

Tuesday, 10 October 2017, 15:00 - 18:00, Room XXV (25)

Break-out session 5

Towards a global reform effort – designing principles

Phase 2

10 IIA reform options

Moderators

Mr. Youyou Wang, Deputy Director Investment Law, Ministry of Commerce, China

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

Kick-off speakers

Mr. Maximin Emagna, Private Sector and Investment Expert, Sustainable Economic Development and Trade Department, African, Caribbean and Pacific Group of States (ACP)

Ms. Samira Sulejmanovic, Head of Unit for Bilateral Trade Relations, Ministry of Foreign Trade and Economic Relations, Bosnia and Herzegovina

Mr. Christoph Sprich, Senior Manager, Foreign Trade Policy, Bundesverband der Deutschen Industrie e.V. (BDI)

Mr. Mahamady Koussoube, Director of Investment Facilitation, Investment Promotion Agency, Burkina Faso

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

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

Rapporteurs

Ms. Emma Aisbett, Junior Professor of International Economics, University of Hamburg

Mr. Markus Wagner, Associate Professor of Law, School of Law, University of Warwick

IIA REFORM

ROAD MAP

UNILATERAL

REGIONAL

MULTILATERAL

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

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Break-out session 5 – Report back
Towards a global reform effort – designing principles

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. Emma Aisbett, Junior Professor of International Economics, University of Hamburg

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Along with UNCTAD's guidance, the BoS addressed three specific questions:

Have you undertaken, are you considering undertaking, or have you been asked to engage in the design of principles?

Some of our panellists' states had been involved in design of principles, and others expressed an interest in doing so in the future. One state had been involved in such an exercise both at through the G20 and the African, Caribbean and Pacific group of states.

Indeed, the fact that some states have already been involved in two such processes, while other states had not been involved in any, raises the important question of the advantages and disadvantages of a suite of plurilateral principles statements, compared to a single, truly multilateral effort. There were a range of views on this question. Some participants see advantages to inclusive, multilateral approaches of the type which can be facilitated by UNCTAD. Others see advantages in "letting many flowers bloom", at least as a stepping stone toward fully multilateral efforts.

What are the pros and cons of each of this reform option?

Perceived advantages included:

- Allowing partners to step back and "think big" about important systemic, long term issues, rather than focusing only on legal detail;
- Supporting the evolution of the system by freeing parties from the constraints of the terms of existing agreements;
- Providing an incrementalist approach, a stepping stone which may allow parties to achieve common goals otherwise out of reach. Incrementalism also supports a smooth transition and evolution, thus avoiding harmful abrupt changes in the rules of the game for investors;



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and

- Strengthening bargaining power for smaller countries. For example if supporting sustainable development is already agreed as a design principle, it is easier for them to object to clauses which are blatantly contrary to such.

Perceived disadvantages include:

- The fact that legal principles are non-binding, meaning that they may not actually affect hosts' rights to regulate and so on.
- On the other hand, through arbitration, these broad statements of intent might become legally binding. Indeed they might become legally binding with meanings different to those envisaged by the parties to the design principles.
- Finally, although principles may seem relatively easy to agree on, it might still prove difficult to formulate a set of truly multilaterally agreed principles. The result may be the emergence of multiple sets of plurilaterally agreed principles. This prospect was of concern to some participants.

What are the lessons learned, what is the way forward?

Delegates stressed that principles present opportunities to test ideas that can – upon successful implementation – be introduced on the multilateral level. At the same time, the use of principles presents a challenge given that they have the potential to be interpreted broadly (e.g. in investment disputes) and thus careful thinking is required about how to formulate principles. History has shown that some principles widely used in existing international investment agreements have been interpreted very broadly – considerably more broadly than anticipated when the rules were drafted, sometimes to the detriment of countries.

Several delegations stressed the need for a common understanding and shared vision, which could provide a basis for further development of the IIA regime and pave the way towards binding mechanisms on either the multilateral or regional level for those countries who wish to do so.

The discussion revealed important elements for domestic and international policy reform. This included on the one hand the need for flexibility. A number of participants expressed the need for greater flexibility for countries compared to the existing situation; others stressed the need for more inclusive approaches with respect to the needs of developing countries; yet others pointed out important linkages between the IIA regime and other areas, such as human rights, human health, the environment and sustainable development.

At the same time, some participants expressed the need for a certain degree of uniformity in order to create international investment agreements that provide legal certainty, for both governments and investors. The discussion revealed a tension between multilateral approaches on the one hand and plurilateral / bilateral approaches on the other. Participants identified a very real risk of undermining multilateral developments by creating principles on the plurilateral / bilateral levels.



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In this context, a number of delegations expressed the need for reform on the multilateral level, despite the difficulties that exist in the current – fragmented – system. If or when such reform is forthcoming, reform will have to focus on three areas, bearing in mind that principles will potentially be translated into legally binding mechanisms: institutions, substantive rules and procedural mechanisms.

An important caveat that emerged in the discussion is that any existing or developing principles cannot be simply overlaid over the existing structure. Rather, in order for principles to have a meaningful impact they need to be developed in a fruitful, joint and empowering process for building capacity so as to not disadvantage countries that may not have either experience or capacity in this field.

