

Phase 2

10 IIA reform options

Moderators

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Ms. Dragana Djurica, Senior Expert on Competitiveness, Regional Cooperation Council (RCC)

Kick-off speakers

Mr. Christoph Sprich, Senior Manager, Foreign Trade Policy, Bundesverband der Deutschen Industrie e.V. (BDI)/Federation of German Industries

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Ms. Blanca Gómez de la Torre, Director, International Affairs and Arbitration Unit, Attorney General Office, Ecuador

Mr. Jens Benninghofen, Deputy Head of Division, Federal Ministry of Economics Affairs and Energy, Germany

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

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Mr. Mustaqueem de Gama, Counsellor, Permanent Mission of South Africa

Rapporteurs

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Mr. Nicolás Perrone, Assistant Professor of International Law, Durham Law School



UNCTAD Annual High-level IIA Conference:

Phase 2 of IIA Reform

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Tuesday, 10 October 2017, 10:00 - 13:00, Room XXIV (24)

Break-out session 4 – Report back

The implications of disengaging

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

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BoS 4 undertook discussion of the implications of disengaging with the existing regime of international investment agreements.

In that context, the discussion in BoS 4 was wide-ranging and robust, addressing the reform of existing IIAs broadly through the renegotiation of treaties through the mutual efforts of treaty partners, the unilateral termination of treaties upon their expiration, and, finally, in some cases, the peremptory withdrawal from the IIA regime.

Discussion in BoS 4 was informed by the diverse experiences of the states and other participants present as well as the work of UNCTAD in both its “Road Map for IIA Reform” (WIR 2015) and its more recent “10 Options for Phase 2 of IIA Reform” (WIR 2017). In particular, participants found it helpful to make reference to the 10 policy options identified by UNCTAD for phase 2 of IIA reform and the preparatory documents.

Against this background there are a number of key points of the discussion to note.

Key points

1. Many states spoke of the processes they had adopted to consider reform issues, broadly understood.
 - a) Domestic policy making with respect to IIA reform, including possible termination and withdrawal from IIAs, raises many complex challenges for states.
 - b) There was consensus that due to the complexity and significance of the issues raised, states benefited from wide consultation across society in the process.
 - c) To that end, many states spoke of the importance of involving all stakeholders in the

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reform process and in the decision whether to reform existing IIAs, terminate them or withdraw from them altogether.

- d) States pointed to the importance of:
 - i. Consulting across government
 - ii. Consulting with the business community (foreign and domestic)
 - iii. And consulting with civil society groups to reach a well-considered and well-supported policy outcome.
 - 2. With respect to considering how to reform existing IIA portfolios or whether to abandon the IIA regime, many states raised the question as to (a) whether their IIAs served to attract FDI into their states, (b) what kind of FDI was being attracted, and (c) whether IIAs served to assist states with the retention of FDI.
 - a) A number of states noted that they had undertaken internal studies of the FDI received within their states to try to determine whether it correlated to their IIA portfolios, while other states reported relying upon more experiential or anecdotal evidence.
 - b) As a general matter it was noted that the academic literature on the issue is varied in its findings on the effect of IIAs on FDI and that studies on the effect of IIA renunciations are only in early stages.
 - c) It was noted that UNCTAD in 2014 had produced an IIA Issues Note on the relationship between FDI and IIAs that states might find of use.
 - 3. For the majority of states which choose to remain a part of the existing IIA regime, the need to reform existing treaties was a uniform theme.
 - a) States noted that the effect of IIAs on regulatory authority remains an important concern. Other states mentioned the importance of ensuring the compatibility of IIAs with sustainable development goals (SDGs).
 - b) States noted the importance of not only developing internal policy positions but also of communicating with and working with treaty counterparts in order to bring about constructive reform.
 - c) To that end, a number of states noted the importance of bearing in mind the limits that counterparts may have with respect to possible renegotiation, both in terms of capacity to handle treaty reform with multiple parties simultaneously and with respect to the counterparty's own policy preferences and needs.
 - 4. States also noted the challenges of sequencing with respect to reform efforts.
 - a) Thus, for example, some states noted that difficulty with attempted renegotiation had led them to terminate certain treaties unilaterally but that as a consequence of unilateral

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termination they had been faced with the challenge of managing those terminated treaties through lengthy sunset or survival periods of 10 to 20 years.

- b) Other states suggested that even if attempted renegotiation could sometimes be a lengthy process, spanning many years, precisely because the alternative was unilateral termination with even longer survival periods, it remained in states' interests to attempt renegotiation as a more constructive option.
 - 5. States took a consistent view that when approaching questions of reform, bilateral or multilateral options should be preferred; unilateral action is a second-best option.
 - 6. All states noted that regardless of whether the state has chosen to engage in reform, termination or withdrawal, public diplomacy is critical for effective policy management.
 - a) States need to be able and willing to explain their motives and their policies to domestic and foreign stakeholders.
 - b) Failure to do so can have negative economic consequences for the state. The ability to do so well can mean the difference between a successful reform process and one that is not.
 - 7. A number of states noted the important role of domestic institutions.
 - a) Some states mentioned the significance of improving domestic institutions as part of the process of reforming and/or terminating IIAs.
 - b) Other states noted the role of domestic institutions in creating a good investment climate for attracting foreign investment.
 - 8. In conclusion, participants in BoS 4 recognised the significance of the issues raised in "Phase 2 of IIA Reform," although there was a variety of opinion on the extent of reform needed and the specific areas requiring reform.