

UNCTAD High-level IIA Conference

13 November 2019

Break-out sessions: Regional investment policy processes and their contribution to Phases 1 and 2 of SD-oriented IIA reform

“Economies in transition”

Co-rapporteurs:

**Mrs. Andrea Saldarriaga, The London School of Economics and Political Science,
Visiting Fellow**

**Mr. Markus Wagner, University of Wollongong, Associate Professor and Executive
Vice-President, Society of International Economic Law**

Countries in the Western Balkan region are undertaking a comprehensive reform process of their International Investment Agreements (IIAs) and have undergone various reviews, both domestically and with the support of international / transnational institutions. Their experiences and subsequent challenges overlap to a very large extent. A common denominator guiding the review process for these countries is their eventual future (or in the case of Croatia, effective) accession to the European Union.

All countries undertook an extensive mapping exercise of existing IIAs and subsequently benchmarked the existing stock of IIAs against second generation IIA standards. The four countries represented identified three distinct categories of IIAs:

- (i) IIAs with Member States of the European Union, whose future depends on the accession to the EU and the application of the Achmea decision of the Court of Justice of the European Union in 2018
- (ii) IIAs with treaty partners with whom the EU is currently negotiating: which may replace the existing treaties with the EU and pose the question for existing or future treaties between the four participant states and these treaty partners; and
- (iii) existing IIAs with partners with whom the EU is not negotiating: in this case, the four participant states intend to undertake (re)negotiations in line with EU policy and reformed EU models, similar to the treaties the EU has recently concluded with Canada, Singapore and Viet Nam.

Because of this need for alignment with EU standards all countries represented declared a moratorium on the conclusion of new IIAs.

In analyzing the existing stock of IIAs, all countries identified common concerns that will need to be addressed in concluding new agreements or in the renegotiations of old agreements. These include:

- safeguarding the right to regulate by including strong justifications for public policy measures in areas such as health, environment, labor rights, national security;
- exemptions for certain industry sectors / policy areas;
- limitations on the scope of investors / investments;
- reform of investor-state dispute settlement;
- promotion / facilitation of investments;
- a higher degree of consistency among IIAs;
- remedying a lack of clarity in existing treaties; and
- addressing questions relating to the free transfer of capital.

All countries are in the process of finalizing new model BITs on that basis.

Countries also identified specific concerns with respect to different partners:

- With respect to the EU, the main challenge consists in aligning domestic policies with EU policies, bearing in mind how long existing IIAs are still in force and what the subsequent effects of these IIAs will be even after they have been terminated. Furthermore, concerns have been raised with respect to the mitigation of risk after the Achmea decision of the Court of Justice of the European Union in 2018, bearing in mind that intra-EU IIAs are likely to be terminated in late 2019 or early 2020. Some of the outstanding questions raised included how BITs with EU countries will be terminated and whether EU Member States will accept such termination (for those countries not yet members of the EU); what the impact will be for existing sunset clauses; and what impact this will have on ongoing arbitration cases.
- With respect to third countries, challenges exist in the context of renegotiations with existing treaty partners given the limited capacities in some countries for such renegotiations and the difficulty of renegotiations if the treaty party is unwilling to enter into such renegotiations. On that latter point, accession to the EU may provide assistance.
- A final aspect concerns the ongoing debate over the modernization of the Energy Charter Treaty and its intra-EU application.

All countries observed the difference in how the reform process over IIAs has impacted renegotiation efforts and have reported that the atmosphere towards renegotiations has changed

considerably towards a greater recognition of the need to renegotiate. Finally, countries present emphasized that they are fully engaged in UNCTAD Phase 2 reforms at this time and reported the high utility of materials provided by UNCTAD in this process.