



**Presentation during the UNCTAD High-level IIA Conference held in conjunction with the 11th session of the UNCTAD Investment, Enterprise and Development Commission**

**Break-out sessions: Multilateral processes related to investment policymaking and their contribution to Phases 1 and 2 of Sustainable Development-oriented IIA reform**

**Reforming investment dispute settlement**

**SOUTH CENTRE**

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Thank you Ms. Chair,

Let me convey the regards of Prof Carlos Correa, Executive Director of the South Centre. We are pleased and honored to participate in this High-Level Conference and this break-out session looking at the current state of play on reforming the investment dispute settlement system.

Foreign direct investment is a valuable tool to support the sustainable development goals, but in order for it to achieve its full potential, a re-orientation of the international investment regime is required, including through the reform of substantive rules and standards; as well as deep reforms of the dispute resolution mechanisms embedded in international investment agreements.

Such objectives would be achievable only by conducting a serious discussion on the design of investment agreements, mainly by shifting the aim of these agreements from only protecting investors' rights, to one enabling and advancing investments that add value to the developmental process of States and the achievement of the 2030 Agenda for Sustainable Development.

Although significant efforts have been achieved in the reform process through UNCTAD's reform package, current reform initiatives at the bilateral, regional and multilateral levels reveal that reform approaches vary substantially between countries and that many of them are cosmetic and residual. Therefore, there is an increasing interest in placing the discussion on the existing asymmetry between investors and States at the forefront of these debates.

International investment agreements are intended to add a layer of protection for investors when operating abroad, as these agreements provide horizontal obligations requiring a specific treatment for investors and investments. As mentioned by UNCTAD, the number of old generation international investment agreements is ten times greater than the number of modern or reformed treaties. The majority of these agreements include provisions on Investor-State Dispute Settlement (ISDS), which allow foreign investors to challenge host state measures in international arbitration proceedings.

Since 1993, an average of 36 claims has been filed against States every year. The majority of claims have been recorded since 2003, in particular against developing countries. Almost 25% of the total number of cases initiated in 2000s affected States dealing with severe economic crises or States facing a political transition that required social and political measures that, according to investors, impacted their investments.

Almost 50% of the cases initiated during this period were either decided in favor of the Investor (89 cases) or settled (79 cases), which will generally bring benefits for the investor. Given the rate of success of these procedures, the vagueness of the language used in BIT provisions, and the broad interpretation made by ISDS tribunals, ISDS became quite popular as a mechanism for dispute settlement reaching record numbers in the 2010s.

Developing countries are impacted the most. Firstly, not only their regulatory space has been shrinking due to the decisions taken by ISDS tribunals, but also due to the simple threat of a policy measure aimed at achieving public goals, which is known as 'regulatory chill.' Decisions to suspend the adoption of measures adopted to control and reduced the consumption of tobacco (Phillip Morris V. Uruguay/Australia public health measures), or the decision to continuing the operation of coal plants after a notice of arbitration was notified to the country (Vattenfall v. Germany, environment regulation), among other examples, is evidence that 'regulatory chill' is based on factual grounds.

Similarly, the vast sums of money that the States must pay due to the arbitral awards are a growing concern. Almost 58% of current ISDS cases, deal with claims over 100 million US Dollars. One of the most impacting cases dealt with a claim of nearly 30 billion dollars in reparation. In the face of these cases, developing countries are confronted with the hard choice of paying this huge amount of reparation or use this capital to cover social investment schemes, for example, in education, public health, adequate housing, and others.

The effect of ISDS procedures on the judicial and institutional system of States is also an issue of concern. Although the objective of signing IIAs, at least in its origins, was to guarantee a sufficient level of protection for investors, based on existing standards for the protection of aliens in domestic jurisdictions. These agreements were supposed to assist countries in upholding and enhancing their judicial systems to international standards. Nevertheless, the abuse of these procedures achieved the opposite. Investors circumvent domestic courts through ISDS, limiting the possibility of States to review their decisions at the domestic level to either improve their measures or modify them for the attainment of public welfare. Developing countries have been raising these concerns for years, but it is only now that developed States are also under the examination of this ad-hoc system, that the need for reform is getting a global scale.

Developing countries have brought several alternatives to international forums. First, the discussion on alternatives to investor-State dispute settlement is imperative. Several states, both developing and developed, have acted on this regard by including means to prevent disputes between investors and states, for example through the inclusion of an Ombudsman-person for investors or the establishment of a mediation center at the domestic level to prevent disputes from rising to international disputes. Similarly, strengthening the legal and judicial system of States has been attested as an effective method to attain the protection of investors' rights. For example the Free Trade Agreement between the United States and Australia, and the one between the United States and Canada, do not include ISDS, but instead recognize the right of foreign and domestic investors to resort to the domestic judicial system to resolve a dispute, the same is applicable in the case of South Africa.

Equal attention deserves the establishment of filters that prevent the presentation of unjustified claims by investors, for example by reversing the decision of whether a claim can be considered frivolous to the States parties to a particular agreement. This option will avoid unfounded claims to be heard by international arbitration tribunals, avoiding procedural costs, and improving the procedural economy. This objective goes hand-by-hand with the need to require the exhaustion of domestic remedies and requiring the express consent of the State for arbitration on a case-by-case basis, and not be based on automatic consent.

Efforts to achieve coherence in this area should begin at the national level, by strengthening national capacity in the design and implementation of investment policies that align with the sustainable development goals, and safeguarding the right of countries to adopt the necessary

measures to articulate and implement policies designed to achieve equitable, fair and sustainable development in accordance with the 2030 Agenda for Sustainable Development

The South Centre is ready to support its member States and the Group of 77 and China in the analysis of the different challenges they are facing in their current efforts of reform of ISDS and achieve sustainable development and encourage them to value and share their common experiences and expertise; while providing policy support to act collectively and individually at the international level. The Centre is conscious that achieving the Sustainable Development Goals requires global action, the strengthening of multilateralism, and international cooperation.

I thank you, Mrs. Chair.