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"Current Trends on IIAs, their pre-establishment dimension, and UNCTAD's roadmap for IIA reform"

By the Deputy Secretary-General of UNCTAD

AS PREPARED FOR DELIVERY

Good afternoon,

Thank you for the invitation to be here. It is an honor to address you today.

Between 1.1 and 1.3 billion people, or almost a fifth of the world's population, have no access to electricity of any kind. To put that in perspective, that's about 120 to 130 times the population of Sweden without a single light switch. Many more have access that is costly and unreliable.

Energy poverty represents an immense challenge – not only in its own right, but because energy is essential to tackling other dimensions of poverty:

Without reliable energy, businesses in developing countries struggle to produce goods and services competitively.

Without affordable energy, students in rural areas struggle to do their homework, and can only dream about accessing knowledge and resources available on the internet.

Without sustainable energy, communities live with pollution that has serious consequences for both health and environment.

Given these links between energy poverty and other forms of poverty, the international community has adopted – for the first time ever – a specific goal on energy. Sustainable Development Goal 7 calls for international cooperation to ensure access to affordable, reliable, and modern energy for all.

But to make our vision a reality, we're going to need investment, and lots of it. It has been estimated that we face an annual $2.5 trillion financing gap in developing countries – this is massive. For sustainable energy alone, annual investments needed total US$800 billion: US$350 billion on energy efficiency, US$350 billion on renewable energy, and US$50 billion on energy access.

I cite these figures in this room today because it's clear that the private sector can and MUST contribute to filling these gaps. And this is particularly true in the area of energy.

At the same time, the expectations about the role of foreign investment have become more demanding. Today, it is no longer enough that investment creates jobs or generates foreign exchange. Quantity is not enough. We also need quality investment. Countries are looking for investment that protects the environment, promote energy efficiency and the roll-out of renewable energy sources, and moves its firms up global value chains.

So there are twin imperatives: one for greater investment in sustainable energy and another for higher demands on that investment.

This is where the ECT comes into the picture. As the only multilateral agreement providing a legal framework for energy governance and investment, the ECT can play an important role in fostering a sustainable energy future.

Over 20 years ago, the ECT was born out of a need to foster cooperation. By drawing together the energy-poor but capital-rich states of Western Europe with former Soviet states in search of new investments, the ECT helped to unlock energy potential in Europe.

As for investments, the ECT reflected a "grand bargain": between, on the one hand, the willingness to promote private investments and, on the other hand, the need – in such a case – to ensure protection of those investments.

Much of the global investment regime is built around the very same "grand bargain". Beginning in the early 1990s, at the same time that the ECT emerged, the number of investment treaties skyrocketed. Last year, 23 new agreements were signed, bringing the total up to about 3,300 worldwide. Some countries have signed more than 100 of these agreements. However, in response to the financial crisis and growing disenchantment with the global investment regime, the pace of new agreements has slowed.

This "grand bargain" remains valid, even today. The reality is simple: With the need to unleash private capital on an unprecedented scale for the Global Goals, enshrined in Agenda2030, this basic bargain is not likely to disappear. There is no point in shying away from it.

But the "grand bargain" needs to be updated. The status quo is not an option. We need to adjust the "model", reflecting our experiences with past investment agreements.

It is for this reason that we find ourselves at a moment of reflection and re-orientation.

The question is not about *whether* to reform investment agreements, but about the *what*, the *how*, and the *extent* of such reform.

UNCTAD is the global center of excellence of investment. And, as such, we are at the center of reflection.

Therefore, I'd like to share **3 broad policy lessons** from UNCTAD on investment agreements. These lessons point in a direction of change. How far each individual country wishes to go remains their choice. But we encourage countries to find convergence in the direction of change, so as to avoid further fragmentation of the global investment regime.

Our three lessons are as follows: **First**, there are limits to what agreements can achieve. **Second**, investment agreements cannot be seen in isolation. And **third**, investment agreements must better balance the rights of investors with the rights of states to regulate.

Let me address each of these 3 lessons in turn.

First, it's important to recognize the limitations of investment agreements. There are things that they *can* and *cannot* achieve.

So what can they do?

- They can reinforce investor confidence by fostering predictability and transparency. Binding commitments enhance protection.
- Investments can also improve the host country climate by fostering good governance. Domestic reforms can be self-reinforcing.

So what can investments agreements not do?

- They cannot guarantee greater FDI inflows. Most empirical studies conclude that investment agreements are positively correlated with FDI inflows. At the same time, it's clear that investment agreements do not automatically generate greater investment. There are a myriad of other factors that influence the degree of investor appetite.

In other words, investment agreements are no panacea. They cannot be substitutes for sound domestic policies. An investment treaty cannot be a silver bullet that turns a poor investment climate into a promising one.

Similarly, the simple idea of "investment promotion through protection" has not delivered on its promise. There is a need to be far more active in promoting investment. This is particularly true in SDG-sectors, like sustainable energy. This is also why UNCTAD has developed a "Policy Guide for Investing in SDGs". We need to much more actively promote more investment in the sectors with the greatest sustainable yields.

This leads me to the **second lesson**: Investment agreements cannot be seen in isolation.

Investment policies must be consistent with other economic and development policies; and domestic and international investment policies must reinforce each other.

Let me explain.

On the first level, investment policies must be seen in connection with trade, technology and innovation, finance, and services – especially infrastructure services. Investment policies must also be consistent with good governance, private sector development, and labor market regulations.

The point of regional and global value chains is one example: ever more dense production networks have significantly changed the relationship between trade policies and investment policies. The name of the game now is to harness the trade-investment nexus to access and climb value chains. Openness to FDI while maintaining barriers to goods and services (or vice versa) would be self-defeating.

But there is a second level where coherence is needed: Investment policymakers must pursue both domestic and international openness.

On the national level, we are witnessing a trend towards greater openness. In 2014, more than 80% of investment policy measures adopted by 37 countries were aimed at easing entry restrictions and conditions. Some countries have granted new investment incentives or trimmed corporate tax rates. Others have created special economic zones. Still others have relaxed foreign ownership restrictions; one thinks of China, India, and

Indonesia. At the same time, in the trade sphere, the propensity to adopt protectionist measures has increased. Some claim that as many as 5% of world trade is now affected by measures adopted by G20 countries in the wake of the financial crisis.

On the international level, a growing number of investment treaties now include pre-establishment commitments. By the end of 2014, more than 228 agreements extended national treatment and MFN obligations to new foreign arrivals. That is to say, many governments commit themselves to non-discrimination not only *within* their borders, but are also increasingly *opening* their borders.

But, just as with the investment-trade nexus, there is a risk to be single-minded. “Openness” cannot be effectively obtained by simple market access commitments. For one thing, unclear and burdensome administrative procedures can be just as prohibitive as formal restrictions. Further, as illustrated by competition cases in the EU itself, anti-competitive practices can easily frustrate any access formally provided. These types of barriers are particularly relevant in utilities, like the energy sector, where the risk of natural monopolies are high. To address these problems, we need effective state intervention, clear regulations, and strong regulatory authorities to protect the market. And if the EU is struggling to ensure this, just imagine how big the problem may be in developing countries. Countries tackling these barriers must go beyond the simplistic logic of market access. But they need to be included in a conversation about investment if we are to seriously promote affordable, reliable and sustainable energy provision.

The **third lesson** is the most controversial one, and one that is subject to much global debate - in EU, but also elsewhere. The thrust of this debate is that investment agreements must, in the future, better balance the rights of investors with the rights of states to regulate. This is especially true when investment commitments are enforceable through ISDS.

The mounting number of ISDS cases has raised concerns, as the debate surrounding TTIP attests. But we're faced not with a zero-sum choice between having ISDS and not having ISDS. The choice is between having ISDS that works for sustainable development and ISDS that doesn't.

Investment agreements by definition place limits on sovereignty in domestic policymaking. But with rising concerns that these limits go too far, policymakers need to ensure that countries retain the right to regulate in the public interest. At the same time, policymakers must be vigilant that the claimed right to regulate does not provide legal cover for protectionism.

Striking this balance is particularly important in the energy sector. According to UNCTAD data, around 16 percent of all ISDS cases have stemmed from the mining, oil, and gas sectors. And 19 percent of all cases have been related to the supply of electricity and gas.

This is not to say that these cases represent direct challenges to policymaking. But a better balance between the rights of investors and the rights of states would ensure that energy investments contribute to sustainable development.

UNCTAD has proposed a few ways to reform ISDS. For instance, states can add transparency to the arbitral process, or limit investor access to ISDS. States can also add local litigation requirements or introduce an appeals facility.

The key message here is that there are no quick or easy fixes. Each of these reform options entails challenges in their own right. And ISDS cannot be reformed in isolation, but must be considered together with the substantive investment protection rules embodied in investment agreements.

Ladies and gentlemen,

Last September, world leaders gathered in New York to articulate an ambitious vision: We must mobilize all available resources to eradicate poverty while decarbonizing the global economy – all within the next 15 years.

In this respect, the ECT and other investment treaties have immense potential to meet the rising demand for sustainable energy. If we incorporate lessons for policymaking derived from past experience, I'm confident that we can foster sustainable investments for our common future.

Thank you very much for your attention.