

**Remarks at UNCTAD High Level IIA Conference
13 November 2019, Geneva
Angela Pretorius, Ministry of Industrialization, Trade and SME Development**

Breakout Session: Multilateral processes and their contribution to Phases 1 and 2 of SD-oriented IIA reforms “Insuring responsible investment”

Thank you for according me this opportunity to address this session on ensuring responsible investment.

Though the IIA reform is well under way and involves countries at all levels of development and from all geographical region, we remain with a number of challenges under the existing old generation treaty regime. As UNCTAD reports, the stock of old-generation treaties is still 10 times larger than the number of new, reform-oriented treaties. This said, ISDS cases remain high, and in 2018, most of substantive decisions rendered by ISDS tribunals in investor–State disputes, which are in the public domain were decided in favour of the investor, either on jurisdictional grounds or on the merits.

Not only are legal and arbitration costs significant but the resulting awards can pose serious budgetary threat and challenges specifically to developing countries. Though we understand that investors are seeking those investment destinations that provide the most protective, hospitable and profitable climate for their investments, it is important to create a legal framework for investment that achieves a sensible balance between investor rights and obligations on the one hand and the Governments responsibility to operate and regulate in the public interest on the other.

However, it remains a challenge for governments to maintain the balancing act between creating attractive conditions for foreign investors, with investment policies that include features of investment liberalization, protection, promotion and facilitation, against national priorities that need to ensure that any negative social or environmental effects are minimized. Investment policy framework therefore are required to combine elements of investment promotion and regulation and that provides clear and transparent rules for the entry and operation of foreign investors, as well as provide adequate regulation to minimize any risks associated with investment.

From a regional position I would like to mention, that within the Southern Africa Development Community (SADC) group, the development of new policy guidelines for investment is ongoing. This

includes the SADC Investment Policy Framework, as well as the Bilateral Investment Treaty (BIT) template, which is a set of guidelines for BIT negotiations. The BIT guidelines also include an elaborate and detailed section focussing on ensuring responsible investment. The section, referred to as “rights and obligations of investor and state parties” ranges over seventeen articles. Themes that are covered range from: common obligation against corruption; compliance with domestic law; environmental management and improvement; minimum standards for human rights, environment and labour; investor liability; corporate social responsibility, as well as obligations of states on environment and labour standards, to name but a few. The section throughout emphasises on governments rights to implement performance requirements on investors and investments.

It is worth mentioning that SADC member states, while developing these guidelines continuously benchmark against reform-oriented approaches, which includes amongst others the UNCTAD Investment Policy Framework.

From a national perspective, Namibia took the approach of including investor responsibilities in our proposed legal policy framework for investment. Again, tools of reference for the policy included UNCTADs Investment Policy Framework and the SADC model BIT. For the purpose of this meeting I would like to highlight some of the provisions that we considered to include:

1. In our preamble, it is clearly stated that the objects of the policy are in line with our national development goals, of promoting sustainable economic development and growth through the attraction of both domestic and foreign investment. It balances both Governments role to facilitate investment through clear and transparent procedures, while the investor’s role is to contribute to the enhancement of the economic development objectives of the country.
2. The second provision in the policy, I would like to highlight is the introduction of performance agreements for large-scale investments in key sectors. We believe that performance agreements entered into with investors in priority economic sectors supports the contribution of the investment to the development objectives of the country. These agreements are negotiated based on a net benefit criteria, which is also clearly stated within the policy that the investor should meet, as well as certain incentives that Government may offer. I want to point out that the policy ensures absolute transparency in the matter. This includes thorough consultation with all parties involved, as well as publishing the final agreement. In addition, the use of performance agreements allows both the investor and government to tailor the means to achieve the development goals to each specific new

investment, instead of imposing one-size fits all approaches or unilaterally imposed conditions. This should ensure both effectiveness and efficiency.

3. Another provision, we deemed necessary in this policy aimed at achieving our development objectives, as well as promoting responsible investments, are the designation of economic sectors or business activities for investment. These designations should help ensure foreign investment in sectors where growth is needed and discouraged where we believe that investments are saturated. This includes applying thresholds and certain entry conditions for investors to guarantee strategic economic development and growth.
4. Lastly, we did include a specific provision referring to rights and obligations of investors. The provision stipulates that in general investors must carry out their activities in compliance with the law of Namibia. However, it also covers issues such as the engagement of foreign personnel by the investor and elaborates on the permission to engage expatriate personnel. Government's priority of achieving the country's development goals is herewith emphasized and it underlines the investor's obligation to invest in human capacity development and ensuring skills transfer. This requirement should be done in conjunction with the absorption of available skills in the Namibian labour market.

In conclusion, I would like to say that I think it is important from a development country's perspective that investment policymaking should include provisions that capture responsible investment. Responsible investment should be aimed at achieving sustainable development objectives when attracting investment and include measures that ensure FDI's contribution towards a country's development concerns. The host country in return should endeavour to ensure a welcoming investment climate, with transparent and predictable entry conditions and procedures. However, in their efforts to improve the investment climate, countries should not compromise on accomplishing their sustainable development goals.

I thank you

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**Breakout Session: Regional investment policy processes and their contribution to Phases 1
and 2 of SD-oriented IIA reforms “Developing countries: Africa”**

It has been a number of years now that sustainable development oriented IIA reform has entered the mainstream of investment policymaking globally. Reform discussions have mainly revolved around concluding new-generation IIAs and modernizing old-generation treaties.

Several countries have since opted to abandon old treaties in pursuit of reform oriented treaties or applying a reform oriented approach vis-a-vis bilateral, regional, plurilateral and multilateral relationships. The advancement of adopting new approaches and reforming investment policies and treaties has been accepted by an increasing size of developing countries that have similar concerns addressing sustainable development efforts.

On the African continent, much progress has been made in developing investment policy processes including the Pan African Investment Code, the COMESA Common Investment Area Agreement, as well as the SADC model Bilateral Investment Treaty and the SADC Investment Policy Framework. For the purpose of the meeting today I'll be focussing on investment policy processes that have been undertaken within the Southern African Development Community or SADC region.

I'll start with the SADC Model Bilateral Investment Treaty Template, which can be demonstrated probably as the most important product of sustainable development oriented IIA reform. The development of the template has taken place under the overall goal of the SADC Protocol on Finance and Investment to promote harmonization of the Member States' investment policies and laws, and I believe it is the most comprehensively discussed and workshopped SADC investment policy document. It was agreed that the aim of the template should emerge as a set of guidelines from which Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation. Therefore, each Member State will ultimately be responsible for its choice of clauses and the final result of any particular BIT negotiation.

Furthermore, the SADC Model BIT is also not intended to be a legally binding document. Rather, it provides advice to governments that they may consider in any future negotiations they enter into relating to an investment treaty. Due to its extensive commentary provisions it can also serve as an educational tool for officials, or as the basis of training sessions for SADC government officials.

It is important to note that the BIT template is reviewed on a biannual basis in order to continuously incorporate reform trends, as well as striving to achieve harmonization of approaches across Africa. The original template has since been reviewed and the second edition already includes changes of specifically narrowing several of the options provided in the first edition. This is in order to reflect the growing desire to limit the breadth of certain types of clauses in order to avoid unintended consequences, and a greater determination to put forward “made in Africa” solutions. Issues referred to include the definition of investment and investor, pre-establishment rights, compensation levels for expropriation, and dispute settlement. Demonstrating some of the options that have been narrowed are for example the section “investor rights post-establishment” where the removal of the provision “fair and equitable treatment” was done and replaced by “fair administrative treatment”. Believing that the traditional concept of a fair and equitable treatment provision remains highly controversial, member states instead agreed to the fair administrative treatment approach, which includes changing the focus of the language from investor rights to a focus on governance standards. Another important change that was made for the second edition of the template is the removal of the ISDS from the actual enumerated articles and into an Annex. This came as a result of the majority of Member States being of a commensurate view that it should be removed from the text.

Of course, it is also worth mentioning here that the template incorporates advances made in the drafting processes of the COMESA Common Investment Area Agreement and the Pan African Investment Code. The drafters were very conscious of the opportunity to seize upon the growing harmonization of approaches across the continent. In addition, the template includes learning from UNCTAD’s Investment Policy Framework for Sustainable Development.

The second policy document I would like to highlight here and that has been developed by SADC as a regional policy vision is the so-called Investment Policy Framework. The aim of the policy is to offer Member States a regional framework to enhance their investment policies, so as to attract investment that can work for the development of the region as a whole. The IPF identifies five

policy action areas that provide concrete options for: (1) Improving coherence and transparency of the investment environment; (2) Ensuring market access and competition; (3) Reinforcing and protection of investor's rights; (4) Ensuring responsible and inclusive investments; and (5) Promoting regional and international integration. Therefore, the Framework, also reflected in the BIT template, presents a regional policy vision that is helping to increase coherence between policy and legal instruments. Again, the IPF is not a legal binding document but rather serves as a checklist for member countries to take into account in developing their national investment policies.

Lastly, it's worth mentioning that SADC is in the process of developing a Business and Investment Promotion Strategy, which focuses on establishing and maintaining a highly visible regional investment brand, the development of an attractive regional business and investment climate, annual provision of information on the regional economy, and establishing a symbiotic relationship with the regional business community. The framework supports and encourage implementation of national reforms that will foster regional policy harmonization whilst ensuring adherence to international best practice.

Finally, I would like to conclude with Namibia's expectations regarding the Africa Continental Free Trade Agreement Investment Protocol. We believe that negotiations should pay careful attention to include provisions that define what regional and bilateral treaties apply. This is being mindful of regional investment agreements such as ECOWAS, COMESA and SADC, as well as bilateral treaties concluded between African countries. Otherwise, two or three treaties may apply to the same circumstances. In addition, regional policies, including the Pan-African Investment Protocol all create already a strong sense of a Pan-African direction and made in Africa approaches on many issues. It would be most desirable if the AfCFTA negotiations build on this and use as much of it as possible. It is therefore important that African negotiators should own the process and that the AU Secretariat should ensure that any advisors for the process are current with and supportive of the African directions.

I thank you.