



UNCTAD High-level International Investment Agreements (IIA) Conference 2018

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Thank you, Mr. Chairman.¹ It is a special honor for me to salute you as Chair of this important session, representing Sri Lanka, a beautiful South Asian country where I had the honor to serve as a U.S. diplomat.

I thank you and the UNCTAD Secretariat for including representatives of international business among the speakers at this important session. I am honored to be one of those business speakers and to be included among the keynote speakers.

Mr. Chairman, all speakers have been asked to focus our remarks today on the prospects for “Phase 3” reforms in international investment agreements as laid out in the UNCTAD World Investment Report for 2018. As in so many other areas, “reform” can mean quite different things to different people. To many of us in the international business community, if “reform” means simplifying, speeding up, clarifying, eliminating ambiguities and loopholes, bolstering enforcement, and generally strengthening investment agreements, then we support reform. If reform is ultimately about strengthened IIAs yielding more and higher quality foreign direct investment (FDI) and achieving the Sustainable Development Goals (SDGs), then we enthusiastically support reform.

But I fear to others in our room this afternoon “reform” of IIAs is more of a political effort, even a campaign, to reduce investor protections, to narrow coverage and protections, to impose new burdens on foreign investors, and to eliminate legal protections and enforcement mechanism. If this is the case, then I am afraid that is not real reform and is not the sort of effort we in the business community can support. If FDI reform translates into reduced investor protections, carte blanche powers for governments to change, even ignore, commitments to investors, to discriminate among investors, and to eliminate effective access to neutral

¹ The session was chaired by The Honorable Jayantha Jayasuriya, Attorney General of Sri Lanka.

apolitical dispute settlement, then that isn't reform. Such non-reform changes are a recipe to see FDI flows dry up and DGSs wither on the vine.

Foreign investors put their valuable capital, their technology, their intellectual property, their hard-earner good names, their brands, and their access to global markets on the table when they invest abroad and put themselves under the sovereign, essentially unlimited, authority of a host government. Those investors deserve fair protections plus access to an effective, fair, neutral and apolitical dispute settlement process.

IAs need to ensure those provisions for investors. Weakening, constraining, or eliminating those core protections is not "reform". It is confiscation, it's wrong, and it's not reform.

Excellencies, colleagues, I strongly endorse the sentiments just expressed by our Chinese Government colleague about not throwing the baby out with the bathwater. In this case the "baby" represents FDI flows, all the benefits flowing from those investments, most importantly progress in achieving the SDGs.

I want to make three broad comments which I believe are widely shared by international investors. I listened carefully in the ministerial-level plenary sessions yesterday and this morning to the comments of the CEOs of some outstanding and very successful companies. They were quite eloquent on how they make investment decisions, what key factors affect their assessments of potential country factors, and on the importance of strong international investment agreements and access to strong investor-state dispute settlement procedures. And I found it especially interesting that the CEO of Ethiopian Airlines, an incredibly successful company and also an African state-owned enterprise, expressed views very similar to those of European private sector consumer product companies on investment climate issues and investment protections.

First, and I realize these remarks will be controversial to many here at UNCTAD, I want to offer a business perspective on "policy space", a phrase that, I know well, echoes loudly around Geneva and international organizations. We've already heard speakers here today underline the importance of "policy space" for sovereign governments, especially developing countries. We are all entitled to our views; I just want to offer a business perspective that "policy space" sounds to some of us like governments having unlimited power to change rules, break commitments, and discriminate at will against investors. If that's what policy space means to some of you, I will simply ask how you can expect private foreign investors to do business with your country if your government has effectively unlimited power to abuse investors and avoid effective dispute settlement disciplines.

Second, I would just posit that discrimination, whether on the individual, group, or national level is always bad. It's bad morally and legally; it's bad policy and it's very bad economics. Discriminating against or among foreign investors, treating them worse than you treat your own businesses is bad policy. Don't try to demonize particular sectors, certain nationalities of investors, or individual companies. Investment drives economic growth, jobs, exports, and improved standards of living.

Third, I just want to offer an alternative view on the so-called multilateral investment court proposal being aggressively marketed around this conference and far beyond by our colleagues from the European Union. Some are trying hard to convince you that their court proposal is THE solution, not a solution but THE only acceptable solution, to perceived problems in investment agreements. We in the U.S. private sector are very worried about this proposal. All of you should be too. I don't have time to go into all the details today, all the problems we see with this EU proposal, but replacing a well-established ISDS system of independent arbitration with a bureaucratic government-dominated system of politically selected "judges" is a recipe of reduced substantive expertise, reduced independence, and increased costs; and all those costs will be passed along to the hard-pressed taxpayers of every participating country (rich or poor) around the world, rather than paid by the parties to each individual dispute as is currently the practice. Bureaucratizing and multilateralizing investment agreements is not reform. What it is, is a recipe for reduced FDI flows and frustrated SDG ambitions.

But let me be clear. We all recognize that governments are sovereign. You and the governments you represent can revise investment treaties as you wish. You can reduce investor protections. You can limit or eliminate ISDS. Business can't stop you. But if you want real reform, if you want to throw out the bath water but save the baby, treat us in business as partners in this effort, not enemies. You need us. Government resources and international official development assistance flows will never be adequate to fund all the investment needed to achieve the SDGs. Business can help. We can invest. We want to invest internationally but the rules, legal protections and procedures matter if we are putting our assets at risk.

We want to be partners in this effort. Work with us as you set your policies, as you "reform" your investment regimes, rules and international agreements. We can achieve win-win solutions if we work together.

If you go off and, under the guise of "reforming" IIAs, set out to punish international investors and gut IIAs, you may score some political points at home and internationally. But just remember that if your "reformed" IIA treaties and agreements work for your government, for international organizations, NGOs and academics, that's fine. You can all feel great that that

you've rebalanced the equation. But if the new regime doesn't work for business, for the people who actually invest, you may have a hollow and short-lived victory. Business doesn't want to fight with governments. We want to work with you. Give us a chance. We'll all end up better off.

I end up where I began by expressing my appreciation to UNCTAD, to you, Mr. chairman, and to everyone in the room for giving me and a handful of other business representatives the chance to offer some business perspective to these important discussions.