

South Centre Statement at UNCTAD's High Level IIA Conference

Below is the South Centre statement delivered by **Kinda Mohamadieh** at UNCTAD's High Level International Investment Agreements (IIAs) Conference held in Geneva, Switzerland on 9-11 October 2017 .

Thank you Chair for giving the floor to the South Centre. The Centre is an intergovernmental organization of developing countries, with 54 Member States, based in Geneva .

- While we have positively witnessed reform of the investment protection regime becoming a policy objective adopted by a broad base of developed and developing countries, and UNCTAD's forum on international investment agreements (IIAs) has been instrumental in this process, discussions reveal that the focus of reform efforts and the end objective behind proposals and actions presented as reform vary substantially.
- In this process, fundamental questions on systemic issues face reforming countries:

One: From all the approaches surfacing in regard to reforms, what would help countries attain systemic changes that allow fostering the linkages between investment and development objectives and addressing the challenges arising on the country's policy and developmental space?

The experience with investment treaties strongly suggests that policy interventions that would be necessary to activate FDI's potential benefits and to contain adverse effects of FDI on stability, balance of payments, capital accumulation and industrial development have been increasingly circumscribed through rules imbedded in international investment treaties. Within such a context, for example, would referencing sustainable development principles in a treaty be enough to situate the investment protection rules within a sustainable development framework? It is clear that there are provisions that have been intrinsically contradictory- in their crafting and interpretation- to policy space and sustainable development, and thus ought to be dropped from investment treaties. Moreover, the requirements from investors in terms of contribution to development objectives are a necessary element to address.

Second: What would be the interface between the systems or alternatives that are being envisioned as part of the reform, whether new model agreements or new dispute settlement bodies, and the existing web of treaties? And what would be the impact of reform on a country's policy space and sovereign right to regulate if a country negotiates new treaties based on a reformed model while maintaining the web of old treaties in place? Joint interpretations or amendments, as pointed out in the discussions at the UNCTAD IIA forum, have their limitations in terms of addressing the shortcomings of old treaties. In this context, withdrawal from old treaties, and replacement by new models - where possible - seems to be a necessary element for effective reform.

Third: When it comes to investor-state dispute settlement (ISDS), are the reforms being discussed today, including transparency and other procedural elements, establishing an appeals mechanism or a multilateral ISDS forum, despite their importance, enough to address the problems of the system, in terms of its implications on the sovereign right to regulate, or is there a need to rethink the overall utility of investor-state arbitration as the norm for investor-state dispute settlement? And what would be the utility of envisioning arbitration as an exception instead of the rule, which would be applicable in certain cases only, specifically those that do not involve elements of the sovereign right to regulate and public interest? More broadly, how should this discussion be part of the broader discussions about reforming and strengthening domestic judicial systems?

Fourth: How are processes proceeding at the national, regional, and multilateral levels and to what extent are these processes coordinated? Effective institutional coordination of decision making at these multiple levels is necessary. If not, risks are high that negotiations could proceed regionally or multilaterally in a way that hinders the achievement of benefits or be regressive vis-à-vis national efforts and visions .

The South Centre underlines the importance of keeping these fundamental issues and questions in view when approaching reform proposals.