

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.

UNCTAD High-level IIA Conference

13 November 2019

Break-out sessions: Multilateral processes related to investment policymaking and their contribution to Phases 1 and 2 of SD-oriented IIA reform

“Preserving the right to regulate, while providing protection”

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We have had a broad discussion on the topic, which was as balanced as the title suggests. States and representatives of several regions shared their views, as did representatives of civil society. We note that there was no business representative.

To start with, we had some discussions about the very framing of the topic, considering whether we should term it the right to regulate, the duty to regulate, the power to regulate, or the sovereignty to regulate. Additionally, the climate crisis was a big issue in the discussion as well, shaping a lot of the debate.

The debate itself featured four broad themes: first, a consensus that the right to regulate needs to be preserved; second, the various experiences with, and ideas about, how best to frame this right; third, the options for incorporating it into the current legal framework; and fourth, the specific issue of the Energy Charter Treaty reform process.

Firstly, there was broad consensus regarding the importance of the right to regulate. The question was how, and how far, it needs to be preserved.

Secondly, we heard experiences from two large emerging economies, which adopted different approaches. One of them was enacting domestic legislation. The other one was issuing a new Model BIT. Both adopted these measures while simultaneously terminating some existing BITs. With respect to regional perspectives, the issue of how to reform or structure the framework for

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investment is under serious consideration, with different regions currently facing different challenges and exploring different approaches.

Thirdly, with respect to the options discussed for implementing the right to regulate, three options were discussed. UNCTAD's reform packages were referred to often in the discussion.

One option is disengagement with the system, terminating bilateral treaties and other investment agreements. A second option is the interpretation or modification of obligations. This could be done, for example, by interpreting existing clauses, modifying existing agreements or negotiating new agreements. The example of the Comprehensive Economic Trade Agreement between the European Union and Canada [CETA] was mentioned. The third option is to establish exceptions or carve-outs, inspired by Article XX of the GATT or one of the existing carve-outs.

The fourth theme were discussions about the specific case of the Energy Charter Treaty reform process. This is a treaty signed in the mid-1990s, which is now expanding at the same time as there are discussions about reform. This is a process that has phase two potential. However, critical views were expressed in this regard.

Finally, though this Conference is a meeting on IIA reform, concerns were raised with respect to investor-state contracts.

Thank you for the opportunity to join the discussion and to present this summary.