

Letter from Civil Society Regarding Investment Issues and UNCTAD

October 15, 2014

To:

Mukhisa Kituyi, Secretary General of the UN Conference on Trade and Development (UNCTAD)
Member States of UNCTAD

We the undersigned civil society organizations, representing constituencies from various regions of the world, write in concern about the implications of investment protection treaties on the prospects for sustainable development in our countries and regions.

Experience of both developing and developed countries has shown that the international investment protection regime, codified in a growing number of bilateral investment treaties (BITS) and investment chapters in free trade agreements, creates major impediments to sustainable development and the role of the state in protecting the public interest.

These challenges emerge out of both the imbalanced substantive provisions that these treaties set in place, as well as the problematic and expansive role of investor-state dispute settlement (ISDS). These tribunals, usually comprised of three private attorneys, are authorized to rule against public interest policies on the basis of broad foreign investor rights that surpass those afforded to domestic firms. The tribunals often order "compensation" to foreign corporations for the "expected future profits" that they believe were impeded by the challenged policies. There is no outside appeal. Many of these attorneys rotate between acting as tribunal "judges" and as the lawyers launching cases against the government on behalf of the corporations.

We have, in various fora, documented and highlighted many cases that reveal how the system encroaches on policy, regulatory and fiscal space. Through the dispute process, states' regulatory efforts in the areas of health, environment and climate change, financial stability, water, labor rights, and agriculture among other areas have been challenged, with billions of dollars of taxpayer money already awarded to corporations, and with many billions more still pending. These awards, alongside the excessive legal costs incurred by states in defending such cases, have created an increasing burden on the taxpayers of our countries. UNCTAD's monitoring of ISDS cases has made a significant contribution to the understanding of these problems. We have also been highlighting the severe implications of new trends fuelling ISDS, including third party funding and speculation over arbitral awards.

Our concerns take on a renewed importance given the ongoing negotiations on the Sustainable Development Goals (SDGs) and the post-2015 development framework. Indeed, transforming the approach toward investment rules is essential for improving the policy space in developing countries and providing the enabling environment for the pursuit of development-oriented national objectives. When geared towards the achievement of national development goals and in the right policy context, investment can be an important tool of development; yet as UNCTAD's TDR concludes "results do not support the hypothesis that BITS foster bilateral FDI."

We have welcomed the steps taken by several governments reviewing their policies on investment protection treaties, and seeking to find alternatives that do not unduly restrict the space of host governments to regulate in the public interest.

We welcome the additional light that UNCTAD's Trade and Development Report (2014) has shed onto the growing restrictions on policy space resulting from the investment protection rules. The TDR rightly highlights the need for change including through terminating or renegotiating investment treaties, and seeking alternatives in domestic laws and judicial systems.

We also welcome the ongoing efforts taken by the International Investment Agreements (IIAs) Team in UNCTAD's Investment Division to support the formulation of investment policies and treaties that truly promote development.

We urge that the primary role of the Investment Division should be to provide the invaluable service to developing countries of increasing their knowledge of the impediments resulting from the unbalanced provisions of international investment treaties and in pursuing alternatives.

We urge greater coherence in the work of UNCTAD's various divisions on these issues, through aligning their work with the long-established development perspective established over more than 30 years in UNCTAD's Trade and Development Report.

Sincerely,

Arab NGO Network for Development (ANND)
Attac Norway
Bangladesh Krishok Federation
Council of Canadians
Eastern and Southern Africa Small-Scale Farmers Forum (ESAFF) Zambia
EquityBD
Food & Water Europe
Food & Water Watch
IBON International
Labour, Health and Human Rights Development Centre
Ongd AFRICANDO
Our World is Not for Sale Network (OWINFS)
Public Citizen
The International Union of Food, Agricultural, Hotel, Restaurant, Catering,
Tobacco and Allied Workers' Associations (IUF)
Transnational Institute