

## D-8 Organization for Economic Cooperation - UNCTAD Guiding Principles for Investment

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### **What is the current state of IIA reform in D-8 Members?**

International Investment Law is rapidly evolving in the two last decades as a result of increasing number of international arbitration cases brought by foreign investors against host states, not only against developing or less developed states, but also against developed states as well.

Cases brought under NAFTA, such as Ethyl vs. Canada (1998) and Methanex vs. United States (2005) were wake up calls for capital exporting countries who had signed investor friendly IIAs since 1960s.

While NAFTA member countries are trying to bring new interpretations to the Investment Chapter of NAFTA and make it less balanced between investors and states, in the other side of the planet, developing countries, such as Indonesia which is D-8 member country and India started to terminate or modify its BITs in the last decade to re-balance rights of states vis a vis investors.

Finally, as a result of many cases brought against the EU member countries, such as Spain or Czech Republic, under numerous intra-EU BITs and the Energy Charter Treaty, the need for reforming of IIAs became a stark reality for all the countries given the fact IIAs emerged as an obstacle in front of national policy-making, such climate change mitigation goals and the implementation of the Paris Agreement.

As a result of all these developments, many efforts to reform not only IIAs, but the whole universe of international investment law gained speed worldwide in the last five years. The deliberations of the UNCITRAL Working Group III, modernization of ICSID Rules and Regulations, the signature of the Mauritius Convention on Transparency, and re-negotiation programs of many countries to reform their BITs, and lastly modernization negotiations for the Energy Charter Treaty are amongst these reform initiatives that I could remember first.

In Türkiye, we have been following all these developments very closely. So far; Türkiye has contributed to the modernization of ICSID rules and regulations, and attending UNCITRAL WG-III meetings since 2017. Secondly; since March 2021, with the other

OECD member countries, we have been participating OECD's Future of Investment Treaties Track 1 meetings on "Investment treaties and climate change" as well as Track 2 meetings on substantive provisions of IIAs.

Along in line with these efforts; as Türkiye; we are trying to keep our model BIT text up to date. In this respect; nowadays we are working on a new model reflecting our experience in recent negotiations, such as Türkiye - UAE BIT negotiation and the multilateral negotiations for the modernization of the Energy Charter Treaty. We expect that our new model will be ready for negotiations by 2024.

In preparing this new draft model, we are considering that Türkiye is both a capital importing and exporting country. So, it is necessary for us to keep our model balanced between investors' right and host state's right to regulate. In this context; while we are thinking of including new provisions such as "third party funding", "security for arbitration costs", and "corporate social responsibility", we also consider keeping the essential guarantees for investors; such as a well-defined general standard of treatment article as well as National Treatment and MFN Treatment, free transfer of profits, and direct recourse to arbitration for dispute settlement.

Lastly; as an Energy Charter Treaty signatory state; I would like talk about our experience with regard to the modernization negotiations of the said Treaty.

As a staunch advocate for the modernization of the Energy Charter Treaty, in close cooperation with the EU, UK, and Switzerland, as Türkiye, we negotiated two and half years during the Covid Outbreak through virtual meetings. The main goal of the negotiations was to modernize the Treaty and make it balanced and aligned with the Paris Agreement by the negotiation of 25 topics, including definition of "investment" and "investor", general standards of treatment, right to regulate, MFN clause, indirect expropriation, subsidies, denial of benefits, frivolous claims, third party funding, denial of benefits, transparency, and corporate social responsibility among others.

Nevertheless, after the successful conclusion of the negotiations by reaching of all the goals set at the beginning; the EU announced that they would withdraw from the Treaty due to its non-alignment with the Paris Agreement. Currently, with other signatory countries, we are waiting for the final decision of the EU to decide what to do in the future. Finally, I must say that, even though it is very disappointing to see all the efforts and works of more than two years has been wasted; we have learned a lot during the modernization negotiations and gained deep experiences with regard to the challenges waiting in front of the reform process of the IIAs.

### **How can Members strengthen regional dialogue and coordination on comprehensive IIA reform?**

D-8 Organization may serve as an appropriate platform to strengthen regional dialog and coordination among member countries. In this respect; D-8 Secretariat may organize an annual seminar or workshop in coordination with UNCTAD to strengthen regional dialog among D-8 countries and provide them with opportunity to exchange their views and experience on IIA reform.

Currently, there are 20 BITs in force among the D-8-member countries. With this framework; Türkiye has signed BITs with all D-8 Countries so far, and all these agreements are still in force, except the one with Indonesia, which was terminated by Indonesia in 2016. Türkiye has re-negotiated her BITs with Nigeria, Bangladesh and Pakistan and signed new agreements in 2011-2012. Türkiye also signed a comprehensive Investment Chapter under its Free Trade Agreement with Malaysia in 2022, replacing and substituting BIT signed in 1998.

So, overall, Türkiye is ready to modernize and sign new BITs with Egypt, Indonesia, and Iran.

I think that; as D-8 countries, if we can organize such multilateral experience sharing exercises, it would be much easier for all D-8 member states to re-negotiate and modernize BITs among us. Likewise; such seminars or workshops may be organized bilaterally among volunteered D-8 countries that would like to share their gained experience on this field through peer learning. In this respect; Türkiye is ready to share its experience with any D-8 member country, and we are also ready to learn from the experiences of the others, such as from Indonesia, that concluded a modern BIT with Singapore in 2018 having some new provisions.

### **How can soft policy tools, in particular Guiding Principles, help build regional consensus for IIA reform, and what lessons can be learned for other regions?**

Guiding Principles for Investment Policymaking, jointly developed by UNCTAD and D-8 Organization, includes ten basic principles for promoting investment for sustainable development. I will not read all these principles; however, when we look those ten principles closely, we realize that it is also possible to benefit from those principles for IIA reform. Especially, the following principles may lay down the foundation for IIA reform:

- balanced rights and obligations (between investors and host states);
- right to regulate (of the host states to protect public interest, welfare, and environment among others);
- openness to investment (for open, stable and predictable entry conditions for investment, especially transparency will help investors to take their investment decisions easily);
- investment promotion and facilitation (this principle may be used to re-balance IIAs between protection and promotion aspects)
- corporate governance and responsibility principle may be used as another tool to re-balance IIAs with regard to investor's rights and responsibilities.

Indeed, these Guiding principles intersect with the reform areas proposed by many scholars, negotiators or investment policy makers. On the other hand; it is always possible for us to benefit from the lessons learned by the others worldwide. The failed modernization process of the Energy Charter Treaty is one of the important initiatives that may be mentioned in this respect. Indeed, IIA reform is a very challenging task for all stakeholders, requiring not only negotiating skills, but also political support from governments, parliaments and public in general.