SECOND SYMPOSIUM ON INTERNATIONAL INVESTMENT AGREEMENTS

International Investment Agreements and Investor-State Dispute Settlement at a Crossroads: Identifying Trends, Differences and Common Approaches

SYMPOSIUM OVERVIEW

14 December 2010
Paris, France

Co-organised by the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD)

With the Participation of the International Centre for Settlement of Investment Disputes (ICSID)
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The second Symposium on International Investment Agreements, focusing on “International Investment Agreements and Investor-State dispute at a Crossroads”, was co-organized by OECD and UNCTAD, with the participation of ICSID, and took place at the OECD Headquarters, Paris on 14 December 2010.

The Symposium attracted over two hundred participants from OECD Countries as well as from non-OECD countries.

Speakers included internationally renowned legal scholars and practitioners, government representatives and representatives of arbitral institutions.

The discussions provided a timely stocktaking of the recent developments in investment treaty practice both at bilateral and regional levels, as well as of the evolution in investor-State dispute settlement, giving the opportunity to promote a shared understanding of key issues in the sphere of international investment law. The discussions were also undertaken with a view to proposing ways to improve the system and to continue offering a forum for dialogue between governments and relevant organizations on these issues.

The symposium was structured as follows:

- **Session I: Evolving investment treaty practice and regional perspectives**
  - Session I-A. Evolving investment treaty practice
  - Session I-B. Regional developments and perspectives

- **Session II: Investor-State Dispute Settlement: Is the System at a Crossroads?**

- **Session III: Two core provisions of IIAs and their impact on the investor-State dispute settlement system: Definition of Investment and Most-Favored-Nation treatment**

In Session I, participants emphasized that the traditional configuration between capital exporting and capital importing countries is now out-of-date. As a result of this evolution, and in a context of “shifting wealth”, emerging economies are paying increasing attention to domestic regulation and sustainable development. This is accompanied by concern that provisions included in international investment agreements may affect States’ ability to regulate domestic activities and to change their regulation. It was generally agreed that there is a need for clarification of treaty language, as the number of disputes involving States as respondents increases.
Discussants highlighted the current trend towards more balance between investment protection and other public policy objectives (especially through the inclusion of provisions on labour rights, environmental issues, etc.). This was widely seen to be a very positive evolution. However, some cautioned against overburdening investment treaties with too many other policies and going too far in the direction of environmental issues. An academic expert stated that we should not lose sight of the fact that investment treaties must remain dedicated to investment issues. It was also recalled that the right to regulate the legal domestic order must be done in conformity with the provisions of the treaties.

Participants discussed the potential challenges faced by this evolving treaty practice, such as the complexities of the application of the Most-Favoured-Nation clause in a context of periodically updated treaties, and a potential watering-down of investment protection principles incorporated into Free Trade Agreements.

Innovations in treaty practice following the entry into force of the EU’s Lisbon Treaty were an overarching theme of the session. The perspective of a transfer of competence and a new common commercial policy encompassing investment issues raised some concerns among participants. It was said that, in this transition process, the European Union might face a difficult challenge trying to find core principles of a new common policy.

Other regional developments were addressed, such as the APEC integration process, ASEAN’s most recent initiatives on investment, and the ongoing negotiations of the TransPacific Partnership. Discussants emphasized that regionalism may be the best response to the current need to replace old BITs. Regionalism would allow for a more systemic approach to investment governance.

Additionally, panelists discussed the issue of consistency in the ICSID jurisprudence and widely agreed that it was desirable for investors and the international system that investment law provide predictability and stability. It was also underlined that total consistency in the overall body of treaty law provisions was not always the goal of governments. It was suggested that, despite the elusiveness of an overall multilateral agreement on investment which could bring real consistency and coherence to the law, the ad hoc nature of arbitral tribunals and the differing fact patterns in individual cases, the tribunals were doing rather well in achieving consistency.

The second session was a stocktaking of recent procedural innovations and developments in the investor-State dispute settlement system, with a view to propose ways to improve the system. Is the system at a crossroads or is it just a lively system that is continuing to improve?

Most panelists agreed that the system did not need a radical change of direction and that there is no real sense of crisis, but rather a need for some fine tuning and adjustments.
Discussants addressed the issue of annulment and revision of awards. A panelist pointed out the restrictive view on annulment within the ICSID framework, whereas some other panelists expressed their concerns about what they see as a “pro-annulment” tropism in ICSID annulment committees. It was underlined that annulment is not an appeals mechanism and must remain an extraordinary remedy; consequently, _ad hoc_ committees should not undertake a _révision au fond_. However, it was acknowledged that the line between reviewing the process and addressing the substance is sometimes very thin.

Discussants also addressed the long-standing debate on whether there should be an appellate body in the Investor-State dispute settlement system. Opinions were divided. While some speakers – notably from the business community- cautioned against adding length and cost to the current system, some others argued that setting up an appeals mechanism would be the most efficient way to resolve problems of conflicts of interest and consistency and to give more legitimacy to the system.

The actual influence of arbitral institutions, especially the ICSID Secretariat, on the substance of awards was also discussed. Although a representative from ICSID recalled that tribunals and annulment committees were the only ones that could take decisions and resolve the cases, several speakers raised the question whether there should be a solemn declaration by ICSID Secretary-General to generate a political momentum and give direction to the system.

Participants highlighted the importance of the issue of transparency of the process. In this area, it was widely agreed that publication of awards, open hearings and granting access to the proceedings would ensure a critical legal debate, paving the way towards more consistency. Most speakers were of the opinion that it would also be necessary to allow for _amicus curiae_ submissions. The issue of transparency goes back to the debate on the importance of having some consistency and jurisprudence in this developing law.

Panelists also touched upon the issue of conflicts of interests of arbitrators and challenges to the independence and impartiality of international arbitrators: What entity is the best placed to decide a challenge request? How to address the lack of uniformity of standards applied in deciding challenges? How to detect conflicts of interests at an early stage?

Lastly, various trends regarding the enforcement of awards were identified. While recognition of awards doesn’t raise much difficulty, the execution of awards faces a couple of hurdles, such as annulment proceedings which delay enforcement and the sovereign immunity for States’ assets. Various solutions were considered, such as interim relief and security deposits. It was emphasized that there is a crucial need to improve the rules on execution against States’ commercial assets.

Among the main discussion topics in the Symposium were the two most critical provisions of international investment Agreements: the most-favoured-nation clause and the definition of investment.
In the third session, discussants took stock of the various approaches found in the language used to define investment in bilateral treaties (all inclusive definition, positive list approach, negative list approach). Several experts recalled that, for ISCID arbitration, the situation must meet the definition of investment in both the ICSID Convention and the applicable BIT, which has given additional certainty.

Government representatives were of the view that the scope of the definition of investment is closely related to the intentions of the contracting parties when drafting the treaties. In this light, a discussant stated that, since the ultimate goal of the treaty-making activity is to stimulate investment, a broad definition of investment should be found in the model treaties. He argued that opening the treaty’s scope would also be the most efficient way to avoid diverging interpretations. Several panelists expressed their strong disagreement with this view, asserting that the classical open definition of investment has led to uncertainties and has left too much room for arbitrators to impose their interpretations of the language of the treaty, sometimes circumventing it.

A discussant expressed the view that the definition of investment should integrate new concepts with a view to setting limits to the type of investment protected, such as the legality of the investment and the more controversial concept of contribution to the host country’s economic development.

The debate centered on whether an objective definition of investment is to be found in the ICSID Convention or it is the consent of parties to the investment treaty that defines investment. Most participants acknowledged that no objective definition of investment is to be found within the framework of the ICSID Convention.

The controversial issue of the expansion of the Most-Favoured-Nation clause to cover procedural matters was also addressed. Most panelists recognized that countries, when negotiating, did not intend to give the clause that effect. Concern was expressed by a number of panelists that the extension of the MFN clause to procedural matters by arbitral tribunals was an alteration of the intention of the parties to the investment treaty. Nevertheless, several experts underlined that the concern over the potential extensive use of MFN has not materialized in tribunal awards.

Lastly, some participants considered that States had a responsibility to clarify these two key provisions and strongly urged States to try to reach common understanding on their meaning and scope, whether through treaty revision or other means.

Call for further discussions:

There was a general consensus that the investment treaty-making and investor-state dispute settlement system might be at a crossroads, but they do not need to change direction.
However, it was repeatedly stressed that there is room for improvement and some fine tuning is required, keeping in mind that it is a maturing system which might not be inherently structured to provide consistency.

Lastly, participants touched upon the idea of starting thinking again of a possible model BIT or a model investment chapter in FTAs.

The symposium provided an opportunity for policy-makers and legal experts to flag a few key issues, but further dialogue and discussions are needed to get a better and common understanding of the system and improve the whole structure.

Hence, the two co-chairs called for this type of dialogue regarding international investment agreements to be continued.