



**South Centre Statement to the 2<sup>nd</sup> Session of the Expert Mechanism on the Right to Development**

**11-12 November 2020**

**Fourth Thematic Study on the right to development and international investment law**

Thank you Mr. Chair.

Our comments focus on the fourth thematic study on the right to development in international investment law. We believe that foreign direct investment (FDI) can play a valuable role in supporting States in achieving the 2030 Agenda, the Sustainable Development Goals and their national development aspirations. The latest United Nations Conference on Trade and Development (UNCTAD) World Investment Report has predicted a decline in global FDI of over 40 percent due to the impact of the COVID-19 pandemic. Flows to developing countries are especially hit hard, as export-oriented and commodity-linked investments are among the most seriously affected due to this crisis.

There is an urgent need to re-orient the international investment regime to realize its full potential, including through the reform of its substantive rules and standards; as well as of the investor-State dispute resolution mechanisms embedded in international investment agreements. In particular, this requires the inclusion of development and human rights related objectives within these agreements. This reflects the reality that international investment law does not exist in a vacuum, but rather has intersections with international human rights and public international law. These objectives would be achievable only by conducting a serious discussion on the design of investment agreements, by shifting the aim of these agreements from only protecting the rights of foreign investors, to one enabling and advancing sustainable investments that add value to the developmental process of host States and the achievement of the 2030 Agenda. Currently, less than 10 percent of existing investment agreements have any reference to sustainable development or human rights.

The majority of current international investment agreements include specific 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 almost 38 claims have been filed against States every year. This has particularly impacted developing countries and their ability to operate effectively in the larger public interest. Firstly, their regulatory space has been shrinking due to the decisions taken by ISDS tribunals, as well as the threat of claims against policy measures aimed at achieving developmental goals. This situation, known as ‘regulatory chill’ has much factual basis in States’ decisions to suspend the adoption of measures adopted to control and reduce the consumption of tobacco (Phillip Morris v. Uruguay/Australia public health measures), or 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. The fear that foreign investors could use ISDS to challenge COVID-19 related public health and sanitary measures has led to several calls for a moratorium on ISDS.

Similarly, the vast sums of money that are claimed by investors and awarded by arbitration tribunals, as well as the exorbitant costs of the proceedings themselves are significant concerns. In the face of these, developing countries are confronted with the hard choice of using their limited financial resources to either pay huge amount of reparations to foreign investors or to use it 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 systems of States is also an issue of concern. Foreign investors routinely circumvent domestic courts through the use of ISDS, thereby limiting the possibility of States to review their decisions at the domestic level itself. Developing countries have been raising these concerns for years, but it is only now that developed States are also facing the brunt of this system that the need for reform has been gaining traction. Yet multilateral reform efforts seem focused on procedural issues, and substantive issues are not being given the necessary attention.

Given the high priority for developing countries to include a stronger sustainable development orientation in their incoming investments, they have sought to highlight several alternative approaches to investment agreements and the use of ISDS that would safeguard their public interests. Several States, both developing and developed, have included dispute prevention mechanisms in their investment agreements. Similarly, strengthening the legal and judicial system of States has been attested as an effective method to provide adequate protection of investors’ rights.



Other options have considered the inclusion of obligations for investors and allowing for claims to be raised by victims of human rights abuses due to the activities of investors.

Efforts to achieve coherence in this area should include 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 right to development must be paramount in any efforts to reform the international investment regime at the national and multilateral levels.

I thank you, Mr. Chair.