

UNCTAD Annual High-level IIA Conference: Phase 2 of IIA Reform



Tuesday, 10 October 2017, 10:00 - 13:00, Room XXVI (26)
Break-out session 3 – Report back
Consolidating the IIA network

This report represents the views of the rapporteurs on the discussions among the participants of the respective break-out session. It does not represent the views of the UNCTAD Secretariat or its member States.

Rapporteurs

Mr. Steffen Hindelang, Associate Professor of International Law, Free University of Berlin

Mr. Yarik Kryvoi, Director of the Investment Treaty Forum, British Institute of International and Comparative Law (BIICL)

This report summarises presentations and discussions of State representatives, intergovernmental organisations, academics and other stakeholders in Break-out Session 3 on Consolidating the International Investment Agreements (IIA) Network at UNCTAD's Annual High-level IIA Conference - Phase 2 of IIA Reform.

Along the lines sketched in the UNCTAD World Investment Report 2017,¹ the participants discussed four main approaches available to States to consolidate international investment agreements:

- issuing joint interpretative statements by parties to IIAs (an issue also discussed in BoS 2);
- replacing old bilateral investment treaties with modern bilateral treaties one by one;
- replacing several investment treaties with one modern regional agreement (consolidation); and
- managing relationships between coexisting treaties by transition clauses.

States reported using all these approaches, often in combination, to manage their treaty portfolio. While replacing one treaty by another may resolve problems in individual cases, consolidation and de-fragmentation of the international network require a more systematic approach.

Joint interpretative statements and replacement of old IIAs

A common way of dealing with fragmentation is through replacing several old IIAs with one modern agreement. Each IIA needs to be approached individually, because it takes two States to terminate or replace a BIT. In practice, some States are willing to replace treaties while others oppose it or do not actively respond to requests for renegotiation. Motivating uninterested States to review international investment agreements could pose a challenge. Similar challenges are faced in

¹ UNCTAD World Investment Report 2017, pp. 136-137.



UNCTAD Annual High-level IIA Conference: Phase 2 of IIA Reform



agreeing on joint interpretative instruments. For EU Member States, an additional step is required to abrogate old IIAs with third countries, namely securing approval from the European Commission.

Consolidation

Regional reform efforts offer good opportunities for treaty consolidation and de-fragmentation. Existing bilateral investment agreements can be replaced by comprehensive free trade agreements or by other multilateral agreements. For example, the European Union acts on behalf of its Member States when it comes to negotiating investment treaties. EU Member States must follow the commonly adopted framework and obtain approval from the European Union before starting negotiating new investment agreements on their own.

However, uncertainty remains in relation to intra-EU BITs. There is a key Court of Justice of the European Union (CJEU) case pending on compatibility with EU Law of intra-EU BITs. Some EU Member States consider intra-EU BITs fully in line with EU law. Other EU Member States believe that such treaties are invalid or at least in contradiction to EU law.

From a developing States' perspective, consolidation is important because it can:

- provide ways to rationalise and declutter investment regulation by reducing complexity in the treaty network which, in turn, helps States keep track of their international commitments and reduces transaction costs for investors;
- help introduce sustainable development rules and principles, which may include space that allows for regulating investors' conduct in the host State;
- help build on the strong complementarity between trade and investment, should old treaties be replaced by more comprehensive agreements; and
- be instrumental in supporting economic growth and competitiveness, and in unlocking the benefits of growth.

States are looking for a balanced international investment law regime in line with their policy priorities. Participants perceived the protection of foreign investors and a functioning international enforcement mechanism as important building blocks for promoting the rule of law and economic development. Treaty consolidation could be used to implement revised approaches to substantive and procedural standards and help prevent frivolous claims.

Specific States emphasized newly arisen challenges. For example, one State illustrated the need to consolidate and reform international investment treaties after a quick ramp up in claims against it. Reforms of the international investment law regime, as explained by the representative of this State, could prevent a domino effect for a State whereby one dispute spawns several others. Other States expressed their desire to be better prepared for potential investment claims through international investment treaties. And, lastly, as another State representative explained, States are now carefully analysing the reasons behind investment claims and seeking reform of the existing international investment treaties with a view to reaching a balanced outcome, i.e. both protecting foreign investment and responding to other legitimate concerns, such as the protection of health, environment, or public security.



UNCTAD Annual High-level IIA Conference: Phase 2 of IIA Reform



Further experiences shared in the session suggest that consolidation through multilateral agreements has further challenges, for example:

- time constraints as it is easier to negotiate with one party than with multiple parties;
- selection of partners for consolidation; and
- drafting transition clauses.

Some participants expressed their concerns that agreeing on new agreements without abandoning the older ones could increase legal complexity and transaction costs significantly. Several States identified the management of successive agreements as the most challenging task, especially when no specific provision for the relationship of two successive agreements was included in the agreement.

Another consolidation challenge which emerged during the break-out session relates to identifying and mobilising resources of States, including experts in international investment and trade law. This is particularly important when developing States negotiate comprehensive free trade agreements containing investment clauses with States that possess more experience and command over larger resources.

Transition challenges

In some parts of the world, such as Africa, regional agreements do not replace the existing treaties but co-exist with them. In this context, the challenge is to manage relations between various IIAs. Including conflict clauses could effectively manage treaty relations. They may, for example, provide that, in case of conflict, the newer treaties prevail over the older. Transition clauses may clarify the controversial issue of how to ensure a smooth transition from the old regime to the new one. In the absence of such clauses, States will need to rely on the 1969 Vienna Convention on the Law of Treaties.

Next steps

Most States are just beginning to modernize the existing stock of treaties by means of treaty replacement and consolidation of the IIA network. Here, the role of UNCTAD is crucial in offering policy guidance (e.g. through the 2017 WIR's "10 Options for Phase 2 of IIA Reform") and providing a multi-stakeholder platform for discussion. The participants also referred to other ways in which UNCTAD could assist, including training lawyers and treaty negotiators, providing States with statistics, guidance and best practices, as well as other forms of technical assistance.

