDI and to strengthen the investment promotion function of IIAs.

10. The meeting agreed that all of this could be best achieved through an inclusive, open and transparent dialogue, and noted that the meeting was already a first important step in this direction. In that context, they appreciated the World Investment Forum (WIF) as a truly interactive and inclusive forum for discussing investment-related issues, which included the possibility to hear from and create linkages between parallel events and themes. It was noted that the Round Table on Sovereign Wealth Funds (SWFs) considered the IIA regime too complex for fostering SWF investment in least developed countries. Similarly, the Tripartite Investment Promotion Conference suggested strengthening the investment promotion features of IIAs. Participants also noted with appreciation that the IIA Conference would report to the Ministerial Round Table 2, which would ensure that IIA-related issues would receive high-level attention and be fed into multilateral consensus–building processes.

11. Many participants appreciated UNCTAD’s role in contributing, through its research and analysis, to an informed discourse on IIAs and sustainable development, and several countries requested specific support and technical assistance in this regard. While the overall objective was to impose clarity, structure and discipline on IIAs and ISDS, IIA policymaking should be viewed as a dynamic and flexible process that involves all affected stakeholders. An online debate on IPFSD would offer a unique way to contribute to this objective.