



**13th Annual Forum
of Developing Country
Investment Negotiators**

3–11 September 2020 | ONLINE EVENT



**Ministry of
Foreign Affairs
of Thailand**

MEETING REPORT

**Investment
Policy-Making
During COVID-19
and Beyond**



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Day 1, Thursday, September 3, 2020

Opening Ceremony

The Forum was opened by **Mr. Cherdchai Chaivaivid** (Director General, Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand), and **Ms. Nathalie Bernasconi** (Senior Director, Economic Law and Policy, International Institute for Sustainable Development [IISD]).

Welcoming participants on behalf of the Thai government, **Mr. Chaivaivid** described the negative impact that the COVID-19 pandemic has had on investment flows, with developing countries set to face the harshest consequences. Mr. Chaivaivid noted that the measures taken by governments in response to the pandemic have also affected the implementation of existing investment projects, as well as long-term business planning, while highlighting the likely setbacks that COVID-19 will mean for financing the achievement of the Sustainable Development Goals (SDGs). He indicated that the Forum is a valuable platform for exploring what the pandemic is likely to mean for investment policy; how to channel foreign direct investment (FDI) to smaller sectors in an inclusive, sustainable way; and possible actions and strategies to pursue.

Ms. Bernasconi thanked the meeting hosts and described some of the key themes for the Forum discussions, including how the agenda had been adapted to reflect the COVID-19 context. She also explained the format, in light of the virtual platforms being used for this year's event.

Keynote and Theme Setting

Professor Muthucumaraswamy Sornarajah (Emeritus Professor, National University of Singapore) gave the keynote address, examining the impact of investment treaties in times of crisis. Taking a close look at the Argentine economic crisis of the early 2000s, the global financial crisis from 2008 to 2009, and the Arab Spring in 2010, Professor Sornarajah described examples of investment disputes that were raised in response. He noted that the likely sovereign debt defaults that some governments are due to experience as a result of COVID-19 may also lead to investment cases, as seen in Argentina and Greece in years prior, and anticipated that investor–state dispute settlement (ISDS) cases are likely to become frequent in the months and years to come. Professor Sornarajah also noted the types of arguments that could be used in defence of COVID-19 measures, namely that regulatory measures are not compensable, national security, or necessity. In addition, he set out five options that developing countries could consider. These included treaty termination, treaty suspension, withdrawal of consent to arbitration, statutory



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

suspension of claims arising from COVID-related matters, and relying on corporate social responsibility. He then outlined what future approaches could look like, such as life without treaties or how investment treaties could be better designed to avert such problems in future crises.

Session 1: Investment Policy-Making During the Global Crisis

The first session of the Forum discussed the impact of the COVID-19 pandemic on FDI and the international investment governance framework. The session was moderated by **Ms. Ajuma Patience Okala** (Deputy Director and Legal Adviser, Nigerian Investment Promotion Commission), who introduced the overall theme and outlined some of the problems that developing countries are already facing amid the threat of COVID-related ISDS cases.

Mr. Hamed El-Kady (International Investment Policy Officer, Division on Investment and Enterprise, United Nations Conference on Trade and Development [UNCTAD]) described the two overarching types of investment-related measures that governments have taken in response to the COVID-19 pandemic. The first involves the support measures that governments may otherwise provide foreign investors. The second involves public health-related measures, such as new regulations or screening mechanisms for FDI that may affect the local health sector. Mr. El-Kady then described two kinds of approaches or solutions in addressing potential challenges foreign investors might invoke against those government measures. A short-term solution would be a moratorium on COVID-19-related ISDS cases. A longer-term solution would involve tackling the root causes behind the constraints that states face in their right to regulate in the public interest, as well as tackling the existing stock of investment treaties.

Ambassador Albert Muchanga (Commissioner for Trade and Industry, African Union Commission) described the various efforts that African governments have taken to curb the spread of the virus, ranging from overall shutdowns to measures aimed at facilitating continued supplies of essential medical equipment and foods. He noted some sector-specific examples of COVID-19 measures, such as how mines have had to shut down their operations outright, as well as the growing debt burdens that governments are facing. Ambassador Muchanga then described the policy framework and action plan that the African Union has developed to support member states in their pandemic response, including ensuring the flow of essential goods and improving the skills and capacities of workers in productive sectors. Another component is ensuring that momentum toward the implementation of the African Continental Free Trade Area (AfCFTA) is not lost, despite the postponement of negotiations and trading under the AfCFTA due to the pandemic.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Ms. Chantal Ononaiwu (Trade Policy and Legal Specialist, Caribbean Community [CARICOM] Secretariat) noted that regional organizations like CARICOM can play an important role in initiating or coordinating countries' efforts to protect their COVID-19 related measures from challenge by foreign investors. Through consultative/deliberative processes, regional organizations can draw attention to the possible exposure of governments to potential COVID-19-related ISDS claims under both investment treaties and investment contracts, highlight the need for countries to determine whether they should take action to protect against such claims, and provide a forum for consideration of various options for protecting against such claims. She noted that there have been discussions within CARICOM, including at the ministerial level, on how countries can protect their COVID-19 related measures from ISDS claims. She also remarked that the level of risk that each country is exposed to, even within CARICOM, may vary, and that efforts at coordinated action should not preclude countries from undertaking the necessary risk assessments and associated protective actions. She also highlighted the important role of regional organizations in supporting broader discussions on investment treaty reform and ensuring it remains on countries' respective agendas. In this regard, she noted that in 2019, CARICOM had collaborated with UNCTAD, IISD, and the Commonwealth Secretariat to convene a CARICOM Forum on international investment agreement (IIAs), where officials generated recommendations on IIA reform.

Ms. Vilawan Mangklatanakul (Director-General, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Thailand) outlined the extreme measures that Thailand and many other countries had to take in response to the pandemic, from the closure of borders and ports to stay-at-home orders. She then referred to the overarching conversation over how to strike a balance between achieving public policy objectives and mitigating the impact of such measures on the private sector. She also described the intra-governmental coordination efforts that Thailand has undertaken to minimize the risk of COVID-19 measures being subject to investor-state disputes.

Mr. Ignacio Torterola (international lawyer) examined in further detail the Argentine economic crisis of the early 2000s and subsequent investor-state cases. He noted the size and scale of Argentina's financial collapse and the response of international organizations, while also highlighting that the Argentine case involved a situation specific to one country—unlike COVID-19, which is global in scope. He noted that the situations that are likely to prove especially challenging for states are sovereign debt defaults and breaches of contract, and that states should also be mindful that the measures they impose in response to COVID-19 are reasonable and proportional to the threat of the virus. Mr. Torterola described the importance of governments obtaining advice from government lawyers who have a strong understanding of past ISDS jurisprudence and experience in arbitration. He further noted that a joint interpretation



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

by treaty parties could be a promising response, which bears similarities to the ISDS suspension proposed by IISD.

After this initial round of interventions, each panellist was invited to make further elaborations on the exchanges.

Ambassador Muchanga outlined in further detail the various efforts that the African Union Commission has undertaken to foster discussions among governments and with experts to develop a better understanding of the potential threats that states face under their existing investment treaties. He also discussed related recommendations that the African Union Commission has presented to member states for their consideration, built around the principles of cooperation and multilateral action to mitigate ISDS risk under investment treaties. He noted that this did not extend to the risks that exist under investment laws and contracts.

Mr. Torterola said that international arbitration agreements do not preclude states from enacting legitimate regulatory measures in the public interest, to the extent that such measures are not discriminatory and are reasonable and proportional to the situation at hand. He said that states should consider these limits closely when designing their policy responses. He also said that states need to look at the possible defences that they could use when facing such arbitration, noting also the suggestions raised by Professor Sornarajah in his keynote address. Mr. Torterola outlined possible defences under customary international law, as well as those under investment treaties themselves, while reiterating that not all treaties allow for the same types of defences.

Ms. Ononaiwu echoed Mr. Torterola's point that not all treaties have the same exceptions, meaning that states may not be able to avail themselves of certain defences under particular treaties. She described some of the general exceptions included in more recent treaties, as well as security exceptions that are featured in some treaties. She noted that while such exceptions may prove useful when a state is defending itself in an ISDS case, it will not prevent a claim from being initiated in the first place. She explained further the conditions for using such exceptions as defences, highlighting these as valuable considerations for states. Referring to Mr. Torterola's suggestion of joint interpretations, she indicated that some recent treaties include clarifying language on how to use the exceptions therein. Ms. Ononaiwu also said that even in such instances, the tribunal can still determine whether a health or economic measure taken in the midst of a crisis would ultimately fall under the scope of a given exception, so states could not allow themselves to take such protections for granted.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Mr. El-Kady said that, according to an UNCTAD database, only 16% of current investment treaties have general exceptions or security exceptions, meaning that states have limited opportunities to avail themselves of such exceptions when conducting their defence. He added that the current crisis has highlighted the urgency of reforming international investment agreements, while UNCTAD plans to scale up its technical assistance and capacity-building support to developing countries, including through virtual means and the development of an “IIA reform accelerator,” involving policy documents that can help inform states’ policy actions. These documents are meant to provide states with tools, instruments, and specific drafting formulations that they can use as they seek to develop consensus positions on reform. In the interim, he recommended that states begin looking at their existing treaties, start developing a new model bilateral investment treaty, and pursue renegotiation or termination, assuming such measures are in line with their national development strategies.

Ms. Manglatanakul highlighted the ISDS risks that states face under their investment contracts, which she said is higher than the risks they face under their investment treaties. She gave related examples of how such cases could unfold.

During the plenary Q&A session, participants asked a series of questions, touching on issues such as the particular challenges that micro, small, and medium-sized enterprises (MSMEs) have experienced as a result of COVID-19; the push by some governments to privatize strategic sectors or adopt long-term investment contracts; whether newer, third-generation treaties provide sufficient defences for states in crises like these; risks that states face under national investment laws; how to identify a “high-risk” treaty; and what states that are still party to older treaties without general exceptions and security exceptions can do to defend themselves. Panellists noted that some of the newer treaties remain relatively untested when it comes to using their exceptions as part of a state’s defence, as well as the need to review past ISDS jurisprudence and the defences available under customary international law when dealing with cases being raised under older treaties. They added that since arbitral outcomes are unpredictable, even in the best-case scenario, states need to go beyond considering tweaks in treaty language. Panellists also examined some examples of relevant jurisprudence in further depth in their responses. On the issue of national investment laws, they noted that reform of such legislation should be conducted in parallel to the reform of international investment agreements. Panellists noted that some of the more recent free trade agreements have provisions that are specific to MSME needs or could be used to support them implicitly.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Day 2, Friday, September 4, 2020

Breakout Session 1: Sharing of Country Experiences on COVID-19-Related Policy Responses

This breakout session was split into five groups, by language preference. The morning discussion for English-language speakers was moderated by **Ms. Sarah Brewin** (International Law Advisor, IISD). The morning discussion for French-language speakers was moderated by **Ms. Bernasconi**. The afternoon discussions for English, Spanish, and French speakers were moderated by **Ms. Brewin, Mr. Daniel Uribe** (Programme Officer, South Centre), and **Ms. Soledad Leal Campos** (Senior Policy Advisor, IISD), respectively.

Participants in the breakout groups discussed the types of measures that their governments had adopted in response to COVID-19 that may affect foreign investors, as well as whether they felt some of these measures could face an ISDS challenge. They reviewed which economic sectors had traditionally faced ISDS challenges before COVID-19, and whether different sectors may face such claims in the wake of the pandemic. It was noted that COVID-19-related ISDS claims may have shifted from sectors traditionally more prone to ISDS challenges, such as mining, oil, and gas, to other sectors like transport, hospitality, and tourism, which have been badly affected by the pandemic. Participants considered whether the risk of such ISDS claims had increased as a result of the pandemic, and whether a suspension of ISDS for COVID-19 related measures would be a useful way forward. They also reviewed how such a suspension would be implemented and what other options might be available. It was further noted that the risks are not only found in treaties, and indeed some countries were more concerned about the potential for claims to come under their international investment contracts or laws. In this regard, it is important for governments to identify COVID-related ISDS risks resulting not only from investment treaties, but also from contracts and domestic laws, and to develop coherent solutions to address all sources of ISDS claims.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Day 3, Monday, September 7, 2020

Session 2: Recovery for a Sustainable and Resilient Future

The second session took an in-depth look at how investment law and policy can support the recovery from COVID-19, as well as some of the challenges that lie ahead in ensuring that such efforts keep sustainable development considerations at their core. It was moderated by **Mr. Makane Moïse Mbengue** (Professor of International Law, Faculty of Law, University of Geneva), who introduced the session with some reflections on the need to better integrate global health governance frameworks with investment-related frameworks and considerations, and vice versa. He also highlighted that while the COVID context is new, the need for sustainable development to be the main driver of investment policy-making has been a constant theme throughout all of the Annual Forums of Developing Country Investment Negotiators.

Ms. Opeyemi Abebe (Adviser and Head of Trade Competitiveness, Trade Division, Commonwealth Secretariat) described the difficult economic climate caused by COVID-19, with international organizations forecasting recessions and FDI flows dropping, especially in developing countries. Noting the increasing protectionist and anti-globalization sentiments being expressed by some in the developed world, she stressed that the development of and participation in regional value chains might be a productive way forward for developing countries as they seek to jumpstart their economies. Attracting investment will also be critical in the recovery, and therefore ensuring that the necessary incentives are in place will be vital.

Ms. Jane Kelsey (Professor of Law, Faculty of Law, University of Auckland) highlighted the importance of distinguishing between immediate responses and longer-term approaches to rebuilding economies and societies. She referred to some of the tracking efforts underway by some institutions, such as the World Trade Organization, to compile the measures that countries are taking in response to COVID-19, some of which affect investment. She described examples from developed countries, such as revising thresholds for foreign investment screening, imposing performance requirements, and setting other conditions on FDI. Ms. Kelsey further noted that although many of these could be questionable in terms of their legality under the prevailing international rules on trade and investment, capital-exporting states are ignoring these—as they had during the global financial crisis—and the current regime of international investment agreements is ill-equipped to handle this challenge.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Mr. Faizel Ismail (Director, Nelson Mandela School of Public Governance, University of Cape Town) outlined how African governments have responded to the health crisis posed by COVID-19, especially given how many people work in the informal sector and the large share of the population that lives in urban slums. He also noted that health infrastructure is generally limited in the African continent. Despite these hurdles, he said that African governments have been able to respond effectively to the COVID-19 crisis, taking quick action to implement health protocols. There have also been significant efforts on behalf of public health experts from the Africa Centres for Disease Control and Prevention (CDC) to build local capacity. On the economic side, however, there are worrisome indications of negative growth rates and a forthcoming recession, coupled with an overdependence on commodity exports and the imposition of export restrictions by many developed economies on pharmaceuticals. Mr. Ismail highlighted the importance of building productive capacity within the continent and reducing dependence on imports from developed economies in key sectors.

Mr. Kamalinne Pinitpuvadol (Legal Expert, Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand) provided insights into the experiences of the Association of Southeast Asian Nations (ASEAN) amid various parallel developments, from the COVID-19 crisis to China's investments in transportation and other infrastructure in the region to the continued trade tensions between the United States and China. The pandemic is likely to have an increasingly severe impact on FDI in the region, he said, while describing some of the meetings that ASEAN member states have already held to assess how to improve supply chain connectivity and mitigate the economic impact on MSMEs. He also referred to discussions on potential stimulus measures and ways to draw in investments.

Mr. Daniel Uribe (Programme Officer, South Centre) said that the COVID-19 pandemic provided an important reminder of the need for rethinking how the current system works. Governments and other stakeholders must also consider how to ensure that FDI supports developing countries' efforts at creating more sustainable, inclusive economies. In so doing, countries would need to consider balancing national development strategies with FDI liberalization, as well as strengthening crucial domestic industries and ensuring their resilience. The role of FDI in fostering innovation and supporting the establishment of regional and local supply chains for producing critical goods must be considered. Mr. Uribe also noted that FDI could be used to support technology "clusters," which can in turn enable the production of locally strategic supplies. He then discussed the delicate balance between promoting more resilient, responsible investment and ensuring certain key investor obligations are included and respected.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

There was then a second round of interventions by the panellists, starting with **Mr. Pinitpuvadol**. He stressed that efforts toward boosting FDI might not necessarily be supportive of sustainable development, while describing the role that investment promotion agencies could play to mitigate this risk. He gave a few specific examples to illustrate that point, such as efforts by his government to encourage rapid investment into medical technologies, along with the work being undertaken to ensure that human rights and other core considerations from the SDGs are embedded in Thailand's recovery strategy.

Mr. Ismail reiterated the cooperative efforts by the Africa CDC and the African Union to create a protocol for procurement of health-related goods, turning then to the implementation of Phase One of the AfCFTA and the development of an investment protocol in Phase Two. The AfCFTA should not focus solely on market liberalization but also have sustainable development as a top priority. One key issue is to ensure that African economies are less dependent on commodity exports and diversify further, while also work toward ensuring value addition in production processes. Another is to build productive capacity in pharmaceuticals and other health products. Developing regional value chains further in the continent will be vital for improving food security, especially given the export restrictions that some countries have imposed on key agricultural goods. Future agreements with major developed country partners must also be designed so that African countries retain the policy space to industrialize and to do so sustainably.

Mr. Uribe then referred to the Joint Statement Initiative on Investment Facilitation that is being negotiated by a group of WTO Members, stating that this effort must learn from the problems of the IIA regime. Should such an initiative go forward, it will be important to ensure flexibility in the implementation of investment facilitation measures, taking into account the challenges countries may face as a result of the COVID-19 crisis, the digital divide, varying levels of economic development, or other factors. Also important will be the need to foster linkages between foreign and domestic industries, such as through knowledge transfer or exchange of experiences. Mr. Uribe said that the differences between investment facilitation and investment promotion must be acknowledged, and that states will need to take a whole-of-government approach to ensure that their investment policy strategies are cohesive and coherent. Developing states will also need to retain the policy space to protect some of their strategic sectors, given that the proposed WTO agreement does not currently distinguish between economic sectors.

Ms. Kelsey highlighted the need for a new model for South–South cooperation and regional initiatives, not only because of COVID-19 but also as the result of long-standing challenges such as technology deficits and debt burdens. These pressures can severely hamper initiatives focused on innovation and development. A new framework has to involve a rethinking of how the 21st century approaches development. While technologies will be crucial to that effort, it cannot be in a



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

way that allows the big technological companies to maintain their data, platform, and supply chain dominance. There is a need for an alternative agenda for development. Moreover, developing countries must resist the push to adopt the other new agendas that are currently being proposed, whether in the WTO or free trade agreement (FTA) context. It is also crucial to revisit the rules that are preventing progress toward this alternative agenda.

Ms. Abebe described several considerations that developing countries should keep in mind when involved in economic partnership negotiations with developed country partners. This included the need to decouple trade negotiations from investment negotiations; the need to ensure that the right to regulate is preserved in both types of negotiations, not solely as a defense from ISDS claims but as a fundamental right; and the need to develop national and regional model treaty texts that can clarify developing countries' respective objectives, including on sustainable development, while enabling them to negotiate more effectively. On the substance of these agreements, developing countries should avoid taking on board any performance requirements beyond what is included under the WTO agreements; focus on investor obligations, which should cover human rights, environmental issues, and labour, among other issues, and are justiciable; and ensure that these agreements avoid pre-establishment national treatment.

During the plenary discussions, participants discussed the challenges that emerge when negotiating agreements with trade and investment components, given the trade-offs often sought by negotiating partners; the importance of understanding the strategies being developed by capital-exporting countries; the challenge of FDI to Africa being currently aimed at exporting raw materials rather than value-addition activities; and the importance of regional solidarity in negotiating processes with other partners. Other issues included were the role of civil society in international policy processes, along with the challenges and opportunities that COVID-19 has created for civil society and public participation, given the increasingly virtual nature of communication. Participants also considered the role of investment promotion agencies in supporting the COVID-19 recovery in a sustainable way, how to integrate technology transfer into free trade agreements and other arrangements, and the need for investment negotiators to keep an eye on developments in other policy areas, such as e-commerce or trade in services. Overall, ensuring that investments are responsible and of high quality is key to a sustainable COVID-19 recovery.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Day 4, Tuesday, September 8, 2020

Breakout Session 2: Understanding the Joint Initiative on Investment Facilitation and Its Relationship to Investment for Sustainable Development

This breakout session was split into five groups, by language preference. The morning discussion for English-language speakers was moderated by **Mr. Joe Zhang** (Senior Law Advisor, IISD). The morning discussion for French-language speakers was moderated by **Ms. Leal Campos**. The afternoon discussions for English, Spanish, and French speakers were moderated by **Mr. Zhang**, **Ms. Leal Campos**, and **Ms. Stefanie Schacherer** (Associate, IISD), respectively.

Participants in the breakout groups discussed whether FDI had contributed to sustainable development in their respective countries, and if so, how much, along with whether their views on the matter had changed as a result of COVID-19. Noting the visible trend in many parts of the world where governments have shifted their FDI governance from a protection-oriented approach to one prioritizing investment facilitation, participants discussed the proposed provisions under consideration by some WTO Members under the Joint Statement Initiative on Investment Facilitation and whether such measures are central to investment facilitation. Participants also considered what issues, if any, should be covered under a binding investment facilitation framework. Many of the participants noted that discussions and negotiations on investment facilitation frameworks should take into account the sustainable development objectives countries have for FDI, governments' capacities in making informed decisions, as well as their different levels of development, and should ensure flexibility in implementation for developing countries. Lastly, participants discussed what characteristics of quality investment support sustainable development and how investment agreements could be used to promote investment with such characteristics.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Day 5, Wednesday, September 9, 2020

Session 3: Developing a Multilateral Framework for Settling Investment-Related Disputes

The third session took an in-depth look at the deliberations underway at the United Nations Commission on International Trade Law (UNCITRAL) within Working Group III (WGIII), which is focusing on multilateral ISDS reform. The session was moderated by **Ms. Andrea Laura Mackielo** (Second Secretary, Argentine Mission to the European Union).

Ms. Taylor St John (Lecturer, University of St. Andrews) gave an overview of how the WGIII discussions have evolved and where they stand to date. She noted that there is clearly consensus for undertaking ISDS reforms, but different countries have different reform priorities. She also outlined three overarching camps of reform: (i) a group interested in replacing ISDS with a permanent court of first instance and appellate body, (ii) a group interested in curbing the worst abuses or excesses of ISDS, such as third-party funding, but otherwise keeping the existing system, and (iii) a group pushing for a wider discussion on the purposes that investment treaties should serve and whether to do away with ISDS or rethink how it deals with human rights or obligations on corporations and local communities. The lines separating those groups are now becoming blurred, and she suggested that there will likely be multiple reform outcomes should the process be successful. In that vein, Ms. St John noted that states are unlikely to have one endpoint that they converge on, but rather a plurality of approaches.

Ms. Kekeletso Mashigo (Director Legal: International Trade, Investment, Dispute Settlement; Trade Policy, Negotiations & Cooperation Branch; Department of Trade, Industry and Competition [DTIC], South Africa) set out some of the ideas that South Africa is suggesting in the UNCITRAL process for consideration either individually or collectively. The focus is on finding a balanced, acceptable, and workable solution to investment disputes, including through dispute prevention and alternative dispute resolution. She also raised the need for strengthening domestic legal systems, both unilaterally and through treaties, along with the importance of exhausting local remedies before proceeding to ISDS. Other options raised by South Africa involve state-state dispute settlement and risk insurance for protecting investors.

Ms. Kanawan Waitayagitumjon (Third Secretary, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Thailand) outlined the potential support that an advisory centre on international investment law could provide, drawing from the experience of the existing Advisory Centre on WTO Law (ACWL). She suggested that a permanent body like this could be



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

a source of impartial, neutral advice for developing countries, drawing its insights from existing jurisprudence. It could also be a platform for exchanging know-how on dispute prevention and providing preliminary risk assessments in the early stages of a dispute. The design of the centre is important for ensuring that its recommendations do not run counter to developing country interests.

Mr. Jonathan Bonnitcha (Senior Lecturer in Law, University of New South Wales, and IISD Associate) noted that the procedural focus of the UNCITRAL WGIII discussion means that this work is very technical in nature, and that the reforms may not be able to encompass some of the biggest challenges inherent in the ISDS system. Having such a forum for states to debate multilateral reform options and set the agenda does have value in its own right. This work should not detract from the need for in-depth discussions at the domestic level over whether such treaties are needed at all; rather, negotiators need to make the link between some of the technical issues under discussion at UNCITRAL, such as arbitrator codes of conduct, and the rationale for these agreements in the first place. He gave the example of security for costs, which is the subject of a 2019 paper by IISD, that demonstrates some of the asymmetries built into the current ISDS system. With the parallel risk in third-party funding, states are finding it increasingly difficult to win in investor–state arbitration. Compensation and damages are another issue with major implications for states, especially with awards amounting to hundreds of millions or even billions of U.S. dollars.

Ms. Ana María Ordóñez Puentes (Director of International Legal Defense, National State Legal Defense Agency, Colombia) said that while the mandate of UNCITRAL WGIII is very narrow, given its focus on procedural issues, these same small details can make a significant difference in actual ISDS cases. Some substantive issues have also been brought into the reform discussions, despite the limitations of the existing UNCITRAL WGIII mandate. One example she gave involved how arbitrators apply public international law, given that international investment law is not a self-contained regime in its own right. Other issues that have both procedural and substantive elements include third-party funding, counterclaims, and damages.

The second round of interventions began with **Ms. St John**, who presented a recent analysis she undertook with Anthea Roberts of the reform options on the table and how to present these in a type of “mental map,” which could in turn facilitate states’ deliberations. Their mental map took the form of a “flexible framework” that would be adaptable over time, with the outer circle involving a skeleton framework around which protocols could be inserted. An inner circle would involve a type of forum where states could convene and discuss common concerns. The middle circle would then involve specific protocols, such as an appellate mechanism, or rules about damages, or third-party funding, to name a few examples. States would also need to consider



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

whether minimum standards are needed as a sort of baseline outcome from this multilateral process. She also noted that multilateral forums like WGIII provide valuable opportunities for states to form like-minded coalitions, which should not be ignored.

Ms. Ordóñez Puentes described Colombia's proposed approach for the WGIII outcome, which would involve a multilateral convention with a series of core provisions, or minimum standards, that would serve as a baseline. States could then choose from a menu of measures, even a multilateral investment court, as they see fit. Among the minimum standards that Colombia would like to see addressed are a code of conduct for arbitrators, third-party funding, counterclaims, and a provision that sets out international investment disputes as an exceptional mechanism for dispute resolution.

Ms. Waitayagitgumjon outlined Thailand's suggestion of establishing an advisory centre on international investment law, along with the possibility of developing a permanent multilateral mechanism paired with non-structural reform options. Among these latter options would be the use of alternative dispute resolution, independence and impartiality of arbitrators, and third-party funding. She noted that structural and non-structural reform options can be complements to one another and suggested that a multilateral instrument could allow flexibility for states to choose the reform options that suit them best.

Ms. Mashigo also described the value of flexibility in whatever emerges from UNCITRAL WGIII, as well as the overlap and complementarity of some issues under discussion. She also said that a comprehensive approach would require further resources, given that the current agenda is very expensive. More time for discussion would be beneficial.

Mr. Bonnitcha noted that the narrow focus of the UNCITRAL WGIII mandate on procedural issues has not aged well in light of the current pandemic, prompting larger questions over whether the overall system is still needed and why. More crises are sure to come, while past crises have shown that ISDS cases are highly likely in these scenarios. States will need to consider whether they can continue with a system that allows for such large awards, which in some cases amount to billions of U.S. dollars. He described some of the options under discussion, such as cost-shifting orders, in response to this issue. Mr. Bonnitcha concluded by referring to the opportunity that such multilateral forums provide for building coalitions for action, even if that action ultimately takes place at the domestic or regional level among like-minded states.

During the plenary discussions, participants discussed the considerations that states should keep in mind when developing a roster for a future appellate body or multilateral investment court, such as inclusiveness and transparency. They also examined how unsuccessful states have been in addressing counterclaims and the related issue of investor consent, as well as who should have access to an advisory centre on investment law.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Day 6, Thursday, September 10, 2020

Breakout Session 3: Strategizing for the Next UNCITRAL WGIII Session

This breakout session was split into five groups, by language preference. The morning discussion for English-language speakers was moderated by **Ms. Nyaguthii Maina** (International Law Advisor, Agriculture and Investment, ELP Program, IISD). The morning discussion for French-language speakers was moderated by **Ms. Bernasconi**. The afternoon discussions for English, Spanish, and French speakers were moderated by **Ms. Maina**, **Mr. Uribe**, and **Ms. Bernasconi**, respectively.

Participants in the breakout groups discussed the reform options under consideration at UNCITRAL WGIII and which ones are priorities for their respective governments. Noting that ISDS is an exceptional privilege afforded to foreign investors, many participants emphasized that it should be treated as an exception, rather than the rule. Some participants also expressed the interest of their governments in using WGIII as an opportunity to make comprehensive reforms on ISDS and ensure that it contributes to sustainable development. In this context, participants acknowledged that states will need to be bold in submitting new ideas. Participants then examined which issues or options they would like to add to the existing UNCITRAL list. Lastly, they considered how best to share the lessons learned from the Forum discussions with their capital-based colleagues.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Day 7, Friday, September 11, 2020

Session 4: Identifying Ways Forward Post-Crisis for Investment Policy-Makers and Negotiators

The fourth session was devoted to reviewing the ideas raised during the Forum discussions, as well as to considering options for the road ahead. Following an introduction by **Ms. Bernasconi**, the session was moderated by **Mr. Howard Mann** (Senior International Law Advisor, IISD).

Ms. Brewin provided a summary of the first plenary and breakout session on COVID-19 measures that could be subject to ISDS claims, including health and economic measures. She noted the history of past crises and the associated spike in ISDS claims, and how the COVID-19 crisis is affecting both capital-importing and capital-exporting states given the pandemic's global reach. Ms. Brewin outlined the various possible responses that Forum participants discussed, including a multilateral response, as well as the potential role that regional economic communities could play in helping states. She also referred to the importance of investment officials and government lawyers in advising policy-makers on the risk of ISDS challenges to COVID-19 measures, as well as options for defending such measures. In the short term, suspending ISDS, amending national laws that provide for ISDS, or taking action at regional and national levels could be a productive way forward. States also need to consider the longer-term response, such as addressing their old stock of treaties, as well as multilateral approaches to protect COVID-19 measures from ISDS claims. She added that participants also reviewed the possibility of combining different responses, pursuing multiple approaches in parallel. Pursuing diplomatic options, as well as legal ones, could also lead to promising results. Lastly, she said that participants highlighted that the right to regulate is a fundamental right of sovereign states under customary international law, and states need to be prepared to reassert that right.

Following Ms. Brewin's summary, participants then discussed the need for greater awareness of these risks, as well as the value of having regional and international platforms for discussing such issues. Some referred to their work in examining all of their existing bilateral investment treaties to determine their preferred approach. They also reaffirmed the state's sovereign right to regulate under customary international law and the need to both exercise that right and recapture it while redefining development objectives for the future.

Mr. Zhang provided a summary of the second plenary on a sustainable, resilient economy and associated breakout group discussions. He outlined the range in views among participants over whether FDI had supported sustainable development, even if FDI had made positive



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

contributions to their economies overall. Another takeaway that he highlighted was the need for a transformation of the current international investment governance framework, which could ensure developing countries retain their policy space, build solidarity among themselves when negotiating in international forums and elsewhere, and support countries as they renegotiate agreements that are no longer suited to the current landscape. He also recounted participants' emphasis on quality investment for achieving sustainable development, not just its quantity. Mr. Zhang described the transition underway from investment protection to investment facilitation, including the discussions among some WTO Members regarding a binding multilateral framework for investment facilitation (MFIF), as well as the concerns that some countries have regarding this initiative.

Following Mr. Zhang's summary, participants then described some of their national experiences in terms of incorporating sustainable development considerations into investment laws, along with the concerns that some had of an increasingly fragmented regime for international investment governance. Regarding investment facilitation, some participants asked whether the WTO was the appropriate forum for such a framework.

Ms. Maina provided a summary of the third plenary on multilateral ISDS reform at UNCITRAL and associated breakout group discussions. Some of the issues that were referred to repeatedly in the breakout session were compensation, third-party funding, and the exhaustion of local remedies. Some participants suggested that proposals in these areas could be even more ambitious, such as by suggesting new approaches to calculating damages. Reforms under UNCITRAL should also be paired with reforms at the domestic and regional levels. States can also continue their efforts to terminate or renegotiate old treaties, if they so choose.

Following Ms. Maina's summary, participants discussed the option of an interregional body that could help coordinate states as they prepare their UNCITRAL strategies. Other participants also encouraged colleagues to comment on possible reforms being put forward, along with the need to raise the profile of ISDS reform given the various competing priorities that governments and regions are juggling. The value of regional groupings and processes for discussing reform options and issues was also raised.



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Reflecting on the exchanges that took place over the course of the entire Forum, participants then discussed and developed the following list of reform options and actions that could serve as next steps for their respective governments or organizations:

- Developing and identifying alternative forums for resolving investment-related dispute settlement other than investor–state arbitration
- Approaching treaty partners to suspend ISDS for COVID-19 measures
- Reviewing and potentially terminating or renegotiating old treaty stock
 - E.g., Replacing with FTAs with investment chapters, developing joint interpretations for existing treaties
- Developing written submissions to UNCITRAL on a key issue of concern
 - E.g., Damages and counterclaims. If not at UNCITRAL, consider other options with like-minded countries.
- Developing a joint submission to UNCITRAL among like-minded countries
- Getting more actively involved in UNCITRAL Working Group III discussions
- Increasing understanding and actively getting more involved in the MFIF discussions
- Engaging government at various levels (e.g., networks of Attorneys General, political decision-makers)
- Setting up an “International Network of Regional Organizations from the Developing World Toward Sustainable Investment Policies”
- Developing coherent national or regional policy and governance frameworks to regulate investment
- Developing dispute prevention or de-escalation (e.g., ombudsman)
- Fostering post-reform action (collective strategies and solidarity, national and regional space, instruments beyond investment agreements [national, domestic investment laws and policies; contracts])



13th Annual Forum of Developing Country Investment Negotiators

3–11 September 2020 | ONLINE EVENT



Ministry of
Foreign Affairs
of Thailand

Announcing the 14th Annual Forum

Ms. Bernasconi introduced **Ms. Yewande Sadiku** (Executive Secretary/CEO, Nigerian Investment Promotion Commission), who announced that the 14th Annual Forum of Developing Country Investment Negotiators would be hosted by Nigeria. The current intention of the hosts is to have an in-person Forum in 2021, if conditions allow.

Closing Ceremony

Ms. Bernasconi closed the Forum with thanks to the Thai government as host, all of the Forum participants, the IISD team supporting the event, the interpreters, the Trade and Investment Advocacy Fund (TAF2+), as well as UNCTAD, the South Centre, and the Commonwealth Secretariat as Forum partners.

©2020 The International Institute for Sustainable Development
Published by the International Institute for Sustainable Development

Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700

Website: www.iisd.org

Twitter: [@IISD_news](https://twitter.com/IISD_news)



iisd.org