



Interventions of Ambassador (Retired) Shaun Donnelly
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Compiled from remarks in Opening and Closing Plenaries and in several working group sessions

- Thank you, Chairman, and thanks to James Zhan and his outstanding team at UNCTAD's Investment and Entrepreneurship Division for the excellent arrangements for this important conference on International Investment Agreements (IIAs). And for all the good work on investment statistics and data bases they are doing.
- Special thanks for including The U.S. Council for International Business (USCIB) and a few other business representatives in this conference and giving us speaking roles on several break-out session panels.
- I think business has a very important role in these discussions on international investment and IIAs in particular. Recall that we in the business community are the ones who actually put the investment (i.e. the resources, the technology, the money) into Foreign Direct Investment (FDI).
- Without private business there would be little, if any, FDI. If you as government representatives agree on IIAs that get rave reviews from governments, academics and NGOs, even from UNCTAD, but which don't work for business, you won't get the FDI investment flows everyone is seeking.
- I am not saying that business should write IIAs. That is your job, the job of sovereign governments, weighing all relevant factors and reflecting your national interests and priorities. But what I am saying is that you should include business as a privileged partner as you negotiate, renegotiate, or consider updating IIAs. Because if IIAs don't work for business, they won't work, PERIOD. And none of us will get the investment, jobs, technology, and economic growth we are seeking.
- I know it's popular in some political circles to talk about the international investment system to be "in crisis" or "broken". That is certainly not a view we at USCIB or others in the international business community share. To the contrary, international FDI flows are playing an increasingly useful role in driving economic growth, trade, and jobs in many countries. IIAs are generally working well. We certainly hear from our member companies that as they consider invest options around the world, they pay close attention to the existence of strong IIAs, plus, of course, effective implementation and rule-of-law protections through an independent, competent judiciary.



- For us in the business community it is clear what makes a great IIA, one that can deliver FDI flows and all the benefits that accompany high-quality investments - strong, comprehensive core protections for investors, broad up-to-date definitions capturing the broad array of creative investment vehicles, and strong implementation and enforcement procedures through Investor-State Dispute Settlement (ISDS) system to resolve disputes.
- I also want to highlight two critical features found in modern U.S. IIAs, whether Bilateral Investment Treaties (BITs) or investment chapters in FTAs, which we believe should be recognized as “best practices” and included in all IIAs – strong market access commitments to reduce, hopefully eliminate, investment barriers, sectoral bans, and discriminatory treatment of foreign investors, generally accomplished in parallel with strong “pre-establishment” commitments on investments, effectively a “right to invest” without broad investment screening by the host government. As with trade, protectionism can unfortunately be a persistent virus when it comes to investment. Including strong market opening and “pre-establishment” commitments in IIAs can be an effective way to combat investment protectionism, and maximize the impact of investment agreements.
- I realize that ISDS is under political attack in some quarters which is, I believe, truly unfortunate. I certainly acknowledge ISDS is not perfect. It can be tweaked, clarified, or strengthened. We can, and should, keep increasing transparency in the ISDS process. But campaigns to eliminate ISDS without alternative implementation or enforcement systems for IIAs amounts to throwing the baby out with the bathwater and would, inevitably, result in reduced FDI flows and all the benefits that come from FDI.
- Simply declaring “the era of ISDS is over” or “ISDS is dead” is irresponsible. All of us need to approach ISDS and all the issues around IIAs seriously and substantively, not simply looking to score political points or somehow take a stand against globalization or big business. The international investment issues are, or least they should be, serious issues. Let’s all do investment policy, not investment politics.
- It is disappointing to many of us in the business community to see the European Union, the birthplace of modern ISDS agreements, now seemingly among ISDS skeptics, trying to peddle a venomous cure for ISDS – a deeply-flawed Investment Court System, seemingly designed more to solve a self-inflicted political problem in the EU than to improve investment protections.
- The EU Commission’s “Investment Court System” proposes to replace the tried-and true market-oriented ISDS system of independent expert arbiters which is working well with an unproven bureaucratic, politicized system dominated by government judges with limited investment expertise. This seems a recipe to add delays, costs and uncertainties for potential investors.



- Similarly, from what we understand about the EU's proposal for some sort of appellate body to review decisions from their proposed Investment Court (and maybe some ISDS decisions as well?) seems to raise more questions than answers. A flawed appellate body risks adding costs, delays and politicization to what should, and what has been under ISDS systems, a technical, legal review. The purported analogy to the WTO Appellate Body is a canard. In the WTO, 164 member nations have all accepted and are legally bound by a single set of laws and rules. On investment agreements, it is a totally different game with over 3000 widely-differing individual bilateral and regional agreements so the scope for binding legal precedents across the system is effectively non-existent.
- We continue to believe the ISDS system is working well. Not perfectly, but very well. And working for everyone, not just for investors. Governments continue to win significantly more ISDS cases than do aggrieved investors. And when companies win, they typically are awarded damages at a small fraction of their claim, often less than 5%.
- We all need a functioning enforcement mechanism to resolve inevitable disputes which arise under IIAs. Investors certainly need a way to resolve their serious grievances. But so do host governments. ISDS provides that necessary enforcement tool. It works for all of us.
- ISDS is especially important for small and medium sized investors, more than large multinationals which have the financial resources, the long-term focus, and the expert staff to sustain a prolonged disputes and political stalemates. An enforcement system for IIAs is critical for the small investors – a system that is fair, transparent, definitive, and as quick as possible.
- It is, unfortunately, still a reality that some governments, in developed as well as developing countries, federal and sub-federal governments, do still on occasion treat foreign investors badly. Discrimination, unfair treatment, and broken commitments are not uncommon experiences for foreign investors. And simply telling those investors to “take it up in court” is not always an acceptable answer. In some countries, national courts treat foreign investors fairly. In those cases, foreign investors will often choose to use the local court system. But where court systems are not truly independent, speedy, and fair or where rule-of-law is questionable, foreign investors need access to an independent, fair international arbitration system to get a fair hearing on their grievances. ISDS simply affords investors those basic protections.
- In our discussions this week, not surprisingly, some of strongest attacks on the established IIA network of agreements and on ISDS system to resolve disputes come from representatives of countries who have faced large numbers of ISDS cases. That's fair. But it is important to remember that investment disputes and ISDS cases are not randomly distributed. Disputes and ISDS cases seem to be concentrated in a relative handful of countries, generally countries which have shown a pattern of abusing foreign investors. The number of ISDS cases any country faces tends, in my experience, to reflect two key



variables – 1) the number of foreign investments in each country and 2) some measure of how fairly the host government treats foreign investors.

- Some countries represented in our meeting here today, frankly, have better records than others when it comes to respecting investment agreements and treating foreign investors. Countries like Singapore, Sweden, Switzerland, Tunisia, Japan, Israel, and France have attracted significant foreign investment from around the world but have few, if any, ISDS cases filed against them. The country I know best, the United States, is of course a major destination for inward FDI but has had relatively fewer cases filed against it and has, thus far, never lost an ISDS case.
- My basic point is simply that investment disputes and ISDS cases tend to be concentrated in a relatively small number of countries. Some of those countries clearly also have a pattern of not treating foreign investors fairly and/or concerns over the fairness and independence of the judiciary.
- In closing, I'll return to where I started. Obviously, business plays a key role in the whole nexus of foreign investment issues. We're the ones who actually invest, who make all those good things happen. You as government representatives need to get the infrastructure right – the laws, policies, physical infrastructure, educate a trained work force, and ensure public security and rule-of-law. And we can make the investment happen.
- So please continue to include business in your discussions, international discussions like these UNCTAD meetings as well as with your own national policy discussions at home, of FDI policies and of international investment agreements. We can help you come up with policies and rules that will actually work, that will deliver investments, jobs, and growth.
- If all of you as government officials ignore us from the business side and write beautiful investment laws, rule, and agreements that work perfectly for governments, for academics and NGOs, and even for UNCTAD and other international experts, but which don't work at all for business, what will you have accomplished? Just remember that the real goal of all these policy discussions on FDI, IIAs, and ISDS is to help make real investments, the right kinds of investments, happen. Business should be a full partner in those efforts.
- We in business are ready, indeed anxious, to work with governments, with UNCTAD and other serious players in a shared effort to make international investment work for all of us. Please just give us a chance to participate.
- Thanks for your attention and thanks for including us in these important discussions.