

Monday, 9 October 2017, 16:00 - 18:00, Room XXV (25)

Phase 2

## Break-out session 2

Clarifying and modifying treaty content

10 IIA reform options

### Moderators

**Mr. Alejandro Carballo**, General Counsel and Head of the Conflict Resolution Centre, International Energy Charter

**Ms. Caroline Nicholas**, Senior Legal Officer, United Nations Commission on International Trade Law (UNCITRAL)

### Kick-off speakers

**Ms. Mpho Ntshese**, Principal Industrial Officer, Department of Industrial Affairs, Ministry of Trade and Industry, Botswana

**Ms. Irena Alajbeg**, Head of Trade and Investment Policy Sector, Ministry of Foreign and European Affairs, Croatia

**Mr. Boaz Fleischman-Alaluf**, Director, Investment and Trade Agreements Division, Ministry of Finance, Israel

**Mr. Frederick Matwang'a**, Counsellor, Permanent Mission of Kenya (on behalf of **Ms. Roslyn Ngeno**, Manager, Policy Advocacy Unit, Kenya Investment Authority)

**Ms. Patience Okala**, Deputy Director/Legal Adviser, Nigerian Investment Promotion Commission, Nigeria

**Ms. Jasmina Roskić**, Head, Department for International Agreements and Foreign Trade, Ministry of Trade, Tourism and Telecommunications, Serbia

**Ms. Kekeletso Mashigo**, Director, Multilateral Organisations, Department of Trade and Industry, International Trade and Economic Development, South Africa

IIA REF

ROAD MAP

### Rapporteurs

**Mr. Shaun Donnelly**, Vice President, Investment and Financial Services, United States Council for International Business (USCIB)

**Ms. Lise Johnson**, Head, Investment Law and Policy, Columbia Center on Sustainable Investment (CCSI)

**Mr. Sébastien Manciaux**, Professor of Law, University of Burgundy

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

9 – 11 October 2017

@unctadwif

#IIAReform



UNITED NATIONS  
UNCTAD

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



**Monday, 9 October 2017, 16:00 - 18:00, Room XXV (25)**  
**Break-out session 2 – Report back**  
**Clarifying and modifying treaty content**

*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

**Ms. Lise Johnson**, Head, Investment Law and Policy, Columbia Center on Sustainable Investment (CCSI)

**Mr. Sébastien Manciaux**, Professor of Law, University of Burgundy

---

In Break-out session 2 (BoS 2), the participants debated how best to clarify and modify treaty content. More specifically, the participants focused on three questions: what treaty content reform options have been undertaken, the pros and cons of each reform, and the lessons learned. This report will outline the discussion that flowed from each of these key points of departure.

**(i) Which reform options (“jointly interpreting treaty provisions” and/or “amending treaty provisions”) have you undertaken, are you considering undertaking, or have you been requested to undertake?**

Regarding old-generation IIAs, most—if not all—speakers explained that both options, “jointly interpreting treaty provisions” (UNCTAD reform option 1) and “amending treaty provisions” (UNCTAD reform option 2) have been considered and undertaken in their respective countries. For most speakers, jointly interpreting treaty provisions is seen as the most straightforward way to bring about immediate changes in their IIA network, particularly compared to the other option, amending treaty provisions.

Joint interpretations were noted as desirable for several reasons, including that they could be concluded quickly through diplomatic channels, or even through email communications. It was also noted that joint interpretations do not require a domestic ratification process, which makes the option faster and less likely to be held up by any of the parties. States therefore saw joint interpretations as a relatively efficient way to introduce clarity to vaguely worded provisions in older-generation BITs.

More specifically, the following points were made by speakers on these reform options:

- to be successful, both options assume that treaty partners share the same concerns and are ready to discuss with an open mind the interpretation or amendments proposed;
- joint interpretations are unable to change treaty language, only clarify it;



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



- procedures for amending treaty provisions vary from one State to another.

In most countries, parliaments must eventually decide or approve the amendment of treaty provisions, which in the current context is complicated as there are currently strong criticisms of the ISDS system in civil society. In some other countries, amending IIA provisions is within the executive's competence. In that case, it is "only" the ministries that need to be convinced; and both options are sometimes seen as less efficient than superseding old IIAs by new ones (UNTAD reform option 3), leading some States to propose brand new IIAs or a new Model Treaty.

According to the speakers, most States have started to undertake a substantive review of their IIA network, often after finding themselves defending against claims in arbitration proceedings by application of an arbitration clause included in an IIA. The goal of these reviews is to reform the current stock of IIAs in order to achieve a better balance between the protection of foreign investors' rights and the preservation of States' ability to regulate. In this respect, there is a real demand for information on "best practices." Sustainable development was a strong concern for all countries/speakers.

Most speakers explained that the undertaken reviews included all stakeholders, i.e. private companies, experts, academics, etc. Consultations are undertaken at a large scale in some countries, with some being public and others involving specific stakeholders. This last initiative is welcomed by foreign investors. It was considered important to communicate that reforms were not anti-business, but were designed to address specific, identified problems in IIAs.

The suggested reforms will extend the process but are necessarily to achieve the desired effects. Substantively, desired changes included clarifications on standards such as the meaning of "investment", "investor", the MFN clause and the ISDS clause, among others.

### (ii) What are the pros and cons<sup>1</sup> of each of the reform options?

#### ii.a "Jointly interpreting treaty provisions"

Pros:

- Seen as the easiest way to bring changes in an IIA, assuming that the IIA partners share the same interpretation;
- Ratification is not needed;
- Jointly interpreting treaty provisions could be seen as a technical issue, rather than a political one, compared to amending treaty provisions. In this sense, jointly interpreting treaty provisions could be a less sensitive issue (although this was heavily debated); and
- Some treaties (for instance CAFTA or NAFTA) contain a mechanism for interpretation that has already proved helpful.

Cons:

---

<sup>1</sup> The discussion of pros and cons was facilitated by the World Investment Report 2017 (WIR 2017) tables on pros and cons of these options (see WIR 2017, pp. 133-134).

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



- Consistency is an issue if different interpretations of the same provision included in various IIAs are provided. This is true from the point of view of both the State and at a more general level;
- Caution must be exercised when drafting an interpretation clause: an interpretation may not go as far as an amendment (modifying the rule). An interpretation that proves too broad will lack utility. Thus, joint interpretation may be seen as a limited tool, or more to ease the transition to a more sustainable solution;
- Unclear what force tribunals would give to a joint interpretation. While some treaties contain language noting that joint interpretations will be binding, others do not; thus, rules of treaty interpretation will be used to determine the weight given;
- It may not always be easy to agree on a joint interpretation. In such cases, a question was asked whether States should pursue other options, such as issuing unilateral interpretations, as had been done by some States already; and
- Treaty clarification through interpretation is of general application; it does not necessarily align with the goals of sustainable development (but it could).

### ii.b “Amending treaty provisions”

Pros:

- Allows a real, if limited in scope, modification of the treaty which may be more relevant for political changes;
- Raises less doubts than joint interpretation about the willingness of State Parties to change the meaning of an IIA provision; and
- Regarding amendments, it was highlighted that, as compared to joint interpretations, they are not as constrained by the existing text; additionally, the amendment would have clearer legal force. Moreover, as compared to a full termination and replacement, amendment could be less time consuming.

Cons:

- not the most cost effective option as it is potentially as resource-consuming as superseding old IIAs with new ones;
- length of ratification procedures (by all Parties of the given IIA). Depending on the relevant States’ laws, the amendment may need to go through a ratification process, which could stall or even prevent entry into force;
- partial approach compared to the general approach consisting of the replacement of the entire old IIA with a new one;
- compatibility with “survival clauses” may be an issue; and
- amendment requires the agreement of other Member States, while withdrawing from an IIA may be done on a unilateral basis.

### (iii) What are the lessons learned?

While reform is still at a nascent stage, it is possible to identify a few lessons resulting from experiences:



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



- Necessity to use all available tools, as each has advantages and drawbacks. They are more or less relevant depending on the IIA at stake, to the situation in which the State finds itself, the goals of each State;
- Necessity to avoid fragmentation in the reform procedures or create new problems. In this context, a multilateral approach and UNCTAD technical support can be very useful;
- Some States have indicated that they prefer to terminate their existing treaties and start with a blank slate, an option that was further discussed in other breakout sessions.

There were also several questions and issues raised for further discussion, including the timing of joint interpretations and amendments, as well as the role and impact of multilateral efforts regarding joint interpretations. We ran short on time, but the lively discussion among a diverse range of States and stakeholders indicate that these are important issues for future analysis and work in phase 2.

