

Remarks at UNCTAD High Level IIA Conference
13 November 2019, Geneva
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“Opening plenary”

- Thanks UNCTAD for the invitation. We welcome this event and the focus on reforms for existing agreements. The framework proposed for discussion based on UNCTAD’s “Ten options for phase 2 of international investment agreement reforms” is interesting.
- There is broad consensus regarding the need for reforms; the big challenge is the scope of reforms needed and the shape of those reforms (in other words the “what” and the “how”).
- In the document presented for discussion, the focus is on the “how” and not on the “what. Even though UNCTAD presented a catalogue of substantive provisions in 2015 on the “what”. I strongly believe that both elements are linked and it is difficult to discuss options on the how without analysing in depth the substance (i.e. what needs to be modified).
- Today’s conference is a good opportunity for us all to take stock of what is happening now and reflect on what needs to happen next – both in terms of methods and actual changes.
- We all know that there are no multilateral rules on investment. There are multilateral mechanisms for ISDS and some multilateral provisions on transparency but not broad multilateral rules for international investment.
- That said, there are several important developments taking place right now at the multilateral level.
 - At UNCITRAL (along with single-institution reforms at ICSID)
 - There are also discussions at the WTO on a potential Investment Facilitation Framework, even though it is not nominally on investment treaties it deals with some aspects that some countries have been included in their investment treaties.
 - In addition, in November 2018, the Members of the Energy Charter Treaty committed to a modernisation process extending to substantive provisions.

- These multilateral developments are relevant but narrow in their scope and they do not reach the substance of the vast bulk of older treaties.
- Aside from these multilateral efforts, many International Organisations such as UNCTAD, WTO and OECD continue to provide policy analysis and research in addition to platforms for peer learning and international cooperation on investment treaties and related issues.
- The OECD, in work with over 60 countries, including the G20 and others, provides detailed investment treaty and policy analysis. Governments have met twice a year to discuss investment treaty policy issues since 2011.
- The analysis and discussions have helped many governments to improve and strengthen their treaty policies and reforms. The analysis is also used in our many Investment Policy Reviews focused on individual countries' policies.
- At the OECD, we go beyond that and we advocate for a whole-of-government approach on the climate for investment, where investment treaties can be one piece of a broad set of policies needed to attract investment that contributes to sustainable development, based on the OECD PFI and new indicators that we are developing for governments on how to attract quality, sustainable investment.
- In investment treaties, more narrowly, we think it is important to focus on some key elements that could make a big improvement in rebalancing existing treaties. These include Fair and Equitable Treatment and Reflective Loss.
- In these areas, the OECD has analysed policies and alternatives in detail.
- I would like to draw your attention to the extensive OECD work on reflective loss claims in ISDS – in particular the many ISDS claims by shareholders. Partly due to the need to ensure that multilateral and other reforms are not circumvented through treaty shopping, the issue of reflective loss has come again to the fore at the OECD and at UNCITRAL. Based on the large body of OECD work, we will be working on this issue together with UNCITRAL in 2020. Governments began reconsidering reflective loss issues during our October investment meetings in a discussion co-sponsored by Costa Rica and the Republic of Korea, with input from UNCITRAL.
- Another element that I would like to mention, as part of the work on sustainable development and balancing interests, is recent OECD work addressing Business responsibilities and Investment Treaties.
- Business and human rights (BHR) and responsible business conduct (RBC) are fast-developing field marked by a remarkable convergence on standards. The updated

OECD Guidelines on Multinational Enterprises and Due Diligence Guidance -- which are aligned with the United Nations Guiding Principles on Business and Human Rights and with core ILO Labour standards -- have been guiding the efforts of many governments, business groups and civil society to improve business conduct or corporate social responsibility.

- Investment treaties are frequently criticised as being one-sided with only obligations for governments and only rights for business. Investment treaty policy makers are increasingly interested in integrating policies relating to business responsibilities into trade and investment treaties. David will provide some additional information in a break out panel this morning.

Governments discussed these issues for the first time at our recent OECD meetings in October. It was further decided that the next Annual OECD Investment Treaty Conference on March 16, next year in Paris, will address Business Responsibilities and Investment Treaties. We would warmly invite you to participate in the Conference.

- To conclude:
 - We share UNCTAD's views that reforms are needed and that modernisation of old generation treaties remains a priority;
 - Even though today's conference is focused on options to reform (the How), our view is that both the How and the substantive part (the What) need to be discussed jointly.
 - Finally, we welcome the efforts of all International Organisations working in this field, and once again I would like to thank UNCTAD for organising this Conference. The complexity and titanic challenge that countries have regarding the international investment regime will require all IOs to work in a complementary way to help countries to build a better regime that contributes to the sustainable development of all countries.