

Improving resolution of investor-state disputes the focus of new UN publication

23 August 2010 – A new online publication by the United Nations trade arm explores alternative methods that governments and international investors may use to resolve increasingly frequent disputes that must currently be handled through lengthy international arbitration.

Investor-State Disputes: Prevention and Alternatives to Arbitration, released today by the United Nations Conference on Trade and Development (UNCTAD), seeks to address problems that have arisen through the increased use, in recent years, of international investment agreements – most of which take the form of bilateral investment treaties.

These agreements were intended to smooth the way for foreign investments in developing countries by providing legal protection to the foreign investors and their investments. But as they have become increasingly complex, disagreements over their components or their practical application have mounted.

As a result, the study says, such disputes could potentially reduce the benefit of such agreements to developing countries.

It suggests two possibilities to correct this situation. One, alternative dispute resolution, seeks to resolve disputes through negotiation or amicable settlement, such as international conciliation or mediation.

The other, dispute-prevention policies, seek to prevent conflicts between foreign investors and States from escalating into formal disputes. They do so by such means as establishing inter-institutional “alert mechanisms” within States, or by encouraging information-sharing among governments on investment regimes.

The need for such alternative possibilities are increasingly important, considering that UNCTAD counted a total of 357 such disputes by the end of 2009, of which 202 – or 57 per cent – were initiated during the past five years. The bilateral agreements themselves have grown from 1,881 a decade ago to 2,751 in 2009.

In its balanced and all-sided approach to the subject, the UNCTAD study outlines the concerns and complexities raised by the current international agreements, as well as the challenges in relying on alternative approaches.

The former focus on the special nature of international investment arbitration, which involves a sovereign State as a defendant. The possibility always exists that investor-State disputes will strain the relationship between investor and host country. The arbitration may focus on the payment of compensation instead of on maintaining working relationships between investors and governments.

There is also concern about the increasingly large financial amounts at stake, as claims can total millions of dollars, and about an increase in the time needed for claims to be settled. There are also fears about frivolous and vexatious claims, as well as general concerns about the legitimacy of the system of investment arbitration as it affects measures taken by sovereign States.

The new publication also notes a number of potential difficulties with alternative approaches. For example, such alternatives are generally non-binding and might be considered a waste of time and money if they are not conducted successfully. In addition, the parties often lack familiarity and experience with the techniques involved.

The study also notes that States, with their unique attributes as parties to a dispute, may face specific difficulties in using alternative approaches effectively. For example, their flexibility in finding compromise solutions is limited by the boundaries established through existing laws and regulations. Similarly, government officials may not always be given the necessary authority and powers to use alternative approaches effectively.

The UNCTAD study also highlights the advantages of the proposed alternative approaches. These include flexibility, including the possibility of finding amicable grounds for settlement, and faster and less costly resolution. It also finds that certain alternative approaches can improve good governance and other regulatory practices of States.

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