



**Remarks at UNCTAD High Level IIA Conference
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Breakout Session: Multilateral Processes and their contribution to Phases 1 and 2 of SD-oriented IIA reforms “Preserving the Right to Regulate while Providing Protection”

Introduction

Members of the Caribbean Community (CARICOM) have not been engaged in multilateral investment-related processes that directly address the reform area of preservation of regulatory space. As CARICOM countries are not parties to the Energy Charter Treaty, they are not involved in the process of modernizing that treaty. Nonetheless, there is growing awareness among CARICOM countries of the need to ensure that IIAs are aligned with their development objectives and of the critical importance of preservation of regulatory space to achieving that outcome.

To date, CARICOM countries have not been engaged actively in the multilateral discussions on investor-state dispute settlement (ISDS) reform. It is not yet clear whether the multilateral initiatives on ISDS reform will generate systemic changes to the current system of investor-state arbitration. However, far-reaching ISDS reform should be of high priority. If appropriate changes are not made to the current ISDS model, reforms to the substantive aspects of IIAs might not have the intended impact.

Awareness of the need for IIA Reform

CARICOM countries are parties to relatively few bilateral investment treaties (BITs)¹ and trade agreements with investment provisions. In addition, they have had relatively little experience with ISDS. Nonetheless, they are becoming more aware of the importance of assessing the extent to which their existing IIAs promote their development objectives and of ensuring that any new treaties they negotiate further their development agendas.

In October 2019, investment officials of CARICOM countries participated in a Forum on IIAs, which was co-organized by the CARICOM Secretariat, the International Institute for Sustainable

¹ The Bahamas and St Kitts and Nevis have signed only one BIT, which is not in force. Six countries have signed between two to four BITs: Dominica, Grenada, Saint Lucia and St Vincent and the Grenadines (2), Antigua and Barbuda (3) and Suriname (4). Belize and Haiti have signed eight BITs and Guyana has signed nine 9 BITs. Only three CARICOM States have signed more than ten BITs: Barbados (11), Trinidad and Tobago (12) and Jamaica (17).



Development [IISD], UNCTAD and the Commonwealth Secretariat. This Forum improved the delegates' understanding of their countries' investment treaties and options for reform of IIAs and ISDS. Officials also developed a better appreciation of the need to revisit various aspects of their countries' existing IIAs, many of which are old-generation treaties. These aspects include:

- the expansive definition of investment;
- the coverage of sensitive sectors and measures;
- the inclusion of umbrella clauses;
- the inclusion or formulation of the fair and equitable treatment obligation;
- the inclusion or formulation of the indirect expropriation standard;
- the inclusion or scope of application of the most-favoured nation treatment standard; and
- the absence of exceptions to the free transfer of funds obligation.

Officials also recognized the value of developing a model IIA which would feature, inter alia, reforms pertaining to preservation of regulatory space. In this regard, it should be noted that CARICOM countries have been elaborating a CARICOM Investment Code, an intra-regional framework for the promotion, protection and facilitation of investment. Also, CARICOM has drafted a template for Investment Chapters which can be used in its negotiation of external trade agreements. This template incorporates features designed to safeguard the right to regulate and recognizes that any ISDS mechanism should be detailed and circumscribed.

Towards Phase 2 Reforms

CARICOM countries have not as yet embarked on Phase 2 reforms. However, a number of countries have unratified treaties and, at the recently held CARICOM Forum on IIAs, there was recognition of the option of expressly abandoning them. There was also an appreciation that joint interpretative declarations can limit the risk of disputes arising from ambiguity and lack of clarity in the meaning of core standards.

Importantly, participants at the Forum acknowledged the need to undertake a cost-benefit analysis before countries decide whether to pursue certain Phase 2 reforms, in particular, amendment, renegotiation and termination of existing treaties. Further, they acknowledged the value of engaging in the deliberations of UNCITRAL on ISDS reform. However, as mentioned above, it is not clear whether that initiative will deliver far-reaching reforms of the current system of investor-state arbitration.



There is recognition that countries will need to undertake certain preparatory actions when pursuing IIA reforms. For example, in seeking to engage treaty partners, it will be important to examine what these partners have done in their newer treaties/models.

Capacity constraints are real concerns that CARICOM countries will need to confront when pursuing these reforms. In that regard, the Community's continued collaboration with partners such as UNCTAD, the IISD and the Commonwealth Secretariat will be important. Further, the Region will continue to draw on the useful policy tools that have been developed by organizations like UNCTAD and the Commonwealth Secretariat. These policy tools present reform options for consideration and provide information on reform initiatives that countries (including treaty partners) are pursuing.

Beyond Phase 1 and 2 Reforms

Looking beyond Phase 1 and 2 IIA reforms, the Region will need to pursue policy coherence in investment policy-making by ensuring that other aspects of the governance framework for investment (domestic laws, contracts) are supportive of sustainable development outcomes.