

Remarks by Ambassador Xavier Carim
South African Permanent Representative to the WTO
“Taking Stock of IIA Reform”
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Thank you Chairman
Good morning

I want to start by commending UNCTAD for the leadership it continues to demonstrate in the global dialogue on IIA Reform.

In its recent March 2016 “IIA Issues Note”, UNCTAD observes that the question facing us is “not whether or not to reform, but about the *what, how* and the *extent* of such reform”.

No doubt, there are serious efforts at reform across the globe but we can ask equally serious questions about the direction that this is taking: Is the reform leading us towards greater convergence and coherence in the system or towards greater complexity and fragmentation? We could also ask whether the reform efforts have been effective in giving real content to the principles and broad objectives of sustainable development?

In South Africa, our reform effort has comprised four key features:

- First, we initiated and carried out a national review of investment treaties;
- Second, we have terminated our old generation and widely discredited bilateral investment treaties. Other governments are also pursuing this course;
- Third, we made great efforts to update and clarify the protection we offer to investors at the national level by introducing a new Investment Act; and
- We have been engaged in dialogues at regional, continental and multilateral levels with a view to building consensus on how investment treaties can be reformed to give real content to the principles of sustainable development.

South Africa’s new Promotion and Protection of Investment Act that entered into force at the end of 2015, attempts to do this: to give operational meaning to the objectives of sustainable development and inclusive economic growth and development.

In strengthening an already robust legislative framework, the new Act clarifies investor rights and obligations in line with our Constitutional obligations. The Act underscores that South Africa remains open to foreign

investment and that, if needed investors have full access to justice and legal remedies. While the Act recognizes the need to address past discrimination in South Africa, rules and regulations to that effect must be applied to foreign and domestic investors in a non-discriminatory manner. Importantly, the Act confirms the Government's right to regulate in the public interest in accordance with the law. And, finally, the Act locates all this in an overall commitment to international law and human rights.

Having set out these standards in domestic law that applies to any investor, irrespective of origin, we ask should the treatment of an investor depend on whether there is a treaty in place with its home country?

When we assess the international debate and current reform efforts several questions seem pertinent: First, it is striking to us that the current dialogue seems to gloss over the fact that empirical studies - over many decades - are unable to find clear evidence of a relationship between IIAs and FDI flows. It seems clear that investment treaties are neither necessary nor sufficient to attract foreign investment. Proponents can therefore no longer assert that IIAs are needed to attract FDI, and they would need to motivate their arguments in favor of IIAs on another basis.

Second, we are aware that in the current reform effort, parties are making attempts to ensure that legal provisions in treaties reflect their intentions more closely. We also see greater efforts to strengthen provisions related to the right to regulate, notably in respect to environment and public health. More recently, we are seeing efforts to reform the investor-state dispute settlement system to ensure greater transparency, consistency and legal correctness in the decisions and awards by arbitration panels.

While these are positive steps, the efforts are diverse and dispersed in a variety of bilateral and regional contexts that, from a systemic perspective, could well have the effect of creating new sources of complexity and uncertainty in the system.

Part of the complexity is related to how these new generation IIAs relate to the enormous stock of old generation treaties. In this context, we may recall that UNCTAD observed that by the end of 2013, more than 1,300 bilateral treaties were at the stage where they could be terminated or renegotiated at any time. Termination of outdated treaties will go some way to reducing inconsistencies and overlaps in the regime, and should be considered seriously.

My final comments are focused on Africa's development imperatives. Over the last five years or so, there is a greater sense of common purpose amongst African leaders that for sustainable growth and development, our economic strategies must promote economic diversification, build productive capacity and advance industrialization.

The question then is whether IIAs facilitate or constrain those objectives?

Recent current treaty practice appears to recognize the need for governments to introduce measures for environment and public health reasons. Worryingly, however, we also see that new treaties are further reducing the scope for governments to introduce measures that support industrialization. New limitations are emerging in provisions covering technology transfer, research and development, employment and training, local purchasing of goods and services, establishing downstream economic linkages, joint ventures, and levels of local equity ownership.

If this is indeed the direction of new IIAs, they will be in conflict with Africa's development objectives and will be unlikely to find favour on our continent.

I will stop here and thank you for your attention.