Brussels International Energy Charter Forum

Mobilising Investments for a Sustainable Energy Future

Investment protection standards under the Energy Charter Treaty, is there a need to clarify?

12 May 2017
Brussels, Belgium

Ms. Elisabeth Tuerk
Chief, International Investment Agreements (IIA) Section, Division on Investment and Enterprise, UNCTAD
IIA Reform – the Global Picture: There is a Pressing Need for Reform
There is a pressing need for systematic reform of the global IIA regime. UNCTAD’s Policy Framework and its Road Map for IIA Reform are shaping reform objectives and approaches.

- Need for reform is evident from the heated public debate and parliamentary hearing processes in many countries and regions.
- The question is not whether or not to reform, but about the *what, how and extent* of such reform.
- About 130 countries have used UNCTAD’s Policy Framework and Road Map to review their IIA networks and/or to design treaty clauses.

*Source: ©UNCTAD*
UNCTAD’s Road Map for IIA Reform

6 Guidelines
- Harness IIAs for SD
- Focus on critical reform areas
- Act at all levels
- Sequence properly
- Inclusive / transparent process
- Multilateral support structure

5 Areas
- Ensuring responsible investment
- Promoting and facilitating investment
- Safeguarding the right to regulate, while providing protection
- Reforming investment dispute settlement
- Enhancing systemic consistency

4 Levels
- Multilateral
- Regional
- Bilateral
- National

Source: © UNCTAD, WIR16
**Core Principles**

“Design criteria” for investment strategies, policies and treaties

<table>
<thead>
<tr>
<th>National investment policy guidelines</th>
<th>IIA guidance: policy options</th>
<th>Action Menu: promoting investment in sustainable development</th>
<th>Global Action Menu for Investment Facilitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concrete guidance on how to formulate investment policies and ensure their effectiveness</td>
<td>Framework and toolkit for designing and negotiating international investment treaties</td>
<td>Strategic initiatives to mobilize funds and channel investment towards sectors key for sustainable development</td>
<td>10 Action Lines for policymakers to adapt and adopt for facilitating investment and benefitting from it</td>
</tr>
</tbody>
</table>

*Source: ©UNCTAD*
2016 IIA update: The IIA universe continue to grow. 37 new IIAs were concluded in 2016.

Trends in IIAs signed, 1980-2016

Source: © UNCTAD, IIA Navigator
2016 ISDS Update: Investors continue using ISDS: 2016 saw 62 new known treaty-based cases (less than in 2015, but higher than the 10-year average)

Annual number of cases

Cumulative number of known ISDS cases

767

Source: © UNCTAD, ISDS Navigator
IIA Reform: Taking Stock and Charting the Way Forward
IIA reform is intensifying and yielding the first concrete results at the national, bilateral, and regional level.

### Evidence of reform in recent IIAs: preserving the right to regulate, while maintaining protection

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Preamble</td>
<td>Refer to the protection of health and safety, labour rights, environment or sustainable development</td>
<td>1.1.2</td>
<td>11%</td>
</tr>
<tr>
<td>Definition of covered investment</td>
<td>Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts</td>
<td>2.1.1</td>
<td>6%</td>
</tr>
<tr>
<td>Definition of covered investor</td>
<td>Include “denial of benefits” clause</td>
<td>2.2.2</td>
<td>7%</td>
</tr>
<tr>
<td>Most-favoured-nation treatment</td>
<td>Specify that such treatment is not applicable to other IIAs’ ISDS provisions</td>
<td>4.2.2</td>
<td>3%</td>
</tr>
<tr>
<td>Fair and equitable treatment</td>
<td>Refer to minimum standard of treatment under customary international law</td>
<td>4.3.1</td>
<td>2%</td>
</tr>
<tr>
<td>Indirect expropriation</td>
<td>Clarify what does and does not constitute an indirect expropriation</td>
<td>4.5.1</td>
<td>20%</td>
</tr>
<tr>
<td>Free transfer of funds</td>
<td>Include exceptions for balance-of-payments difficulties and/or enforcement of national laws</td>
<td>4.7.2</td>
<td>20%</td>
</tr>
<tr>
<td></td>
<td>4.7.3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public policy exceptions</td>
<td>Include general exceptions, e.g. for the protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources</td>
<td>5.1.1</td>
<td>12%</td>
</tr>
</tbody>
</table>

*Source: © UNCTAD, IIA Mapping Project Database*

*Note: The numbering used refers to the policy options found in table III.1 of the 2015 version of UNCTAD’s Investment Policy Framework for Sustainable Development*
Evidence of reform at the national level: Most of the recently adopted model treaties include some sustainable development-friendly clauses

Reform-oriented provisions in selected model IIAs

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>2 Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>3 Circumscribed fair and equitable treatment (equated to the minimum standard of treatment of aliens under customary international law and/or clarification with a list of State obligations)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>4 Clarification of what does and does not constitute an indirect expropriation</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>5 Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>6 Omission of the so-called “umbrella” clause</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>7 General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>8 Explicit recognition that parties should not relax health, safety or environmental standards to attract investment</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>9 Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The scope and depth of commitments in each provision varies from one IIA to another.

Source: © UNCTAD, WIR16
Evidence of reform at the bilateral level: Most of the recently adopted treaties include some sustainable development-friendly clauses.

Reform-oriented provisions in IIAs signed in 2015

Selected aspects of IIAs

1. References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble.
2. Refined definition of investment (e.g., reference to characteristics of investment, exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts).
3. Circumscribed fair and equitable treatment (equated to the minimum standard of treatment of aliens under customary international law or clarified with a list of State obligations).
4. Clarification of what does and does not constitute an indirect expropriation.
5. Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws.
6. Omission of the so-called “umbrella” clause.
7. General exceptions, e.g., for the protection of human, animal or plant life or health or the conservation of exhaustible natural resources.
8. Explicit recognition that parties should not relax health, safety or environmental standards to attract investment.
9. Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble.
10. Limiting access to ISDS (e.g., limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism).
11. Specific proactive provisions on investment promotion and/or facilitation.

Question for discussion: how many reform-oriented features does the ECT’s investment chapter contain?

Source: © UNCTAD, WIR16
Evidence of reform at the bilateral level: Most of the recently adopted treaties include some sustainable development-friendly clauses

Reform-oriented provisions in IIAs signed in 2015

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Question for discussion: how many reform-oriented features does the ECT’s investment chapter contain?

The Energy Charter Treaty (ECT)

Source: © UNCTAD, WIR16
2016 High-Level International Investment Agreements Conference: Carrying IIA Reform to the Next Level → Phase 2 of IIA Reform

Some 50 country delegates, parliamentarians, officials of international organizations and civil society representatives convened.

Participants:

• shared their experience with the first phase of IIA reform

• noted that despite significant progress, much remains to be done

• supported IIA reform, emphasising that it should promote sustainable development objectives, safeguard the right to regulate and pursue a balanced approach, while protecting and promoting foreign investment

• noted that UNCTAD’s Road Map for IIA Reform and its Policy Framework had provided helpful guidance for reform-oriented actions at national and international levels

• emphasized, In light of the variety of reform approaches, the need for intensified international coordination on IIA reform

• called upon UNCTAD to support the next phase of reform by providing a platform for exchange, developing further policy tools, such as a checklist of actions for "phase two" of reform, and providing technical assistance.
THANK YOU!

Contact:
Division on Investment and Enterprise
Palais des Nations, 1211 Geneva 10, Switzerland
☑ diaeinfo@unctad.org
Twitter @unctadwif

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http://unctad-worldinvestmentforum.org
BACK UP SLIDES
UNCTAD’s online databases: Helping researchers and policymakers in keeping informed of the developments in an ever-evolving IIA regime

The IIA Navigator

- The world’s most comprehensive free IIA database, with over 3,300 investment treaties and model agreements
- Allows for advanced searches of IIAs by type, geography, status and full text
- Provides analysis on the latest policy developments

http://investmentpolicyhub.unctad.org/IIA
UNCTAD’s online databases: Helping researchers and policymakers in keeping informed of the developments in an ever-evolving IIA regime (cont’d)

The IIA Mapping Project

- A collaborative initiative between UNCTAD and universities worldwide to map the content of IIAs
- Over 1,900 IIAs have been mapped to-date, for over 100 features each
- Serves as a tool to understand trends in IIA drafting, assess the prevalence of different policy approaches and identify treaty examples

http://investmentpolicyhub.unctad.org/IIA/mappedContent#iialInnerMenu
UNCTAD’s online databases: Helping researchers and policymakers in keeping informed of the developments in an ever-growing universe of ISDS cases

The ISDS Navigator

- A comprehensive and regularly updated collection of treaty-based international arbitrations between investors and States
- Contains essential information about each ISDS case
- Offers user-friendly tools to search and filter the data

http://investmentpolicyhub.unctad.org/ISDS