

UNCTAD Expert Meeting on Taking Stock of IIA Reform

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We are glad that the need for a systematic reform of the global regime of international investment agreements is no longer questioned and that the centre of the debate is now shifting to the more difficult question how such a reform should look like, what issues have to be addressed and how such a reforms can be achieved.

We are therefore grateful that UNCTAD provides an international platform to jointly elaborate on these important questions and gives us the opportunity to provide here a brief civil society perspective on these important questions.

Most current reform efforts mainly aim to address some specific controversial treaty provisions to rectify the flows of the current system.

While efforts to reduce the scope of *fair-and-equitable-treatment* provisions, efforts to prevent *treaty-shopping* and measures aiming for more independent arbitrators are welcome they alone will not lead to new investment policies that are required to effectively place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investments.

I think this audience is well aware about the growing public concern about the dominant approach to International Investment Agreements (IIAs).

It is worthwhile to recall that just three weeks ago 280 civil society organisations from across Europe, with the support of US and Canadian groups, have called on the European Commission and the United States Trade Representative to not only eliminate the *Investor-State Dispute Settlement Mechanism* but also its so-called replacement, the *Investment Court System*, from TTIP, CETA and all other trade agreements¹. One day later another 145 CSOs, this time mainly from developing countries in Asia and Africa, urged negotiators at the WTO to abstain from considerations to launch investment negotiation at the WTO².

So what should be done?

First of all governments should recognise that a systematic reform of the global investment regime with the aim to maximize sustainable development benefits of foreign investment will require the support and the active engagement of civil society in all aspects. This includes that Trade unions and CSOs are to take part in treaty making as well the periodic review of treaties.

For this it will be important to make the texts of all signed IIAs and their current status of implementation publicly available and easily accessible. It is highly appreciated that the text of 74% of all signed BITs is available at UNCTAD's investment policy hub. Governments should further assist UNCTAD to make IIA texts, including all relevant *side-letters*, publicly available.

¹ see <http://www.s2bnetwork.org/isds-statement-feb2016/>

² see <https://www.scribd.com/doc/300185229/Civil-Society-Letter-on-the-Future-of-the-WTO-2016-Feb-23>

While now 696 treaty based *investor-state arbitrations cases* are known, this is an area where still significant more transparency would be needed.

As private interests in these cases clash with public interest, it should be insisted that in a fair and balanced approach IIA-based settlement agreements between states and investors should be open to public scrutiny.

The ongoing effort to make IIA related dispute settlement procedures and its proceedings more transparent are highly welcome.

In this context we want to highlight that the UN Convention on Transparency in Treaty-based Investor-State Arbitration still needs ratification by two more countries before it can enter into force. We therefore would like to urge countries that see themselves in a position to do so to sign and ratify this convention as soon as possible.

But IIA-related dispute settlement procedures not only have to become more transparent. They also should guarantee that the interests and concerns of all stakeholders are adequately addressed in the proceedings.

IAs that allow that investors themselves can directly bring a case to dispute settlement mechanisms provide a privilege to investors that is fundamentally rejected by CSOs. IAs should at least allow that stakeholders can also directly bring cases against the investors to challenge their rights being infringed upon.

The international legal system on foreign investment reflects a serious asymmetry between the rights granted to *Transnational corporations* and the obligations they have to meet. As the United Nations Intergovernmental Working Group for a new international treaty on transnational corporations and human rights has emphasized, all existing instruments on the duty to protect human rights in business activities are concentrated in ‘soft law’, meaning non-binding regulations such as various internationally agreed Guidelines, such as those on responsible business conduct or on business and human rights.

The imbalance between the rights and obligations of foreign investors needs to be corrected as a matter of priority. A mere reference to the *OECD Guidelines for Multinational Enterprises* in the preamble of an IIA would definitely not meet this requirement.

IAs can never replace the proper codification of rights and obligations of foreign investors under national laws. In fact the granting of exclusive rights to foreign investors under international treaties erodes the policy options to promote domestically driven inclusive growth and sustainable development.

Finally, I am happy to announce that *Both ENDS*, *Madhyam* and *SOMO* have jointly released a book this week with the title “Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices.”³ This free-to-download ebook contains 19 distinct analyses by leading experts and provides a wider range of policy reform proposals. This book is a part of our joint initiative to democratize the ongoing discussions on reforming the current BIT regime.

³ see <http://www.bothends.org/en/News/newsitem/454/New-book-Rethinking-Bilateral-Trade-Agreements-launched-today>