

WB6: Regionally Accepted Standards for Negotiating IIAs¹

RECOGNISING the vision of the joint approach to furthering economic cooperation in the Western Balkans and enhancing competitiveness through a structured agenda for regional economic integration, encompassing: promoting trade integration, introducing dynamic investment inflow to the region, facilitating regional mobility, and creating a digital integration agenda, as stipulated by the Multi-annual Action Plan for a Regional Economic Area in the Western Balkans (MAP REA);

RECALLING commitments stemming from other relevant regional processes, within the framework of the Central European Free Trade Agreement (CEFTA) and South East Europe 2020 Strategy (SEE2020), as well as from the individual-economy levels, such as EU pre-accession processes;

REITERATING the commitment under Multi-annual Action Plan for a Regional Economic Area in the Western Balkans (MAP REA) to develop and implement the Regional Investment Reform Agenda (RIRA) in order to, *inter alia*, facilitate the uptake by economies of the Western Balkans of economic development strategies linked to smart growth based on knowledge and innovation, using EU experience and smart specialisation platforms, green growth, the development of value chains, technology transfers and building a knowledge-based digital economy;

REGARDING Regional Investment Reform Agenda (RIRA) as a comprehensive framework for achieving greater development and reforms of investment policies in the Western Balkans and alignment with EU standards, while focusing on a targeted set of reforms that are politically feasible, economically necessary and that will generate tangible results in the near term;

AIMING to improve the cooperation of the Western Balkans economies taking into consideration the challenges of their EU accession and the common goal of creating a dynamic investment space in the region;

PAYING DUE ACCOUNT to the specificities, sensitivities and complexities of each Western Balkans economy;

CONFIRMING the right of every Western Balkans economy to regulate all aspects relating to investments with a view to meeting individual policy objectives and to promote sustainable development objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity;

TAKING into account obligations that all or some Western Balkans economies have taken under relevant international instruments;

¹ IIAs are International Investment Agreements (BITs and other international agreements on investment-related issues) concluded in accordance with the Vienna Convention on the Law of Treaties, entered into force on 27 January 1980

DESIRING to further strengthen their relationship as part of and in a manner coherent with their overall relations, and convinced that these Standards will create a new climate for further development of investment between the Parties;

RECOGNISING that this regionally accepted standards for negotiating IIAs will serve as a guidance for WB6 economies when negotiating or re-negotiating IIAs and will be implemented in accordance with each economy's policy objectives;

RECOGNISING that these Standards will complement and promote regional economic integration efforts;

DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are parties;

REAFFIRMING their commitment to the principles of sustainable development and transparency;

REAFFIRMING each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity;

REAFFIRMING their commitment to the Charter of the United Nations signed in San Francisco on 26 June 1945 and having regard to the principles articulated in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948;

ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct;

RECOGNISING the importance of transparency in international trade and investment to the benefit of all stakeholders;

BUILDING on their respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral agreements and arrangements to which they are party,

HAVE AGREED to the following (non-binding) Regionally Accepted Standards for IIA negotiations:

National Treatment

Inclusion of a national treatment clause, which expresses the principle of treating foreign investors and investments in relation to the operation of their investment no less favorable than domestic investors and investments after establishment. It shall further be clarified that the principle of national treatment applies only in like situations.

Most-Favoured Nation Treatment

Inclusion of a most-favoured nation treatment clause with the following elements:

- Expressing non-discrimination between foreign investors and investments covered by the respective investment treaty and those from third countries after establishment;
- Applying the most-favored nation treatment only in like situations;
- Excluding procedures for the resolution of investment disputes between investors and states provided for in other international investment agreements;
- Excluding the benefits or preferences resulting from any existing or future customs, economic or monetary union, or a common market or free trade area or a regional economic organisation or similar international agreement to which the WB6 economy is or may become a party as well as any obligation by virtue of its membership to the above mentioned arrangements;
- Excluding the benefits, preferences or preferences resulting from any international agreement on avoidance of double taxation or any other international arrangements relating wholly or partially to taxation;
- Clarifying that substantive obligations in other international investment agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of the MFN provision in the respective agreement;

Fair and Equitable Treatment (FET)

Inclusion of a fair and equitable treatment clause with the following elements:

- Protecting investors against serious instances of arbitrary, discriminatory or abusive conduct by host economies;
- Clarifying the scope of the term “fair and equitable treatment” by enumerating actions in a closed list that constitute FET violations such as, for example, denial of justice in criminal, civil and administrative proceedings; a fundamental breach of due process; manifestly arbitrary conduct; harassment, coercion, abuse of power or similar bad faith conduct; and targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- Clarifying the scope by describing actions that are outside the scope of the FET clause, for example, by a statement that the mere disappointment of investors’ legitimate expectations does not in itself amount to a breach of fair and equitable treatment.
- Clarifying that a breach of another provision of the respective agreement or another international agreement is not considered a breach of the FET clause.

Full Protection and Security

Inclusion of a clause that protects the physical security of investors and investments.

Protection against expropriation

The WB6 economies agree to adopt as regionally accepted standard an expropriation clause with the following elements:

- Protection of direct and indirect expropriation;
- Definition of indirect expropriation as a measure or a series of measures having an effect equivalent to direct expropriation in that it substantially deprives the covered investor of fundamental attributes of property, including the right to use, enjoy and dispose of its covered investment, without formal transfer of title or outright seizure;
- Minimum requirements of a lawful expropriation, namely for public purpose, based on law and carried out in accordance with the Law, non-discriminatory, and against prompt, adequate and effective compensation;
- Safeguarding the state's policy space of the host state by further defining the term non-discriminatory (see point above) as a measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation, except in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.

Transfer of funds

Inclusion of a transfer of funds clause with the following elements:

- Permit transfers related to investments in a freely convertible currency without delay;
- Provide an illustrative list of assets that are covered by the right to transfer;
- Describe exemptions from the right to transfer funds abroad which shall be applied in an equitable and non-discriminatory manner and in line with the international obligations of the Parties;
- Explicitly allow temporary restrictions of the transfer of funds for emergency measures for prudential reasons under specific circumstances, in accordance with the provisions of the Agreement of membership in International Monetary Fund and, upon EU accession in accordance with EU acquis. Such measures shall be non-discriminatory and of a limited duration.

Transparency and good regulatory practices

Inclusion of a transparency clause with the following elements:

- Provide access to investment-related public acts like laws, regulations, procedures and administrative rulings to enable interested persons to become acquainted with them;

- To the extent possible, such measures shall be published before adoption, and interested persons shall have a reasonable opportunity to comment on such proposed measures;
- Clarify that transparency clause does not require a Party to furnish or allow access to information which disclosure would be contrary to its essential security interests in certain areas;
- Whenever possible, investors affected by specific administrative measures or investors being subject to judicial, quasi-judicial or administrative tribunals shall be granted the right to be heard before the decision is issued;
- Principles of good administrative behavior, such as consistency, impartiality, independence, openness and transparency shall be implemented.

Protecting the right to regulate and preserve public policy space

Inclusion of a protecting the Parties' right to regulate clause with the following elements:

- The Parties shall have the right to regulate in pursuit of legitimate policy objectives;
- A clarification that investment protection provisions shall not be interpreted as a commitment not to change the legal or regulatory framework, including in a manner which may negatively affect the operation of investments or the expectation of profits;
- A specific exceptions clause shall be included listing the policy objectives for which a host economy may derogate from the treaty's non-discrimination obligations;
- The exceptions shall be applied in a manner which would not constitute a means of arbitrary or unjustifiable discrimination against foreign investors or investments, nor are a disguised restriction on covered investments;
- Specifically, an essential security interest clause shall be included, stipulating that upon EU accession the essential interests include interests of the EU;
- Reference some specific areas left for the parties to be regulated.

Denial of benefits

Inclusion of a denial of benefits clause that may include criteria to exclude the application of the benefits stated in the agreement such as:

- “substantive business operations” criterion;
- “owned or controlled” criterion;
- “maintenance of international peace and security“ criterion;

- A measure with respect to a third country that prohibits transactions with an enterprise of the other party or would be violated or circumvented if the benefits of the agreement were accorded to the enterprise or its investment.

Promoting sustainable development

Inclusion of a commitment to promote sustainable development with the following elements:

- Recognition that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development;
- Stating the commitment to promoting the development of international trade to contribute to the objective of sustainable development, for the welfare of present and future generations;
- Recognition of the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives;
- Encouraging the integration of sustainability considerations in private and public consumption decisions; and promoting the development, establishment, maintenance or improvement of environmental performance goals and standards;
- Prohibition of investment enhancement by lowering or relaxing domestic environmental, health, safety, and labour legislation and standards, or by failing to effectively enforce such legislation and standards.

Maintaining and promoting labour standards

Inclusion of a commitment to respect, promote and fulfil the obligations of the members of the International Labour Organization (ILO).

The WB6 economies further agree to adopt as regionally accepted standard that labour laws and standards shall not be waived or otherwise derogated from to encourage trade or establishment, acquisition, expansion or retention of an investment.

Maintaining and promoting environmental standards

Inclusion of an acknowledgement that the environment is a fundamental pillar of sustainable development and recognise the contribution that trade and investment could make to sustainable development.

The WB6 economies further agree to accept as regionally accepted standard that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law. Environmental laws and standards shall not be waived or otherwise derogated from to encourage trade or establishment, acquisition, expansion or retention of an investment.

Promoting Corporate Social Responsibility by foreign investors

Inclusion of a clause promoting Corporate Social Responsibility with the following elements:

- Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies concerning the investments;
- Investors shall not bribe public servants or officials of a Party;
- Investor shall comply with their tax obligations;
- An investor shall provide information as the Parties may require for legitimate purposes;
- Encouraging enterprises to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and internal policies such as principles addressing issues such as labour, environment, human rights, community relations and anti-corruption.

Ensuring the ability to prevent avoidance or evasion of taxes

The WB6 economies agree to adopt as regionally accepted standard a safeguard for measures to prevent tax avoidance or evasion.

IAs shall not prevent the adoption or maintenance of any measures aimed at preventing the avoidance or evasion of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements or domestic fiscal legislation.

Dispute Settlement

The WB6 economies are concerned with the existing ISDS system. Concerns include, but are not limited to:

- The lack of consistency and predictability flowing from the ad-hoc nature of the system;
- Significant concerns arising from the perception generated by the system;
- Limited systemic checks on correctness and consistency in the absence of an effective appeal mechanism;
- The nature of the appointment process impacting the outputs of the adjudicative process;
- Significant costs; and
- Lack of transparency.

Therefore, the WB6 economies are well informed about the proposal for the establishment of a multilateral investment court, as put forward in “Submission of the European Union and its Member States to UNCITRAL Working Group III” of 18th of January 2019, and, having in mind their obligations in the context of the EU integration, shall continue to keep close attention to any further developments in this regard. IIAs signed by the WB6 economies shall provide for the opportunity to subject disputes under such agreement to a multilateral investment court upon accession to the EU. In the meantime, the WB6 economies agree to adopt as regionally accepted standard an investor-state dispute settlement clause with the following elements:

- Allow investor-to-state dispute settlement;
- Limit the scope of the investor-to-state dispute settlement;
- Provide for a pre-litigation consultations phase and for the possibility of recourse to mediation at any time during the proceedings;
- Provide for mechanisms to avoid parallel proceedings before domestic or other international courts/tribunals;
- Offer a set of dispute settlement rules, which would also include either the UNCITRAL Rules on Transparency for Investor State Arbitration, or rules ensuring a comparable level of transparency applying to all procedures under the agreement;
- Limit the law applied by a tribunal in ISDS cases to international law and the law of the treaty, but do not extend it to domestic law and clarify that domestic law can only apply as a matter of fact;
- Conditional on the national legislation to make disputes subject to the jurisdiction of a future multilateral permanent investment court after EU accession;
- Ensure ethical standards/code of conduct of tribunal members, in which decisions on compliance with the code are taken by an outside party (e.g. appointing authority such as ICSID Secretary General, PCA Secretary General);
- Prevent fraudulent claims and abusive claims;
- Prevent frivolous claims by establishing rules on early dismissal of such claims and the “loser-pay principle”;
- Subject claimants to disclosure of third party funding;
- Increase transparency of the proceedings.

Limiting the scope of investor-to-state dispute settlement

The WB6 economies agree to adopt as regionally accepted standard that only disputes arising directly out of a covered investment under the IIA and resulting in economic damage or loss to the investors shall be subject to dispute settlement. ISDS shall further be limited to the "post-establishment" phase of investments (operation of the investment, after it is made) and

not to allow it for the "pre-establishment" phase (conditions to establish the investment, market access).

Consultations/mediations

The WB6 economies agree to adopt as regionally accepted standard that disputes shall as far as possible be settled amicably and that a claim may be submitted to litigation only after the parties have engaged in consultations and have failed to resolve the dispute in this manner. It shall further be considered to allow the disputing parties to have recourse to mediation at any time of the proceedings.

Parallel proceedings

The WB6 economies agree to adopt as regionally accepted standard that a claimant cannot in parallel bring proceedings before domestic/international courts and ISDS tribunals. Further, it is agreed to include a 'no-U-turn' clause: once an investor initiates ISDS proceedings it cannot return to domestic courts.

Applicable law

The WB6 economies agree to adopt as regionally accepted standard that arbitration tribunals shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of an IIA, under the domestic law of the disputing Party. In determining the consistency of a measure under an IIA, the tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

Prevention of fraudulent and abusive claims

The WB6 economies agree to adopt as regionally accepted standard that the submission of claims shall be prohibited if it is related to an investment that has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

The WB6 economies agree to adopt as regionally accepted standard that the tribunal shall decline jurisdiction if the dispute had arisen or was foreseeable at the time when the claimant acquired ownership or control of the investment and the tribunal determines that the claimant had acquired ownership/control for the main purpose of submitting an ISDS claim.

Prevention of frivolous claims



The WB6 economies agree to adopt as regionally accepted standard that a tribunal may reject at an early stage of the proceedings claims that are manifestly without legal merit or unfounded. Costs of the proceedings are to be borne by the losing party (so called “loser-pay-principle”).

Mandatory disclosure of third party funding

The WB6 economies agree to adopt as regionally accepted standard that where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the tribunal the name and address of the third party funder. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded, or the donation or grant is made.

Ensuring ethical standards/code of conduct of arbitrators

The WB6 economies agree to adopt as regionally accepted standard that members of an arbitration tribunal are independent and that they are subject to a binding code of conduct, and that decision on compliance with such rules are taken by an outside party (e.g. appointing authority).

Increasing the transparency of proceedings

The WB6 economies agree to adopt as regionally accepted standard that the UNCITRAL Transparency Rules shall apply in connection with proceedings under an IIA, with the following additional obligations:

- (i) The request for consultations, the agreement to mediate, the request for arbitration where applicable, the notice of challenge and the decision on challenge of any member of the tribunal; a request for consolidation of claims (where applicable) shall be included in the list of documents referred to under Article 3(1) of the UNCITRAL Transparency Rules.
- (ii) Exhibits shall be included in the list of documents mentioned under Article 3(2) of the UNCITRAL Transparency Rules.
- (iii) Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the parties to a dispute as the case may be shall make publicly available in a timely manner prior to the constitution of the tribunal, relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules.
- (iv) Hearings shall be conducted open to the public. A tribunal shall determine, in consultation with disputing parties, appropriate logistical arrangements. Any



disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal.

Compliance with EU law

The WB6 economies agree to adopt as regionally accepted standard only clauses which are in compliance with the EU acquis in the event of EU accession. In this respect, new and re-negotiated agreements shall include:

- A horizontal REIO clause, i.e. provisions ensuring that, upon becoming an EU Member State, the party to the BIT has an obligation to ensure that its BITs are interpreted and applied in a manner that is consistent with the obligations resulting from its membership in the European Union, as well as to take the necessary steps to ensure fulfilment of such obligations;
- A specific regional economic integration organisation (REIO) exception clause in MFN provisions;
- Exceptions that allow the EU to introduce measures limiting capital transfers under Art. 66, 75, 144 and 215 of TFEU including a prudential carve-out in transfer of funds provisions;
- An essential security interest clause stipulating that essential security interests include interests of the EU upon accession;
- When providing for ISDS, the law applied by the tribunal shall be limited to international law and the law of the treaty, but not extend to domestic law. It needs to be clarified that domestic law can only be considered as a matter of fact;
- A specific termination clause in IIAs with EU Member States in the event of EU accession such as:

“This Agreement shall, in any event, be automatically terminated as a whole and its effects shall cease if and on the date when [XXX] becomes a Member State of the European Union.”