

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

“Developing countries: Asia”

Co-rapporteurs:

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There was a very rich discussion with countries sharing their different experiences. There was great emphasis on the importance of sustainable development oriented international investment agreements (IIA) reform, in the pursuit of the SDGs/Agenda 2030.

All countries referred to the five areas of reform that UNCTAD has identified in its work over the years, with an emphasis on rebalancing investment protection and the states' right to regulate, reforming ISDS and promoting and facilitating investment. In their recent treaties, countries used modern formulations, inspired by the UNCTAD toolkits, with the particular example of recent practice by Sri Lanka and India.

Many countries already took steps for IIA reform, including for Phase 2 of IIA Reform. A number of Asian countries analyzed their investment treaty networks. In addition, several Asian countries adopted a new model IIA. Newly adopted models across Asia include more sustainable-development-friendly provisions, such as the clarification of language on scope and definitions, the clarification of the content of fair and equitable treatment and minimum standard of treatment for foreigners, as well as more limited or conditioned access to investor-State dispute settlement and other. Some countries have further taken steps to renegotiate or amend their stock of older treaties, alongside integrating sustainable-development-friendly provisions in their new treaties. More rarely, countries have also taken steps to terminate older generation IIAs with an invitation to renegotiate to the respective partners. One country reported positive responses from treaty partners to its offer to renegotiate.

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At the same time, the discussion revealed that the modernization of old-generation IIAs remains a challenge. More work is needed including by UNCTAD to see how it is possible to jointly modernize the large stock of existing treaties.

In particular, Asian countries pointed out the difficulty of initiating renegotiation from the perspective of a developing state and the coordination that such a step requires within the country. Developing countries noted specifically the importance of having more information and expertise available on the body of ISDS decisions, by way of support to effective negotiations of sustainable-development-friendly IIAs.

The group discussed the concern of overlapping investment treaties among the same countries. A concern which is particularly relevant in Asia-Pacific. Several speakers referred to RCEP and CPTPP in this context. The group noted that RCEP and CPTPP may not provide hoped for consolidation. There are only rare provisions to address the coordination with pre-existing BITs.

Finally, the group observed a broad policy shift: the trend to sign BITs as a photo-op is no longer a practice. There is a much more cautious approach to entering into these agreements, including the view that there is no strong evidence that signing IIAs would lead to the increasing of investment in-flow to one country. The group thus pointed out that the path forward is to work on the better integration of IIA policy with other state policies, namely Phase 3 of IIA Reform. In this last respect, countries noted the importance of coherence, in particular with investment facilitation and broader industrial policy concerns (i.e. Industrialization 4.0).

Thank you and we would like to congratulate UNCTAD for the impeccable organization of the High Level IIA Conference 2019.