

**Remarks at UNCTAD High Level IIA Conference
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**Breakout Session: Regional investment policy processes and their contribution to Phases 1
and 2 of SD-oriented IIA reforms “Economies in transition”**

The bilateral investment treaty (BIT) model which Montenegro is currently using is rather outdated.

About half of investments disputes in Montenegro were brought under BITs and half of it was based on the commercial contact between investors and the State.

The total number of investments disputes which brought against Montenegro was 8, out of which three (3) were filed with the International Centre for Settlement of Investment Disputes (ICSID), one (4) under the The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and one (1) were brought under the jurisdiction of the foreign court.

Six of which were decided in favor of the State and the procedures for the rest are still pending.

The majority of invoked BIT dates back to the 1990s and related to the breaches of: Fair and equitable treatment (FET), Expropriation clause, National treatment (NT) and Most favoured nation clause (MFN), “Umbrella clause”, “Sunset clause” and the Principles of fully protection and security to investment

Montenegrin experience has shown that investors often know how to use definitions of “investors” which are broad enough, to only formally acquire citizenship of a country in order to gain access to arbitration, based on its BITs.

In order to minimizing the risk of the State’s exposure to ISDS claims as well as to define the most suitable policy reform for modernizing the existing network of BITs, Montenegro has undertaken a several reform-oriented activities related to the International Investment Regime, both on the regional and the national level.

On the national level:

- on 14th April 2016, Montenegro reached the **Decision to stop signing new bilateral investment treaties** until it defines a new BIT model,

- The inter - ministerial Working Group was established in July 2018, with mandate to analyze the existing network of BITs and define new model in accordance with the EU and the best international standards.
- Working Group for BITs has been identified the five priorities areas for reform actions: preserving the right to regulate, while providing protection, reforming investment dispute settlement, promoting and facilitating investment, ensuring responsible investment and enhancing systemic consistency.
- It has built consensus on the key provisions which will be in the focus of reform and agreed to define more precisely the scope of the investment, investor and seat and clearly referencing the qualification of the rights defined by the MFN clause,, FET clause, indirect expropriations provision, dispute settlements, “umbrella clause” and “sunset clause”.
- It consider that reforms actions have to be comprehensive and synchronized at four levels of policy making: at the national, bilateral, regional and multilateral level.
- Montenegro has engaged the law firm which will define new model of BIT, based on the results of achieved analysis and the instructions of the Working Group for BITs.
- **The Singapore Convention** has been ratified by Montenegro on 7 August 2019 in Singapore, as an essential instrument in the facilitation of international trade and in the promotion of mediation as an alternative and effective method of resolving trade disputes.
- Montenegro has been adopted **Law on PPP** on October 2019, by which the new Montenegrin Investment Agency will be established and will be a focal point or investment facilitator for addressing suggestions or complains by investors.

On the regional revel:

Through the Berlin's process, several activities, which were supported by World Bank's project” Support for Regional Investment Policy and Promotion in the WB” has been undertaken, as follows:

- **The Detailed mapping of IIAs that are currently in force,**
- **In-dept. review of existing networks of IIAs and theirs benchmarking with new generation IIAs and EU standard and the best international standards,**
- **Diagnostics on investor grievance management in Montenegro,**

- **Investment Policy Statement has been agreed by the ministries of the Western Balkan's six economies for developing regionally acceptable standards for negotiating international investment agreements in line with the investment policy framework and standards of the European Union.**

This analysis finds that Montenegro's IIAs generally include the main protection guarantees, but the existing network of BIT 's do not live up to international good practice due to unclear and limited definitions of basic standards and qualifications of rights and provisions, which can lead to lack of clarity and open the door for an expansive approach to its interpretations.

Based on this analysis, the key World Bank's recommendations for modernizing international investment regime refer to:

- **Create new model of BIT which will be aligned with EU standard and the best international practice.**
- **Develop a strategy to re-negotiate existing IIAs;**
- **Provide more policy space and safeguards against frivolous ISDS claims and include a series of reservations and exceptions to the assumed commitments by new model of BIT.**
- **Consider EU law implications in ongoing and future negotiations.**

The main challenges in future will be related to the following issues:

- What to do with existing treaties?
 - Termination?
 - Amendment?
 - How to ensure a seamless transition
 - Extra-EU BITs vs. Intra-EU Bits
- Negotiating new treaties
 - Who to choose as partner?
 - Conforming with EU law/EU standards