Third round of break-out sessions: Tools for modernizing the IIA network
Treaty re-negotiation, treaty expiration and related challenges[1]

Chair: Mr. Gert Kodra
Albania
Kick-off speaker: Ms. Afroza Khan
Bangladesh
Kick-off speaker: Mr. Stefan Csordes
United Nations Economic Commission for Africa

Rapporteur: Mr. Jansen Calamita
Director
Investment Treaty Forum
British Institute of International and Comparative Law

In the break-out session on treaty re-negotiation, treaty expiration and related challenges, a broad range of views were shared. The experts began by discussing the nature of international investment treaties in their historical context. Given the long profit horizons which investors often face, especially with regard to capital intensive investments, international investment treaties have been structured as long-term agreements to provide security for investors and to address concerns about risk over time.

The experts noted, however, that international investment treaties are not and cannot be static agreements. Over time the international investment treaty regime has developed and there has been an evolution in States' understanding of their development needs. As a consequence of a combination of factors, both political and economic, there has been a desire among many States to consider reform of their treaties to better reflect this evolved set of policy aims. The question that then arises is: if there is to be change how are States to go about it or how might they go about it? In this respect, the break-out session looked at a unilateral approach such as the termination of investment treaties, on the one hand, and, on the other hand, at a bilateral approach, namely the re-negotiation of treaties. The experts acknowledged that one size might not fit all even for an individual State within its treaty portfolio.

With regard to the unilateral changing of treaties and the technical issues which arise with regard to the termination of treaties in particular, the experts noted the long-term commitments that investment treaties often entail and that they include particular mechanisms with respect to termination, expiration and sunset application. It was noted that the duration of investment treaties is often anywhere between ten and twenty years, that they often include indefinite renewal periods, often renew without further action by the State parties, and that even in the event of termination or expiration, they often contain substantial survival clauses (ten, fifteen or twenty years in some cases).

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

The experts then turned to some of the political and economic issues that surround taking the decision to terminate investment treaties.. Some experts indicated that termination might not be advisable for States (developing and transition economies) because of the negative perceptions that would be created in the international investment community. In addition, some experts noted the potential knock-on effects which termination might entail, such as negative consequences in international political institutions, the reactions of international credit rating agencies, and possible effects on bilateral relations. There was also some discussion about the strength of social science research in the area with respect to the relationship between the termination of treaties on the one hand and levels of foreign direct investment.

Other experts did not share these concerns. These experts noted the value of strengthening the domestic rule of law and domestic institutions and of working with treaty partners to arrange for orderly termination of treaties and to address investor concerns. It was also considered important to couple the termination of treaties with domestic reform aimed at mitigating concerns of the investment community and to devote attention to both public and private diplomacy in unveiling such processes.

The break-out session then looked at the alternative approach of re-negotiating existing treaties by acting bilaterally with treaty partners to improve but not eliminate existing texts. Participants noted the potential political and economic benefits of this kind of constructive engagement and the power of States under the Vienna Convention on the Law of Treaties to make such changes to their treaties irrespective of the treaties' original terms, should they be able to reach a new agreement.

In this respect, a number of experts pointed to the need for States to consider and review their investment treaty portfolios carefully before engaging in a program of renegotiation in order to understand and prioritize the aims they wish to achieve. In addition, it was suggested that States would be well advised to look at the model BITs of their contracting counter-parties in order to understand the general positions prior to commencing renegotiations.

Some experts noted with gratitude the support of UNCTAD through its 2014 World Investment Report and its outline of possible paths for States seeking to revise their treaties. At the same time, they noted challenges to renegotiation. Thus, participants pointed to the political cost of renegotiating individual bilateral treaties, limitations of negotiating capacity within the legal offices of certain States, potential reluctance or unwillingness of counterparties to engage in treaty re-negotiation, and finally, the concern that even if a particular investment treaty is re-negotiated, the application of most-favoured-nation provisions might undo the work of re-negotiation. On this point in particular, it was suggested that States consider temporal limitations to their most-favoured-nation clauses to prevent their application to treaties already in existence at the time of their adoption.

Looking at the challenges raised by bilateral renegotiation of broad investment treaty portfolios, a number of experts – both from developed and developing countries as well as transition economies – noted their interest in pursuing multilateral solutions to renegotiation. That is, these experts suggested exploring the feasibility of international instrument(s) following the opt-in approach of the United Nations Commission on International Trade Law Transparency Convention (the Mauritius Convention). Such instrument(s) could serve to provide clarification and updating with respect to certain core investment treaty provisions, like indirect expropriation, across existing treaties. States signing onto such an instrument would thereby open for amendment their portfolio of investment treaties to bring them in line with the standard upon reciprocal acceptance of the instrument by counter-parties.

Finally, the experts also noted the need to consider how States might approach the drafting of termination and survival clauses in new treaties, looking at possible reductions in length to better reflect investment life spans and mechanisms whereby treaties would not renew automatically but would require the State parties to consult with one another before renewal would occur.