

Statement
**Promoting and Facilitating Investment:
The Role of Investment Screening Instruments**

Date
13 November 2019

UNCTAD 2019 High-level IIA Conference

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Breakout Session:
Multilateral processes and their contribution to Phases 1 and 2
of SD-oriented IIA reform

13 November 2019
Geneva, Switzerland

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Refraining from political actions that prevent investment is a key mechanism to facilitate investment. Unfortunately, in light of global policy developments, such restrictive investment policy measures are currently on the rise.

According to the UNCTAD, at the beginning of 2019, the share of policy instruments which restrict investments rose by 50 percent in comparison to the previous period. This is due to the tightening of investment screening measures by many countries in order to protect their national security against foreign investors.¹

As we have heard today, investment facilitation also has to do with the feeling of welcomeness in certain places by investors. We have learned that investment facilitation is about providing a fast and broad highway for investors into the host countries. Investment screening measures could narrow this street, making the investor's journey to the destination country more difficult and the investors in turn feel unwelcome.

There is no doubt that states have the right to protect national security and public order. This is not something I would wish to call into question. However, on the other hand, openness and trust are necessary conditions to attract foreign investors.

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¹ UNCTAD, *Investment Policy Monitor*, Issue 21, March 2019, <<https://investmentpolicy.unctad.org/publications/1195/investment-policy-monitor-no-21>>. UNCTAD, *World Investment Report 2019*, June 2019, <<https://unctad.org/en/pages/PublicationWeb-flyer.aspx?publicationid=2460>>. OECD/UNCTAD, *Twenty-second Report on G20 Investment Measures*, November 2019, <https://unctad.org/en/PublicationsLibrary/unctad_oecd2019d22_en.pdf>.

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Therefore, protection of national security must not be misused to accelerate an international spiral of investment protectionism. This would result in a lack of investment and opportunities for wealth and growth.

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Rather, it is vital that investment screenings be made in the right way. They must be carried out in such a way that guarantees legal certainty for investors and for the target companies of investments. First, threats to national security from the perspective of the state must be clearly defined. Second, reviews must be executed in a transparent and non-discriminatory way. Under these conditions, investment screenings will not stand in the way of investment efforts.

Statement of Business Regional Investment Policy Processes in Europe

UNCTAD 2019 High-level IIA Conference

Break-out session:

Regional investment policy processes and their contribution to Phases 1 and 2 of SD-oriented IIA reform 13 in Europe

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Status Quo

Please allow me to start with a brief comment on global economic development. Today, investment flows are still weak. Trade conflicts, geopolitical risks and increasing investment protectionism hamper the quick recovery of global investment activity. Global investment flows remain below the average of the past decade.¹

At the same time, an increase in FDI flows is urgently needed. As UNCTAD pointed out in September, private investors are required *every year* to fill a gap of 2.5 trillion U.S. dollars to reach the SDGs.² To mobilize these massive investments, business needs security and legal certainty, which is offered also by IIAs.

But many IIAs are in need of reform and the reforms are in progress. As James Zhan said, IIA reform is a must, not an option.

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¹ UNCTAD, *Global Investment Trends Monitor*, Issue 32, October 2019, <<https://investmentpolicy.unctad.org/news/hub/1626/20191025-global-investment-trend-monitor-no-32>>.

² UNCTAD, *SDG Investment Trends Monitor*, September 2019, <<https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2542>>.

But how should this reform look like? There are many ways to improve the system of investment protection. UNCTAD has submitted ten reform options for Phase II of its IIA reform agenda. From a business perspective, all reform steps should meet at least two requirements.

Firstly, reforms must ensure that investments are made in a responsible way. Investors should not harm society, the state or the environment. Otherwise we cannot expect social or political acceptance for IIAs. Investors and recipient countries would have to bear the costs. Secondly, reforms must ensure a high level of legal protection and legal certainty for investors. With a low standard of protection, investments cannot be expected. Again, all parties would lose.

What does this mean for the ten reform options for phase II of IIA reform? I would like to apply the two criteria to reform options of the UNCTAD reform agenda. I have divided these options into three groups:

- Jointly interpreting treaty provisions, engaging multilaterally, referencing to global standards, and managing the relationships between existing standards will hopefully increase societal acceptance. At the same time, the measures may increase legal certainty for investors as well.
- Amending treaty provisions, replacing outdated treaties, and consolidating the IIA network can increase acceptance and create legal certainty. However, in this case, this depends very much on the concrete design of the specific reform steps.
- Terminating existing treaties, abandoning unratified treaties, or withdrawing from multilateral treaties can have very negative consequences. Even if such steps satisfy the interests of specific civil society groups, the termination of treaties can lead to the loss of investment protection for investors, and therefore possibly to a decrease of investment flows.

Investment Agreements in Europe

The European Union has implemented many reform proposals in its most recent IIAs. The EU agreements with Canada, Vietnam, and Singapore meet the most up-to-date standards, as outlined this morning by Carlo Pettinatto from the European Commission. A key innovation is the investment court system. BDI welcomes the EU's engagement for the creation of a Multilateral Investment Court at UNCITRAL.

A challenging development in Europe, however, is the announced termination of the IIAs between the single EU member states. 190 treaties are affected. By terminating these agreements, the legal protection of those IIAs that were most intensively used by German investors is eliminated. To ensure the protection it would be necessary to create alternative legal instruments.

Conclusions

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In European investment policy, business has seen positive and negative examples of the implementation of Phase II of the IIA reform agenda. The newer EU IIAs contain many elements of the reform agenda.

I hope that these far reaching changes have led to a greater acceptance of ISDS and IIAs within European civil society. Future discussions in the European Parliament about coming IIAs will show if progress in this important field of politics is indeed possible.

Moreover, only the future can show what effects the reforms will have on the level of legal protection of investments. When the new investment provisions come into force in Europe, it remains to be seen if they can stimulate investment.

The upcoming termination of the intra-EU BITs cause uncertainties among investors. As such, the EU urgently needs to create an alternative and effective instrument to protect investments within the EU.

From the perspective of German industry, the EU should continue to apply the ten reform options – however, this must be done with great care and in consideration of the investment climate, considering the current significant global challenges that can only be solved by the engagement of private enterprise.