

UNCTAD Expert Meeting on Taking Stock of IIA Reform

Geneva, 16 March 2016

South Centre

- The South Centre is an intergovernmental organization of developing countries, with 52 Member States, and has been supporting them in regard to reforming approaches to investment policies and treaties.
- Today, UNCTAD points out that “the question is not whether or not to reform [the international investment treaty regime], but about the what, how and the extent of such reform”.
- If we take a closer look at the model treaties released and agreements adopted last year, it is clear that approaches to proclaimed reforms substantively vary among countries. While several developing countries have either withdrawn from old investment treaties or are contemplating such steps, and others are finding alternatives in national laws or new models, some new treaties have been assessed to solidify the existing system.
- International lawyers, academics and civil society groups have assessed the Trans-Pacific Partnership Agreement (TPP) investment chapter as “entrenching, rather than reforming, a flawed system”¹. There is a major split between what is reflected in the TPP and the approaches adopted by developing countries rethinking standards of protection and attempting to limit their liability under ISDS.
- For example:
 - Under their new treaty models, India and Brazil adopt an ‘enterprise-based’ definition, attempting to limit the extension of protections to investments and investors that result in economic and development returns. India requires compliance with domestic laws. The TPP, on the other hand, maintains the broad ‘asset-based’ definition that covers every asset that an investor owns or controls and extends protections to investors that ‘attempt to make’ an investment, for example a potential investor who applied for a permit or license, even before making the investment;
 - In regard to fair and equitable treatment, the basis most frequently and successfully used by investors to bring ISDS claims and challenge governmental conduct, India and Brazil avoided this vague standard. However, the TPP includes language that, to a large extent, replicates that in traditional models, leaving significant leeway for arbitral tribunals to undertake an expansive interpretation, despite the clarification annex referencing CIL, which has been side-lined by arbitral tribunals in previous ISDS cases;
 - In regard to investor-state dispute settlement (ISDS), the TPP for example offers automatic consent to all disputes, does not provide for exhaustion of local remedies, extends ISDS to certain investment contracts, and does not provide new safeguards against expansive interpretation nor address arbitrators’ conduct yet. Brazil opts for avoiding ISDS and India takes a lot of the measures absent in the TPP;
 - The TPP, unlike the approaches adopted by Brazil, India, and other developing countries, extends protections to the pre-establishment phase and expands the list of prohibitions on performance requirements, which the historical record of industrialized economies indicates have been essential for industrialization and development.
- On the recurring narrative on ‘investment facilitation’, it is worth underlining that developing countries, including Brazil’s “Investment Cooperation and Facilitation Model”, have favored a flexible and ‘best-endeavor’ approach in this area, recognizing the significant differences in institutional and regulatory contexts, and potential implications of hard rules in this area on policy space to regulate².

¹ See: Lise Johnson and Lisa Sachs (November 2015), “The TPP’s Investment Chapter: Entrenching, rather than reforming, a flawed system”, Columbia Center on Sustainable Development. November 2015

² See: Report from 9th Annual Forum of Developing Country Investment Negotiators, organized by IISD, South Centre, and Government of Brazil, Rio 16-18 November 2015, Report available at: <https://www.iisd.org/event/9th-annual-forum-developing-country-investment-negotiators>, attended by over 100 participants from 48 countries.

This is significantly different from promoting disciplines on national regulatory frameworks and procedures under the ambit of 'investment facilitation'.

- It is clear that countries have taken diverse approaches to key elements in providing investment protection. Within such a context, it is very important to continue the multilateral dialogue, leaving the space for countries to pursue the approaches best fit to their development and regulatory needs. The discussions at UNCTAD have been very important and successful in moving this discussion forward, and should be continued. It is also important to enhance South-South dialogue in this area.