

UNCTAD Expert Meeting: Transformation of the IIA Regime

1st Round of Break-out Sessions: SUBSTANTIVE CONTENT OF IIAs

25 February 2015, Palais des Nations - Geneva, Switzerland

Scope and Definitions

Questions for consideration

1. Should you consider that carefully circumscribing the definitions of covered investors and investment is desirable, what are the key ways of doing so, and what are their pros and cons?
2. Should you consider that the prevention of “round-tripping” and “treaty shopping” is desirable, what are the key ways of doing so, and what are their pros and cons?
3. Is the problem important enough to take action with regard to existing (traditional) treaties as part of IIA reform?

Fair and Equitable Treatment (FET)

Questions for consideration

1. Should you consider that the issue needs to be addressed, what are the key ways of doing so and what are their pros and cons?
2. Of the existing approaches to FET, which one is the most promising way forward? In addition to the approaches mentioned above, are there any other options that could be considered?
3. What can be done to address the “legitimate expectations” issue?
4. Is the problem important enough to take action with regard to existing (traditional) treaties as part of IIA reform?

Indirect Expropriation

Questions for consideration

1. Should you consider that the expropriation clause raises issues that need to be addressed in IIA reform, what are the key ways of doing so?
2. In addition to approaches adopted in some recent IIAs, are there any other ways to solve the dilemma of adequately protecting investors against expropriations, on the one hand, and preserving the host countries' right to regulate, on the other?
3. Is the problem important enough to take action with regard to the existing (traditional) treaties as part of IIA reform?

Pre-Establishment

Questions for consideration

1. If an IIA is sought to include pre-establishment obligations, what are the preferred options to make commitments, while preserving the host country's right to regulate?
2. What are the key issues policymakers need to consider when negotiating pre-establishment obligations in IIAs?

**2nd Round of Break-out Sessions:
THE SUSTAINABLE DEVELOPMENT
DIMENSION OF IIAs**

26 February 2015, Palais des Nations - Geneva, Switzerland

Public Policy Exceptions

Questions for consideration

1. Should you agree that there is a need to preserve the right to regulate (e.g. for public interest policies), what are the pros and cons of using public policy exceptions in this regard?
2. In your view, does the absence of public policy exceptions in an IIA create uncertainty as to whether legitimate policy interests other than investor protection are properly accounted for?
3. What issues should be considered when formulating a public policy exception clause in an IIA? Which public policy areas require particular attention in this regard?
4. Is the issue important enough to be considered as part of IIA reform (for future and/or existing IIAs)?

Corporate Social Responsibility and Investor Obligations

Questions for consideration

1. Should you consider that re-balancing is a desirable objective, what are different ways for doing so, and what are their pros and cons?
2. Should you think that IIAs need to include investor obligations, what are the pros and cons of binding versus non-binding provisions?
3. What are the pros and cons of referencing existing recognized international instruments (e.g. UN Principles on Business and Human Rights, OECD Guidelines for MNEs, ILO Tripartite MNE Declaration) and CSR standards?
4. What could be the consequences of an investor's failure to comply with the relevant obligations?
5. Is the issue important enough to be considered as part of IIA reform (for future and/or existing IIAs)?

Effective Rules for Promoting Sustainable Development-Friendly Investments

Questions for consideration

1. Should you consider that IIAs should include stronger provisions on the promotion of investment for sustainable development, what are the key ways of doing so, and what are their pros and cons?
2. If home country measure have a role to play, what could such roles be?
3. Among the known promotion mechanisms, which is the most promising in the sustainable development context and why?
4. Is the issue important enough to be considered as part of IIA reform (for future and/or existing IIAs)?

Investment Incentives

Questions for consideration

1. Should you consider that issues regarding incentives need to be addressed, what are the key ways of doing so, and what are their pros and cons?
2. As regards the application of the non-discrimination principle to investment incentives, do you see a need for specific exception clauses, and if yes, what kind of exception would be needed? Or do you think that the qualification “in like circumstances” is sufficient? Are there any other options that could be considered?
3. How should one address the risk of a “race to the bottom” concerning investment incentives? Do you consider the above-mentioned “not lowering of standards” clause as an adequate solution?
4. How could IIAs address the risk of a “race to the top”?
5. How could IIAs contribute to making investment incentives more sustainable development friendly?
6. Is the issue important enough to be considered as part of IIA reform (for future and/or existing IIAs)?

Interrelationship with other Bodies of Law

Questions for consideration

1. Should you consider that there is a need to better address the interaction between IIAs and other bodies of international law, what are the key ways of doing so, and what are their pros and cons?
2. For example, an IIA could:
 - a) Specify that commitments made under a multilateral agreement in a specific policy area (environment, public health, etc.) shall prevail;
 - b) Attach an annex (closed or open-ended) including a list of treaties which are to be given priority over the IIA in case of conflict;
 - c) Refer to alternative, non-investment-related goals in the preamble;
 - d) Include general exception clauses related to other policy areas;
 - e) Other options?
3. Is the issue important enough to be considered as part of IIA reform (for future and/or existing IIAs)?

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3rd Round of Break-out Sessions: TOOLS FOR MODERNIZING THE IIA NETWORK

26 February 2015, Palais des Nations - Geneva, Switzerland

Regional Negotiations (Consolidation and/or Parallelism) / FTAs vs. BITs

Questions for consideration

1. Should you consider that regional IIA negotiations present opportunities to modernise treaty networks of participating countries, what can be done to maximize their potential? In the case of "mega-regionals", what can be done to avoid the marginalization of non-participating third parties?
2. What are possible reasons for a regional treaty to preserve pre-existing BITs, as opposed to replacing them?
3. What are the advantages and disadvantages of having investment protection as part of a broad economic agreement as compared to a stand-alone investment agreement?

Multilateral Approaches

Questions for consideration

1. What are the pros and cons of the existing efforts of individual countries to gradually reform the IIA regime?
2. How can multilateral engagement support comprehensive but gradual reform?
3. Do you think that the UNCITRAL process to develop the Transparency Rules and the Transparency Convention provide an effective means for the “wholesale” modification of the stock of existing IIAs? Could the UNCITRAL process be replicated to address other IIA challenges?
4. At present, what are possible means to collectively address the challenges arising from the IIA regime?

Treaty Re-negotiation, Treaty Expiration and Related Challenges

Questions for consideration

1. Is re-negotiation (replacement or amendment) of traditional IIAs an effective way to (i) modernise a country's treaty network, and (ii) approach global IIA reform?
2. What factors are relevant for deciding whether to go down the road of treaty re-negotiation?
3. What policy considerations should be weighed when deciding whether to terminate an IIA?
4. Should you consider that survival clauses deserve special attention in the context of a countries' modernising their treaty networks, what are key ways of doing so, and their pros and cons?

The Role of Treaty Interpretation in IIA Reform

Questions for consideration

1. Should you consider that “authentic interpretation” (i.e. interpretation by contracting parties) can be used to clarify IIA obligations in existing IIAs, what are the pros, cons and practical challenges?
2. Is there room for multilateral interpretative statements on issues, on which there is broad common understanding? Could they apply to all existing IIAs of participating States?
3. What are useful mechanisms and practices for preserving the interpretative power of States in future IIAs (e.g. referral of certain issues in dispute back to the contracting States for joint determination, interventions by non-disputing parties, etc.)?
4. What type of institutional mechanisms could be included in IIAs to facilitate interpretative approaches?

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4th Round of Break-out Sessions: INVESTMENT DISPUTE SETTLEMENT

27 February 2015, Palais des Nations - Geneva, Switzerland

Appeals Facility

Questions for consideration

1. Should an appeals facility be created, which problems would it help to resolve? Which would remain unresolved, be replicated or exacerbated?
2. Single standing appeals body vs. ad hoc appellate mechanisms under individual IIAs: what are the pros and cons?
3. How can an appeals facility be harmonized with the existing system of the ICSID Convention and the New York Convention?
4. What can be done to ensure that an appeals facility covers disputes arising from existing IIAs?
5. What are possible next steps in this regard?

International Investment Court

Questions for consideration

1. Should an international court be created, which problems would it help to resolve? Which would remain unresolved, be replicated or exacerbated?
2. What issues would the court be competent to rule on – only investor protection or also others? Who would have access to the court – only investors, or also other affected stakeholders?
3. What could be the basis of the court's jurisdiction? A multilateral treaty, individual IIAs, investment contracts, or other instruments?
4. What are the challenges with regard to the establishment of an international investment court?
5. What are possible next steps in this regard?

Investor Access to ISDS

Questions for consideration

1. Should you consider that managing investor access to ISDS is desirable, what are different ways of doing so, and what are their pros and cons? For example (illustrative list):
 - a) reduce the subject-matter scope for ISDS claims
 - b) restrict the range of investors who may benefit from the treaty (e.g. only those that comply with domestic laws and regulations)
 - c) introduce the requirement to exhaust local remedies before resorting to international arbitration (or, alternatively, to demonstrate manifest ineffectiveness/bias of domestic courts)
 - d) are there any other options?
2. Do any of the above approaches merit taking action as part of IIA reform (for future and/or existing IIAs)?

Transparency

Questions for consideration

1. Should you consider that more transparency is a desirable objective, what can be done to foster this objective?
2. What can be done to facilitate implementation of the various UNCITRAL mechanisms?
3. Aside from UNCITRAL developments, what other avenues could be pursued?