



IRAQ – INTERNATIONAL INVESTMENT TREATY PROGRAM

Negotiating Items Checklist

A. General Issues

1. Alternative approaches:
 - bilateral investment treaties (preferred by European states)
 - free trade agreements (combine trade and investment matters, preferred by US and Japan)
 - regional investment treaty
2. Possibly study typical content of treaties concluded by MENA countries: regional practice
3. Possibly draft a model bilateral agreement, involving an interministerial process of coordination;
downside: a complicated process – advantage: facilitates understanding by all the relevant ministries, simplifies subsequent negotiations
4. Draw up list of desirable partner states in light of domestic economic and political priorities
5. Study and decide on alternatives

Rules concerning modalities of admission

- no rule on admission in treaties, this approach gives freedom to admit on basis of evolving domestic priorities; this approach preferred by European countries or
- principle of free admission for nationals or other state (with negative list indicating sectors which remain closed (U.S. approach))
- principle of free admission, with positive list of open sectors

B. Specific clauses in treaties

1. Notion of investor (definition of nationals which benefit from treaty); special issues : Should nationals or other state benefit which have no genuine connection to that other state (“denial of benefit clause”, found in U.S. treaties?). Should certain local companies be treated as foreign companies?



2. Notion of investment (definition of those assets to be covered by guarantees of treaty); typically a broad clause (“every asset having an economic value”) and five illustrative groups of assets; special issue: should only investments be covered which are made after entry into force of treaty, or should earlier investments also be covered?
3. National treatment of investor of other side;
4. Special issue: is it desirable to exempt certain sectors in view of a need to protect certain weak domestic sectors?
5. Most-favored-nation clause; special issue: is it desirable to exempt certain areas? In particular: is it desirable to exempt rules on dispute settlement?
6. Fair and equitable treatment (FET). Special issue: should this clause refer to FET in accordance with international law”? This qualification will presumably lead to a lesser degree of protection. SPECIAL NOTE: Study this clause carefully; in arbitral practice, this is the clause which has most significance
7. Rule on expropriation. Note: In practice these clauses do not vary, neither for direct nor for indirect expropriation; indirect expropriation: important in arbitral practice
8. Transfer of funds (of investment, profits); Study: is it desirable to restrict the principle of free transfer of funds in order to protect foreign exchange reserves?
9. Umbrella clause, being a clause that protects contracts with nationals of other state. Are such clauses desirable?
10. Harassment, impairment of management, full protection and security, due process, transparency; study content; in particular transparency and due process, other concepts less important in practice
11. Dispute settlement
 1. State-to-state not important in practice
 2. Investor-state disputes: typically forum ICSID, but also UNCITRAL



12. Rules on extraordinary circumstances: emergencies, armed conflict etc; study: which types of situations should be covered in these clauses?
13. Duration of treaty; length of protection for investments made while treaty is in force