

7th Annual Forum of Developing Country Investment Negotiators

Jakarta, Indonesia | 4-6 November 2013

Executive Summary

The Seventh Annual Forum of Developing Country Investment Negotiators (“the Forum”), held in Jakarta, Indonesia, from November 4 to 6, 2013, was attended by 104 participants from 56 countries, as well as international organizations. The Forum was co-hosted by the Government of Indonesia, the International Institute for Sustainable Development (IISD) and the South Centre.

In keeping with this year’s theme “Investment Treaties and Investor-State Dispute Settlement: Reform or Reject,” the Forum provided a platform to address the challenges posed by investor-State dispute settlement (ISDS) for developing countries, as well as potential responses.

The Forum was divided into seven sessions and covered the following topics: an overview of ISDS in the context of international investment law and policy; recent developments and trends in ISDS; critical issues in the current ISDS model; steps that States are taking to address the challenges arising from ISDS; alternatives and options for reform; and finally, the recommendations for the way ahead for developing countries.

The participants first discussed recent economic studies regarding the potential benefits and costs of investment protection provided in treaties, including ISDS. They concluded that these have failed to show a correlation with the increase of investment flows, casting doubt on the rationale for States to commit to them. They also noted the significant risks inherent to ISDS for host countries, particularly developing host countries. Among other things, participants pointed to the increasingly high damages claims, often amounting to hundreds of millions and even billions of dollars. The resulting awards and the high cost of ISDS proceedings, including important legal counsel and arbitrator fees, were identified as posing significant budgetary threats for many developing countries.

It was also noted that arbitrators were inclined to interpret the substantive provisions and the scope of ISDS expansively, sometimes much beyond the expected areas that were intended to be covered by States. In this regard, it was said that arbitrators, instead of interpreting treaty provisions, were “creating” law in the absence of any effective oversight. Arbitrators’ multiple roles, conflicts of interest, and the predominance of a few elite arbitrators were identified as especially worrisome.

It was noted that arbitral awards lacked consistency and predictability, as arbitrators had diverged on key areas of legal interpretation. This problem was exacerbated by the fact that correctness in law in arbitral awards was not reviewable, which substantially impaired accountability in the ISDS system. Also, there was a lack of an institutional structure to ensure fairness, openness and consistency.

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Another issue of concern was that generally applicable regulatory measures of public interests had been challenged under ISDS proceedings, causing significant constraint on States' right to regulate in the public interest. It was noted that this, in combination with the unpredictability of arbitral awards, was leading to a 'chilling' effect on States' regulatory power. Some participants noted that the shortcomings of ISDS are grounded in the misappropriation of commercial arbitration procedures to the resolution of public law-related disputes.

After identifying shortcomings of ISDS, the participants went on to highlight the major constraints that developing countries were encountering today, including a lack of sufficient political awareness of the risks arising from ISDS as well as technical expertise to negotiate treaties and tackle ISDS cases. Financial resources to defend were also in shortage in many developing countries. Additionally, the overlapping obligations and dispute settlement mechanisms at different jurisdictional levels (supranational, national or regional) made it difficult for developing countries to manage the different criteria required at the various levels.

During the breakout sessions, the participants proposed several recommendations to react to the risks and challenges of ISDS, notably:

- The participants saw an imminent need to **strengthen the capacity of** developing country investment treaty negotiators, particularly on technical issues. The need to promote **political awareness was also emphasized**, especially at the highest political level. The participants noted that it was important for governments to seek both short-term and long-term solutions, and establish good **internal coordination** to address challenges. Participants also agreed on the need to strengthen **regional cooperation and consensus-building**.
- The participants noted that subjecting **domestic judicial decisions** to the review of investment tribunals should be precluded. **Counterclaims** and **investors' obligations** should be included in treaties in order to strike a better balance between investor rights and obligations. The participants stressed that arbitrators, when interpreting investment treaties, should also take into account **other areas of international law**, e.g., relating to the protection of the environment and human rights. Furthermore, it was largely agreed that **exhaustion of local remedies** should be required prior to commencing ISDS. Finally, it was noted that the **cost** of dispute settlement should decrease.
- The participants considered the option of establishing an independent, impartial and neutral **appeals process** for which the WTO Appellate Body could serve as a point of reference. The WTO Appellate Body, according to the participants, was valuable as a means to improve consistency and predictability, reviewing errors in law, being immune from ill-suited business incentives and less costly, etc. More specifically, the participants expressed a preference for establishing an appeals body at the regional level which could also foster regional collaboration.
- In order to improve arbitrators' accountability, the participants agreed on the need to create an **arbitrator roster**, whose membership should reflect geographical diversity, and onto which arbitrators would be appointed based on expertise and

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impartiality. To develop a binding **code of conduct for arbitrator** was also viewed as necessary.

- Participants suggested exploring **innovative models of investment treaties**, in order to shift away from a “protection and lawyer-arbitrator-business” model to an approach that focused on the real considerations of investors in making investment decisions, such as investment facilitation and promotion.
- Many participants stressed that it was critical to further explore **alternatives to the current model of investment arbitration**, which several countries were already beginning to introduce and put into practice. This discussion included the option of using **domestic laws and remedies** and improving these; rejecting treaty-based investment arbitration and using **contract-based arbitration** instead; and further developing and enhancing the use of **alternative dispute resolution (ADR)**.

At the end of the Forum, the participants considered the discussion to be fruitful and beneficial. The participants saw a continuing role for the Forum with respect to information sharing and raising concerns of developing country investment negotiators. In addition, the Forum was regarded as valuable in terms of building consensus among developing countries.

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Meeting Report:

Investment Treaties and Investor-State Dispute Settlement: Reform or Reject?

The Seventh Annual Forum of Developing Country Investment Negotiators (“the Forum”) was held in Jakarta, Indonesia, from November 4 to 6, 2013. It was co-organized by the Government of Indonesia, the International Institute for Sustainable Development (IISD) and the South Centre. This year’s Forum was attended by 104 participants from 56 countries from Asia, Africa and Latin America and the Caribbean, as well as international organizations, including the United Nations Conference on Trade and Development (UNCTAD), the Association of Southeast Asian Nations (ASEAN), the Commonwealth Secretariat (COMSEC), the Office of the Chief Trade Adviser for Forum Island Countries (OCTAPIC), the UN Economic Development and Globalization Division (ESCWA), and the Caribbean Community and Common Market (CARICOM). The agenda, presentations, and background materials for the Forum can be found on the IISD website: www.iisd.org.

The Forum builds upon the successes of the six previous forums held in Singapore (2007), Morocco (2008), Ecuador (2009), India (2010), Uganda (2011), and Trinidad and Tobago (2012). This year the Forum was aimed at identifying the challenges arising from investor-State dispute settlement (ISDS) and exploring solutions to the issues faced by countries today.

Open Ceremony and Welcome

The participants at the Forum were welcomed by **Ms. Nathalie Bernasconi-Osterwalder**, Senior International Law Advisor and Program Leader, Investment and Sustainable Development Program, IISD. She emphasized that the meeting would be conducted under the Chatham House Rules, that is, the information and views expressed at the Forum would not be attributed to any person or government. The summaries of the presentations, however, are reprinted in this report and attributed, unless speakers explicitly requested that their contributions not be included.

Ms. Bernasconi thanked her co-organizers, the Government of Indonesia and the South Centre. She mentioned that, as a result of the discussion of last year’s Forum, it was decided for this year to focus on investor-State dispute settlement. Ms. Bernasconi noted that countries across the globe are expressing their discontent and concerns about the current dispute settlement system in the area of investment. She emphasized that it is no longer possible to ignore the shortcomings of today’s system of investor-State arbitration, especially for developing countries. Therefore, the main topic of the Forum will be to discuss alternatives to and options for reform of the current model for the settlement of investment disputes.

Mr. Martin Khor, Executive Director, South Centre, explained that the system of arbitration has come under heavy criticism due to significant flaws and problematic provisions. ISDS provides a powerful system for the enforcement of arbitrators’ interpretations of host country obligations from BITS. Arbitration panels have awarded private investors enormous financial

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compensation for claimed losses. If the payment is not made, the award can potentially be enforced through the seizure of assets of the government that has been sued. The most disgraceful cases have been those where compensation have been awarded against actions of governments exercising their public interest responsibilities. Signing a BIT in order to protect a country's own companies investing abroad would be mainly in the private interest of those companies, since any compensation awarded would come to them, not to the home government. Instead of sacrificing the broad domestic public interest as a justification for BIT obligations, governments could advise companies investing abroad to undertake due diligence and take out political risk insurance. Mr. Khor said that the risks and potential costs could outweigh the benefits, and that countries are attempting to renegotiate or withdraw from existing BITs, and that other countries could follow suit if they concluded that their BITs are inappropriate and pose serious risks. In his view, dealing with the survival clause is a challenge, but renewing the BITs for another period would prolong the time that countries have to bear the risks.

The official opening of the Forum was conducted by **Ms. H.E. Linggawaty Hakim**, Director General, Ministry of Foreign Affairs, Government of Indonesia. She expressed gratitude to the co-organizers, IISD and South Centre. She said the Forum was very important in the sense of strengthening South-South cooperation, which is also one of Indonesia's foreign policies. She further noted that given that more than 3,000 investment treaties, primarily following the pro-investor approach, existed today, developing countries were facing high risks. She pointed to a backlash among States against investment treaties that was emerging as a new trend in the wake of a significant number of ISDS claims against States. She pointed out that so far five cases have been filed against Indonesia, costing the Indonesian government enormous resources to defend against. She said protecting investment was important, but should be conducted in a balanced manner, and therefore Indonesia was now undertaking a review of its existing investment treaties and policy. She looked forward to the Forum, noting that it could generate recommendations on investment negotiations and wished successful discussions.

Session 1: Investor-State Arbitration in the Overall Context of International Investment Law and Policy

This session was chaired by **Mr. Martin Khor**, Executive Director, South Centre.

Placing Investor-State Arbitration in the Overall Context of International Investment Law and Policy

The first speaker in the session was **Prof. Muthucumaraswamy Sornarajah**, CJ Koh Professor of Law, National University of Singapore. He spoke about the relationship between investment treaties and the promotion of foreign direct investment (FDI). He said the *raison d'être* of investment treaties was to have an enforcement mechanism through dispute settlement, which could secure increased flows of foreign investment as necessary for economic development. However, he noted that recent economic studies showed no clear correlation between the existence of investment arbitration under treaties and the flows of foreign

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investment, and that investor-State arbitration was being questioned due to the many excesses committed by arbitration tribunals. For instance, he pointed to the fact that arbitrators play a leading role in the decisions and control the arbitration, and that it was the interpretation of the treaties given by arbitrators that was becoming the law. As a consequence, the balance is being decided by arbitrators—not negotiators—in a context where international rules are difficult to agree and developed countries would dominate because of the power they have in drafting those rules.

Thus, **Prof. Sornarajah** said there was increased support for referring to arbitration under contracts rather than treaties and to the settlement of disputes under domestic law. He noted that, although commercial arbitration and arbitration under contracts also have their flaws, the contract could be customized to suit the parties, with adequate types of clauses ensuring a balance, and that there was always a possibility to review or renegotiate where a contract was causing public hazards to countries.

Investment Protection Treaties and Host States: A practical cost-benefit approach

The second speaker in this session was **Mr. Lauge Poulsen** of Nuffield College, University of Oxford and University of London, School of Oriental and African Studies. He spoke about the costs and benefits of an investment treaty for a host State. Mr. Poulsen said the primary argument in favour of investment treaties was their supposed economic benefits to host States by their ability to reduce political risk for foreign investors. He explained that investor surveys indicated that although any investor would like investment treaties, very few seem to consider the treaties when making investment decisions. Similarly, with just few exceptions, public and private political risk insurers do not consider whether the host countries have BITs in force when underwriting investment projects to those countries. Thus, although BITs can impact the legal structure of investments, they would rarely have a substantial impact on their destination and volume.

According to Mr. Poulsen, this has two implications. First of all, the key question for host States to consider is whether an investment treaty is really the best way to spend scarce bureaucratic and political resources. Second, the absence of significant economic benefits could be used as a bargaining tool as host States can more credibly threaten to walk away from negotiations.

Commentary

Mr. Xavier Carim, Deputy Director General, International Trade and Economic Development, South Africa, underlined that there was no clear link between BITs and the increase of FDI flow drawing on evidence from South Africa. He suggested, therefore, that countries should be clear as to why they would sign BITs. For him, the deficiencies, shortcomings and risks of the treaties are indeed clearer. As there are significant risks associated with BITs when subjected to international arbitration, one solution could be to return to settling disputes under domestic law.

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Mr. Carim outlined South Africa's experience, which after 1994 signed around 20 BITs in a relatively short period – in the context of the proliferation of BITs across the world—in the belief that they would give a degree of confidence to investors and as part of South Africa's return to the international community following the isolation under apartheid. In the following years, South Africa participated in the discussion about the effectiveness of BITs raised by developing countries, and in 2007 initiated a review of all its BITs. The review observed that there was no relation between signing investment agreements and FDI flows because investments came from countries with which South Africa did not have a BIT signed.

Mr. Carim pointed to the fact that BIT provisions are imprecise, ambiguous, and when subjected to international arbitration, run the risk of unpredictable award outcomes. For this reason, South Africa decided to refrain from entering into BITs in future unless the economic benefits are clear. Further, South Africa had decided to terminate existing BITs and offer partners the opportunity to re-negotiate treaties on the basis of a new Model. These terms would apply to all new treaties. Ten agreements have been notified for termination (mostly with EU countries).

Mr. Carim observed that according to the most recent studies by UNCTAD, South Africa was the seventh most-popular destination for FDI flows. In addition, Mr. Carim explained South Africa has developed robust domestic legal protection for investment - both foreign and domestic – and this was underpinned by constitutional guarantees. Although most of investors did not know about the existence of the BITs until they were terminated, the government had explained to investors that they should rest assured that their investment would remain secure in South Africa.

Discussion

A discussion with participants followed regarding the opportunities for termination in light of the termination clauses that were coming to term and pursuant to which countries could choose not to renew the BIT. This was one of the reasons why South Africa grasped the opportunity now in order not to renew the flawed BIT for another period of 10 to 15 years. Participants also discussed regional dynamics when negotiating and discussed problems of developing countries regarding their bargaining power in negotiating agreements. It was noted that, in line with Mr. Poulsen's presentation, developing countries as host States had a strong bargaining position since there was no proven benefit of the BIT given that it did not lead to increased investment in the first place.

Session 2: Developments and Trends in Investor–State Arbitration

This session was chaired by **Ms. Amina Ousmoi**, Head of Relations with Northern, Central and Eastern European Countries, Department of the Treasury and External Finance, Ministry of Economy and Finance, Morocco.

The first speaker in this session was **Ms. Elisabeth Tuerk**, Officer in Charge, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD, who

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explained trends related to treaty-based ISDS cases. Ms. Tuerk said the number of new treaty-based disputes is increasing each year, with 58 new treaty-based cases in 2012, bringing the total of known ISDS cases to 514. However, since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher. Investors are increasingly using arbitration, and also do so to challenge measures in areas of public policy.

The country with the highest number of new cases in 2012 is Venezuela (nine new cases), followed by Pakistan and Algeria. She also noted that Belgium, South Korea and Laos faced cases for the first time and, in total, 95 countries have faced or are facing cases to date. Ms. Tuerk said 61 developing countries have faced claims, and the most frequently targeted countries are Argentina (52), Venezuela (34), Ecuador, and Mexico. In terms of regional trends, the last two years have seen an increase in number of cases against countries in Asia and Europe. Statistics also show that claimants are predominantly investors from industrialized countries, especially from the United States, the Netherlands, the United Kingdom and Germany. In terms of decided cases, in 2013, 42 per cent of the concluded cases were decided in favour of the government. Of the total of 250 cases decided to date (including both decisions on jurisdiction and merits), 31 per cent were decided in favour of the investor, 42 per cent in favor of the State and 27 per cent settled. Ms. Tuerk noted that little information was available on the content of settlements. She also noted that legal and arbitration costs were significant, posing challenges to developing States and that statistical data on "cases won or lost" needed to be interpreted with caution.

The second speaker, **Ms. Sanya Reid**, Senior Researcher, South Centre, focused her presentation on recent developments in the interpretation and negotiation of investment protection provisions in investment treaties. Ms. Reid said investment protection varies depending on the treaties, on how much a country wants to protect, and the different definitions of investment. Ms. Reid said the scope of the protection of treaties could extend to investors who have already had a presence in the country as well as new ones, and to national and local government decisions. Ms. Reid explained there were some difficulties in dealing with specific sectors and the application of national treatment, especially in treaties that include pre-establishment rights. She stressed that countries should think carefully whether or not to give national treatment to all the sectors or if they wish to protect specific sectors.

Next, **Prof. Gus Van Harten**, Associate Professor, Osgoode Hall Law School, summarized the findings of his extensive research on how investment treaty arbitrators have reviewed sovereign decisions. Prof. Van Harten said many legal issues have been decided in divergent ways. According to him, there is tentative reason to question whether investor-State arbitration provides equivalent protection for investors from countries outside the capital-exporting core of the United States and Western Europe. This conclusion is supported by a significant tendency of the arbitrators to be more expansive in favour of investors when the claimant was a national of a major Western capital exporter (supporting an initial hypothesis that this would arise because of the political power such countries in appointing bodies such as ICSID and the Permanent Court of Arbitration). It was found that U.S. investors were more

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likely to benefit from an expansive resolution than other investors, followed by the United Kingdom and France. He also noted that, in the great majority of cases where the issue arose, arbitrators allowed claimants to disregard the pre-arbitration wait period in the treaty. Further, research from various sources indicates that most power in investment treaty arbitration appears to reside with a small number of arbitrators, with approximately 24 individuals deciding about half of the legal issues. There was also significant overlap between treaty arbitrators and contract arbitrators (62 per cent of cases) yet the treaty arbitrators rarely stayed their proceedings, as courts often do, to wait for the contractual forum to run its course. Prof. Van Harten concluded that investor–State arbitration may present intractable legal uncertainties accompanied by a risk of massive financial liability for respondent States because, regardless of the treaty language negotiated, the arbitrators often adopted creative interpretations to expand their role and the likelihood of investor compensation, especially where the arbitrators were frequently-appointed and the claimant was from a major Western capital-exporting State.

Breakout discussion 1

This breakout discussion was chaired by **Mr. Manuel Montes**, Senior Advisor on Finance and Development, South Centre.

Participants were divided into six groups to discuss the challenges countries face in light of the increase in investment arbitration, the aspects of investment arbitration that are perceived as troublesome, and the responses available.

In relation to the **challenges countries are facing**, the participants pointed out the lack of a harmonized and trustworthy system for implementation and the fact that enforcement was challenging and confusing, adding to the lack of predictability. They also identified the lack of experts and human resources in their countries with full capacities to negotiate the agreements as an important challenge and obstacle to setting proper national policies and negotiating better treaties. Finally, participants pointed to the lack of political awareness at the national political level to lead and guide negotiations.

Regarding the **aspects of investment arbitration perceived as troublesome**, participants recognized the lack of economic resources of developing countries to defend the arbitration cases, given that arbitration demands resources and expertise that are missing in developing countries. They also pointed out a lack of capacity to anticipate potential disputes before the arbitration. In addition, they found it troublesome that investment arbitration implicated different jurisdictional levels (supranational, national or regional) because it was difficult to manage the different criteria and ideologies among the various actors depending on the jurisdiction. Finally, the participants identified the lack of political consciousness with respect to how they could react when facing arbitration.

The participants concluded that possible **responses** for developing countries consisted of revising the treaties and agreements; improving the capacity of their national experts

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(capacity building) and negotiators; and establishing better national coordination, including conducting an internal review of BITs.

Session 3: Identifying the Critical Issues in Current ISDS Model (1)

This session was chaired by **Mr. AbdulkadirJailani**, Director of Treaties for Economic, Social and Cultural Affairs, Ministry of Foreign Affairs, Indonesia.

Investor–State Arbitration: Identifying critical issues

Ms. Nathalie Bernasconi started by pointing to the host of problems in the current ISDS system, including the lack of coherence and predictability, the lack of independence of arbitrators, and the expansive interpretation of ISDS by arbitral tribunals. She went on to further elaborate on the expansion of the scope of ISDS. She noted that investment arbitration was increasingly expanded into unexpected areas that were not intended to be covered and not contemplated by States at all. She said the scope of application of the treaty, scope of substantive obligations, and scope of ISDS all had an impact on the scope of ISDS.

First, in terms of determining the scope of treaty application, she explained that the definition of investment was often interpreted expansively, and that the definition of investor was frequently used by investors to conduct treaty shopping, causing significant problems for States. In this context, she noted that Asian treaties often required investments to be approved or registered, and that to a certain extent this could avoid the unintended expansion of the scope of treaty application through arbitrators. Second, regarding the scope of substantive obligations, she emphasized that a clear and narrow formulation could help restrict the scope and avoid arbitrators' broad interpretation. In this context, she particularly discussed problems relating to two clauses that could draw in obligations from external sources. First, she noted that the umbrella clause could expand the treaty obligations to any obligations including those under contracts and domestic laws and that the most-favoured nation treatment (MFN) clause could allow the importation of a State's obligations from "outside" treaties, including in some instances issues relating to dispute settlement. Third, she put forward an example of expansive ISDS clauses, referring to the U.S. Model, which, while not containing a substantive umbrella clause, has expanded ISDS with effects similar to an umbrella clause. She noted that, by contrast, some States restricted the scope of ISDS by carving out certain areas from the scope of ISDS, such as the EU's policy of excluding pre-establishment from ISDS.

Finally, Ms. Bernasconi discussed the fact that a number of tribunals have ignored or disregarded preconditions stipulated in treaties to commence ISDS, such as requirements to exhaust local remedies, to use local remedies for a certain period of time, cooling-off periods, and fork-in-the-road clauses. Similarly, tribunals have ignored the existence of choice-of-forum clauses in contracts. She concluded that all of this has led to a further expansion of the use of ISDS under treaties.

South Africa's Analysis of the Risks and Benefits of ISDS and Its Conclusions



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The second speaker was **Mr. Xavier Carim**, Deputy Director General, International Trade and Economic Development, South Africa. He began by noting that South Africa undertook a broad policy discussion in order to better navigate and mitigate risks associated with investment treaties and ISDS. In July 2010, South Africa finalized its review and decided to refrain from entering into new BITs unless the economic benefits were clearly demonstrated; to terminate existing BITs and to offer renegotiation; and that disputes could be resolved at the national level or under state-to-state arbitration. He further stated that in the meantime South Africa endeavored to strengthen the national legal system in order to secure the confidence of foreign investors, and to systematically coordinate among all relevant government departments to make collective decisions. Lastly, he also mentioned that if South Africa were to negotiate new BITs, the SADC model and interstate dispute settlement would be the preferred approach.

Relationship of Investor–State Arbitration to State–State Dispute Settlement

Prof. Manjiao Chi, Associate Professor, Law School of Xiamen University, China, said that in recent years interstate dispute settlement was coming back. The comeback, he explained, was due to the following reasons: First, as more sophisticated BITs and investment chapters in FTAs were being developed in which sustainable development is gaining importance, there was a nascent desire to develop new dispute settlement mechanisms; Second, States needed more policy space; and third, the shortcomings of ISDS were becoming evident. He was of the opinion that, although ISDS might not be abandoned in the near future owing to its inherent value, interstate dispute settlement should be strengthened alongside it.

With regard to designing interstate dispute settlement clauses, he first asked how to reconcile the relationship of ISDS and interstate dispute settlement based on the existing treaties and second, whether interstate dispute settlement should serve as an appeals mechanism for ISDS, given that the scope of interstate dispute settlement clause is very broad, overlapping with ISDS on many issues.

He further explained how to properly design interstate dispute settlement clauses in BITs as well as in investment chapter in FTAs. He put forward two options: 1) a horizontal approach, which subjects certain substantive commitments to ISDS and others to interstate dispute settlement; and 2) a vertical approach, which allows both ISDS and interstate dispute settlement to be used in resolving one dispute, but allocates them to different dispute settlement phases. He said this approach was often used in international investment disputes involving financial and taxation measures. Finally, he pointed out that designing proper interstate dispute settlement is a challenge for developed as well as developing countries.

Commentary

Ms. Chantal Ononaiwu, Trade Policy and Legal Specialist, CARICOM Secretariat, reiterated the importance of States conducting reviews and renegotiating investment treaties to fix the flaws. She especially stressed that States, when negotiating investment treaties, should really be

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clear about what benefits they could obtain from signing investment treaties. She pointed out that the cost-benefit analysis with respect to negotiating investment chapters in FTAs is different from that with respect to negotiating BITs because FTAs present a broader scope for tradeoffs than BITs. Therefore, countries may still have to grapple with the challenges of the current model of investor-state arbitration when negotiating investment chapters in FTAs. Besides, she said, setting preconditions for submission of claims to international arbitration was helpful in mitigating risks from ISDS. She further proposed that States should explicitly address the role of alternative dispute settlement (ADR) in resolving investment disputes.

Discussion

The discussion centered on the role and the design of interstate arbitration. In light of the unclear relationship between ISDS and interstate dispute settlement, it was suggested that further exploration should be made as to how to use and structure interstate dispute settlement. Also, one participant stressed that the interstate arbitration mechanism should be designed in view of the entire investment dispute settlement system and in harmony with other mechanisms therein.

It was also pointed out that the ISDS embedded in investment contracts was less problematic than that in investment treaties because contracts contained more balanced commitments between investors and States.

Finally, the MFN clause was particularly highlighted in terms of the expansive and contradictory interpretations given by arbitral tribunals as well as its underlying risks.

Session 4: Identifying the Critical Issues in the Current Investor–State Dispute Settlement Model (2)

This session was chaired by **Ms. Ciata Bishop**, Executive Director, National Investment Commission, Liberia.

Systemic Issues: The strange case of the end of the rule of law in investor-State arbitration

The first speaker was **Mr. Howard Mann**, Associate & Senior International Law Advisor, Investment and Sustainable Development Programme, IISD. Mr. Mann addressed the systemic issues in ISDS. He mentioned those issues were not only found in the treaties but also contained in other legal components, such as domestic law on international arbitration, the UNCITRAL model law on the implementation of the New York Convention, in the ICSID Convention and in other international rules on arbitration.

He discussed the marketing campaigns of international investment agreement (IIAs) launched by developed countries: the first one is that IIAs will attract investment. The second one is that developing countries must want the same protection for their outward investors as developed countries now have for theirs. In this regard, he pointed out that a cost-benefit analysis had never been conducted to test the benefits of this approach. He also mentioned

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two other selling points: depoliticization and IIAs could bring the rule of law via the appeal to international principle. Overall, he said those marketing campaigns were off base in reality. He then focused on the fourth one—the rule of law—in detail.

He discussed some key elements of the rule of law: 1) tribunals should be neutral, unbiased, and free of conflict; 2) transparency and openness; 3) consistency and predictability in the application of the law; 4) arbitrators must be accountable; 5) the final decisions must be correct in law. He observed that all of those elements were absent in ISDS.

In particular, he spoke about the standard of review which is relevant to arbitrators' accountability and correctness in law in final decisions. He said there were two general options for review:

- 1) The ICSID annulment process reviews the decisions of ICSID tribunals. Article 52, the legal basis for review, does not cover errors in law. He cited *CMS v. Argentina*, in which the ICSID annulment committee acknowledged the initial tribunal's findings were wrong in law but would not review the case because an error in law was beyond the annulment committee's jurisdiction to review.
- 2) Non-ICSID cases are subject to the domestic court's review in the jurisdiction where the arbitral tribunal is officially seated, pursuant to the New York Convention. He noted that in this regard investor-State arbitral awards were essentially defined as international commercial arbitral awards for the purpose of recognition and enforcement. After examining Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, an example reflecting domestic law's standard of review on setting aside commercial arbitral awards, he said that error in law was not included. In addition, he looked at the case *BG v. Argentina* and said the U.S. Supreme Court did not consider correctness in law in reviewing the arbitral award.

Mr. Mann further addressed the consequences and challenges of this situation. He pointed out the misappropriation of commercial arbitration proceedings over other forms of dispute settlement on public law issues. He also said ISDS maintains ad hoc approach to disputes as opposed to a systemic view of international investment law as a body of public international law, a factor that gives rise to the lack of accountability of tribunals. He said that the real law was not the law in the treaty, but the interpretation given by the arbitrators, and arbitrators were free to "create" law as they wanted due to the absence of any effective oversight. Moreover, he stated that there were no controls on this type of arbitral lawmaking and no mechanisms available ensuring consistency and predictability in awards and interpretations. He said arbitrators were aware of the doctrine of their own infallibility, so that they can decide cases based on their subjective feeling instead of the objective law. He further noted arbitrators actively promoted this result among domestic courts by advocating competition for the arbitration industry by creating "an arbitration-friendly environment." In conclusion, he indicated the causation, i.e., the conflicts of interest of arbitrators and multiple roles together with the privileging of arbitral procedure over public law principles led to the tyranny

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of arbitral process over the rule of law, which ultimately led to the end of the rule of law in ISDS.

Institutional Deficiencies

The second speaker was **Ms. Veniana Qalo**, Economic Advisor, Economic Affairs Division, Commonwealth Secretariat. She addressed the institutional issues and deficiencies in ISDS. With respect to the contextual background, she first discussed the WTO's multilateral approach in resolving dispute among member States in order to see whether the WTO Appellate Body could serve as a point of reference for the arbitration system. She pointed to the fact that WTO dispute settlement was a single text rules-based system, in contrast to investment dispute settlement in which the rules are embedded in different legal instruments, and substantive rules are included in BITs, ECT, and FTAs.

She went on to address the institutional deficiencies of the current ISDS model, noting that investment dispute settlement is fragmented and not inside a multilateral system. One of the particular institutional deficiencies she pointed out was the lack of consistency and predictability. She said arbitral awards had no precedential value, which led to high risks and uncertainty on policy space, a significant development issue for developing countries. However, she stated that if establishing precedence, a problem emerged as to the credibility of decisions, particularly in the absence of an appeals mechanism. She therefore suggested that it was worth exploring the creation of an appeals mechanism in investment dispute settlement. As to ICSID decisions, she said the annulment procedure was not sufficient owing to its limited scope of review and therefore did not meet the standards of an appeals process. In terms of solution, she concluded that the WTO Appellate Body was a good model that could be looked into and reiterated the criticism regarding using ISDS, a commercial dispute settlement mechanism, to resolve public law-related disputes. She noted that the alternative dispute settlement (ADR) mechanism might also be a good option in addressing the public policy issues. She further said that although many arbitration institutions were trying to reform procedural rules in order to incorporate public interests consideration, e.g., transparency, this was still far from being sufficient.

Finally, Ms. Qalo suggested proposals to address the deficiencies by establishing ADR, pre-conditioning ISDS on exhaustion of local remedies, establishing an appeals mechanism to ensure consistency and establishing a permanent institution for investment disputes.

Commentary

Mr. Edwini Kessie, Chief Trade Adviser, Office of the Chief Trade Advisor for Pacific Forum Island Countries (OCTAPIC) spoke about the WTO dispute settlement system in order to provide a comparison. He remarked that the current investment dispute settlement system was not satisfactory, while the WTO dispute settlement model was running rather well. He said that the WTO system was much more transparent than ISDS. Mr. Kessie explained that at the panel stage parties could choose panelists through consent, similar with arbitration, but that in contrast to the arbitrators the panelists have more of a "good offices" function, with a

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flat, relatively low per diem rate. He noted that the Appellate Body is composed of seven judges chosen to reflect geographic diversity, and that the judges are obliged to disclose conflicts of interest in a specific case.

Mr. Kessie said the correctness in law could be reviewed by the Appellate Body. Besides, he noted that the Appellate Body's decisions are not adopted automatically and member States could use reverse consensus to refuse to adopt a decision if not satisfied with the decisions either on facts or law.

In terms of security and predictability, he said the WTO dispute settlement system is the central element in providing predictability to the multilateral agreement system. Under the WTO system, importing commitments from outside agreements is not allowed, and in practice precedence is followed even though not required. Moreover, he said that the decisions rendered by the Appellate Body were highly consistent due to the fact that the three judges in a case usually make a decision after consulting all other judges. Overall, he said that the WTO dispute settlement system was the most successful international judicial process today, of which certain aspects could be learned for the reform and improvement of investment dispute settlement.

Discussion

A question was raised about how to deal with the relationship between transparency and sensitive issues as well as the public and media's pressure on the proceedings. One response was that the increased participation of the public in the proceedings was a positive element in the sense of bringing in the consideration of public interests and improving the quality of decisions. Furthermore, it was stressed that public interest-related issues should be maintained in the public domain. It was also noted that arbitrators in ISDS routinely breached their fundamental obligations of neutrality and objectiveness, and created new law through expansive interpretation, which could be better controlled via transparency.

Another discussion centered on the question of whether it was necessary to grant ISDS to foreign investors, noting that when investing abroad, investors still had many other options to protect their investment, e.g., domestic legal remedies in the host country, investment insurance, and investment contracts.

It was noted that the WTO Appellate Body system was very effective in terms of ensuring consistency, and therefore adding an appeals body by learning from the WTO Appellate Body into the existing investment dispute settlement system could increase the efficiency. Other valuable features of WTO dispute settlement were pointed out that the disputes concerned private actors (like Boeing and Airbus) although resolved at the interstate level, and the proceedings were time-efficient and not costly. One of the weaknesses mentioned was the lack of effective remedies, especially for smaller States. It was further said that the remedy rule should be improved if adapting the WTO dispute settlement rule to resolve investment disputes.

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Session 5 (interactive): Dealing With the Challenges: What steps are States taking to address investor- State arbitration issues today?

This session was chaired by **Mr. Howard Mann**, Associate & Senior International Law Advisor, Investment and Sustainable Development Programme, IISD. In this session, several representatives from different countries identified the challenges posed by ISDS, and shared their countries' experience with how to deal with them, as well as the results.

The first speaker was **Mr. Andres Arauz**, Deputy Secretary General, Department of Planning and Development, Ecuador. He started by saying ISDS was one of the highest risks to Ecuador's development policy. He said so far Ecuador has had 40 investment cases, of which 10 are still pending. He focused on discussing two cases: 1) *Occidental v. Ecuador* 2. He criticized the decision on the grounds that the arbitrators interpreted the waiting period expansively, ignored the specific forum selection clause in the contract, ignored the claimant's violation of Ecuadorean law, and awarded the highest compensation amount (US\$2.3 billion) ever against a State. He also noted that the case is currently in the annulment process at ICSID. 2) *Chevron v. Ecuador*. He said this case had serious flaws, including the fact that the arbitrators accepted jurisdiction retroactively, allowed judicial rights to qualify as an "investment," considered "denial of justice," and ordered the Executive to suspend the effects of a judicial decision even before it was finalized and then while still under appeal. As a result, he said Ecuador has now commenced a campaign against Chevron. He further noted, as shown in these cases, that arbitrators are abusing their interpretation of investment treaties.

Mr. Arauz addressed the reaction adopted by Ecuador: First, Ecuador withdrew from the ICSID Convention on the grounds that ICSID is not independent from the World Bank, whose governance has remained unchanged; ICSID decisions, unlike UNCITRAL decisions (which could be reviewed by domestic courts pursuant to the New York Convention), supposedly do not provide for domestic judicial review; and ICSID is expensive. He said that no negative consequence had been seen. Second, Ecuador's new constitution prohibits treaties with extra-regional arbitration and declared all pre-existing BITs as unconstitutional. Third, Ecuador reformed its domestic law to include investment contracts with international arbitration. He said investment contracts were very important for investment policy insofar as in addition to rights investment contracts contain obligations for investors, e.g., performance requirements, complying with domestic law, exhausting domestic jurisdiction before recourse to international arbitration, and that States could file claims against investors.

The second speaker was **Ms. Manelyn E. Caturla**, State Solicitor II, Office of the Solicitor General, the Philippines. She said that the Philippines has several ISDS cases, including the pending *Fraport v. Philippines*. She further noted that the dispute with Fraport led to two cases that the Philippines faced: one is the treaty-based ICSID case; the other is the contract-based ICC arbitration case. For defending the cases, the Philippines has to hire foreign legal counsels. She said that, owing to the experience, the Philippines government started to closely review the ISDS clause and BITs themselves. She noted the review includes clarifying the definitions of major terms in BITs.

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The third speaker was **Mr. Ricardo Ampuero**, Special Commission on International Investment Disputes, Ministry of Economy and Finance, Peru. He said that in 2006 Peru created the Special Commission on International Investment Disputes, an inter-ministerial commission chaired by the Minister of Economic and Finance. The two main goals, he noted, are to centralize all the information regarding investment contracts and treaties, and to coordinate all aspects of the investment disputes. He said the commission also consolidates all criteria in drafting investment contracts, e.g., issuing guidelines to remove references to ICSID. This commission is also responsible for hiring lawyers and experts.

The fourth speaker was **Mr. Federico Lavopa**, Researcher and Professor, FLACSO/Argentina. He started by reviewing the cases filed against Argentina. He said that in the 1990s, in order to attract foreign investment, Argentina provided guarantees and created very favourable conditions for foreign investors. However, from 2001 to 2002 Argentina experienced a huge economic and political crisis, reflected by the facts, for instance, that at one point there were five presidents in office within a 10-day period and the country's GDP fell almost 50 per cent. Against this background, Argentina took measures to cope with the crisis which were contrary to the earlier guarantees given to foreign investors and therefore triggered massive ISDS claims against Argentina.

He highlighted the fact that the sheer size of the compensations sought by investors—US\$50 billion— is more than five times of Argentina's national education budget in 2012. He also said in order to defend the cases Argentina had to hire foreign legal counsels due to lack of capacity at the outset, but later intentionally trained a group of in-house lawyers to defend. Another reason why ICSID is unpopular in Argentina, he said, is the inconsistent arbitral awards and poorly reasoned arbitral awards. Mr. Lavopa introduced the status of the ICSID cases against Argentina: eight cases settled, 18 cases discontinued, 15 cases ongoing, and final decisions rendered in nine cases of which Argentina won some.

The fifth speaker was **Mr. Peter Baghume**, Principal Economist, Ministry of East African Cooperation, Tanzania. He said the challenges for Tanzania were how to coordinate treaty negotiations at national and regional levels and how to enhance capacity building and raise political awareness. He further noted that they are exploring the proper relationship between different levels of treaties and making continuous efforts to promote awareness of treaty impacts at the political level.

Session 6: Defining and Refining Alternatives and Options for Reform

This session was chaired by **Ms. Nathalie Bernasconi-Osterwalder**, IISD.

Investor–State Dispute Settlement (ISDS): UNCTAD's "Five Paths of Reform"

The first speaker was **Ms. Elisabeth Tuerk**, Officer in Charge, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD. Ms. Tuerk presented an UNCTAD "IIA Issues Note: Reform of ISDS - In Search of a Roadmap".

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She started by identifying five main concerns with the current ISDS system: 1) a perceived deficit of legitimacy and transparency; 2) contradictions between arbitral awards; 3) difficulties in correcting erroneous arbitral decisions; 4) questions about the independence and impartiality of arbitrators; and 5) costs and time of arbitral procedures. In response, she mentioned that State-State dispute settlement could also be an option, worthy of further exploration. In a related manner, States' role in interpreting treaty provisions could be strengthened.

Ms. Tuerk further introduced the five paths of reform identified by UNCTAD in the IIA Issues Note: promoting ADR or dispute prevention policies (DPPs), tailoring the existing system through individual IIAs, limiting investors' access to ISDS, introducing an appeals facility and creating a standing international investment court. In terms of limiting access to ISDS, she elaborated three paths, including limiting subject matter, restricting the scope of covered investors and imposing the precondition of exhausting local remedies. An appeals facility and a standing investment court could be effective to address systemic problems: the appeals facility, attached to the existing system, could review substantive issues of arbitral awards, while a new standing court would replace the existing system. She noted that that such a court should follow a court-like system, ensuring accuracy, consistency, independence, and impartiality.

Ms. Tuerk highlighted that that it was upon countries to decide on their most preferred path of reform, noting that options could be combined and should be chosen depending on countries' needs/preferences and the extent of change they wanted to achieve. Some of the five path of reform implied individual actions by governments and others required joint action by a significant number of countries. While the collective action options would go further in addressing the problems posed by today's ISDS regime, they would face more difficulties in implementation and require agreement between a larger number of States. Collective efforts at the multilateral level can help develop a consensus about the preferred course for reform and ways to put it into action.

An important point to bear in mind is that ISDS is a system of application of the law. Therefore, improvements to the ISDS system should go hand in hand with progressive development of substantive international investment law itself. UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) offered policy options in this regard.

Investor-State Arbitration: Alternatives and Options for Reform

The second speaker was **Ms. Chantal Ononaiwu**, Trade Policy and Legal Specialist, CARICOM Secretariat. She began by pointing out that in responding to the challenges posed by ISDS, countries could generally explore alternatives to investor-State arbitration on the one hand or options for reform of the current model of investor-State arbitration on the other.

Regarding alternative approaches, Ms. Ononaiwu first addressed those at the national level referring to: 1) a domestic court approach (which South Africa, for example practices), especially where adequate domestic remedies are in place and there is no reason to accord

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an extra layer of protection in a treaty to investors (an argument that Australia, for example also holds); 2) dispute prevention and avoidance mechanisms, which could minimize the number of conflicts but would not be able to resolve the disputes formally. She cited the examples of Korea's Office of the Foreign Investment Ombudsman, China's domestic administrative review, and Peru's special commission. She also stressed that States should have those mechanisms even where they decide to retain ISDS; 3) ADR should also be explored further at the national level. Second, she pointed to alternative approaches in international procedures which included, among others, ADR and the creation of an investment court.

Ms. Ononaiwu pointed out several options for reform, including circumscribing the scope of ISDS, providing for ADR, setting preconditions for ISDS, States adopting binding treaty interpretations, and providing for preliminary objections and consolidation of claims. She also stated that for addressing systemic and institutional deficiencies, transparency should be enhanced, the rules on electing and challenging arbitrators should be reformed, and that an appeals mechanism, either at the international or regional level, should be established in order to achieve greater coherence of treaty interpretation.

She concluded by saying that the approaches and options were not mutually exclusive, subject to a country's choosing based on its specific concerns and interests. She also said countries should invest in domestic reforms to enhance the viability of alternatives to ISDS, and consensus building would be critical for the implementation of reforms to the current ISDS model.

The chair, **Ms. Nathalie Bernasconi**, noted that in her opinion so long as ISDS was not improved and reformed, it could not be used to improve domestic governance because countries could not use a flawed system to redress another flawed and opaque system.

Brazilian Investment Policy and IIAs: Forward thinking

The third speaker was **Mr. Erivaldo Gomes**, General Coordinator for Trade Policy, Ministry of Finance, Brazil. He began by saying that the FDI regime in Brazil was fairly open (indeed, more open than many OECD countries), and that in principle did not distinguish companies by origin of capital. He further noted that Brazil did not discriminate and restrict the type of capital that entered the country, though all foreign investment had to be registered with the Central Bank of Brazil in order to be eligible for remittances. He pointed to the fact that without having any investment treaties, Brazil has attracted significant amount of inward FDI; for example, in 2012 Brazil was the fourth-largest FDI recipient countries in the world.

Alongside the openness and non-discrimination of foreign investment, he said Brazil also adopted prudential measures necessary for safeguarding policy space. For example, he said that under Brazil's laws the government could adopt financial prudential measures allowed in the IMF agreements.

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Mr. Gomes further noted that at the international level Brazil had undertaken investment commitments in various investment-related instruments, including the WTO's General Agreements on Trade in Services (GATS) and Trade-Related Investment Measures (TRIMs) agreements, and the OECD Declaration on International Investment and Multinational Enterprises. Turning to Brazil's approach on investment agreements, he first mentioned that 14 investment protection BITs were signed in the 1990s but were never ratified by Congress owing to their incompatibility with domestic laws. Brazil so far has not had any agreements with ISDS and is now promoting a new approach to IIAs, focusing on States' cooperation and facilitation rather than investment protection. This new approach also incorporates a set of principles from the WTO system, e.g., right to establishment according to national legislation, non-discrimination, and responsible business conduct principles, and follows a State-State dispute settlement model. In addition, he said that Brazil was of the view that international regulatory issues had to be treated at the multilateral level and that the idea of protecting investors' expectations of profit in the context of regulatory issues were unacceptable. Thus, Mr. Gomes summarized that a promising trade and investment regime was the one that on the one hand provided adequate conditions for trade and investment through States' cooperation and facilitation, and, on the other hand, allowed States to have necessary policy space to regulate.

Regarding dispute settlement, he stated it could be conducted via cooperation and facilitation, diplomacy, and State-State mechanism. He also said that investors' direct action could be substituted by direct negotiation, an ombudsman, and domestic procedures. He further introduced the Unión de Naciones Suramericanas (Union of South American Nations, or UNASUR's) regional dispute settlement centre as an alternative to ICSID. Lastly, he suggested that the WTO dispute settlement mechanism was a sound model that should be looked into.

How to kill a BIT and not die trying: Legal and political challenges of denouncing or renegotiating bilateral investment agreements

The fourth speaker was **Mr. Federico Lavopa**, Researcher and Professor, FLACSO/Argentina. He started by pointing to the countries which had already exited the system, including Bolivia, Ecuador and Venezuela, which have denounced the ICSID Convention as well as some of their BITs; the Czech Republic, which renegotiated BITs in the process of accession to the EU; and South Africa, which denounced some of its BITs. However, he highlighted that despite the exiting of these States, BITs had their self-defense mechanisms which could make them live beyond termination, among other things, through survival clauses, tacit renewal clauses and MFN clauses.

Mr. Lavopa also discussed the available strategies to exit the current system as well as their respective pros and cons. With respect to denouncing the ICSID Convention, he explained that other ISDS arbitration mechanisms remained untouched and that the denunciation itself may be considered as an international wrongful act. Further, with respect to denouncing BITs, he noted that, although this was the most direct option, it could deliver a rather negative signal to potential investors and that there were still many mechanisms to maintain validity for a period of time, for example through survival clauses. He said that owing to survival clauses in

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Argentine BITs, Argentina would not be able to see the full effects of terminating BITs until 2036. Finally, with respect to renegotiating BITs, he noted that renegotiation could circumvent survival clauses. But he also pointed out the difficulties arising from reaching consent between parties to renegotiate and the possible application of MFN clauses to vacate the renegotiation outcomes. Nevertheless, renegotiation was his preferred option, and he concluded by stating that “ironically, the most rational strategy to exit the system seems to be to stay within.”

The fifth speaker was **Mr. Andres Arauz**, Deputy Secretary General, Department of Planning and Development, Ecuador. Further to his presentation in Session 5, he said that according to international public law, States should have interpretative power over the treaties, which was also the reason why, in the wake of losing one of *Chevron v. Ecuador* cases, Ecuador initiated a State–State arbitration claim against the U.S. in order to provoke an interpretation of the treaty by the State parties. He also expressed concern about the international arbitral tribunals’ review of domestic judicial decisions even in cases where domestic remedies had not been exhausted and in some cases where tribunals ordered States to intervene in ongoing domestic court proceedings to which the State was not party. He further criticized the high costs of ISDS in conjunction with the substantial influence of the World Bank President on ICSID tribunals and annulment committees and of the Dutch government on Permanent Court of Arbitration designations.

He further presented the national policies of Ecuador. He informed participants that Ecuador had established an Audit Committee, composed of foreign experts and representatives from civil society (including specialists in areas beyond international investment, such as international human rights). He explained that the audit committee was mandated with reviewing the legality and legitimacy of BITs and arbitration procedures. In addition, he said that Ecuador intended to develop a new model BIT entitled “Investment for Development Agreement”, incorporating better definitions of rights and obligations and specifically setting out certain types of performance requirements and prior State authorization. He lastly addressed Ecuador’s efforts made at regional and international levels, such as establishing a forum for dispute settlement at UNASUR and initiating an international observatory for arbitrations with several other countries.

Alternatives and Options for Reform

The sixth speaker was **Prof. Gus Van Harten** of Osgoode Hall Law School. He commented on the reform of investor–State arbitration and presented the option of using an international judicial process to resolve investor-State disputes. Prof. Van Harten highlighted the most significant weaknesses of investor–State arbitration, pointing to the lack of independence, openness, and fairness. He said an international judicial process could be established to reform investor–State arbitration that could provide for all investor claims to a new judicial institution modeled on other international courts.

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Prof. Van Harten also noted that States could incorporate judicial safeguards into investor–State arbitration without establishing a new institution, and he mentioned the following: 1) establish an effective arbitrator roster; 2) appoint arbitrators from the roster by rotation or random assignment; 3) select candidates for the roster on the base of merit and public accountability; 4) use preset criteria for selecting candidates for the roster, e.g., geographical, gender representation, expertise in relevant area of decision making; 5) prohibit “double-dipping” involving arbitrators also working as lawyers in investor–State arbitration; 6) provide for modest remuneration for roster members to avoid business-oriented incentives; 7) incorporate a binding code of conduct; and 8) ensure a judicial process to challenge conflicts of interest.

Prof. Van Harten explained other reforms could be used as a complement, such as to require investors to exhaust local remedies or any contractually agreed remedies, to incorporate screening mechanisms allowing independent officers to block frivolous or abusive claims, to allow the respondent State to raise objections based on that the investor has not fulfilled its commitments, and to include enforceable responsibilities and rights for investors when local remedies are ineffective for those harmed by investor activities.

Commentary

Prof. M. Sornarajah commented that, in general, investment treaties and ISDS were simply not worth subscribing to. He also made several proposals on reforming the existing system, including eliminating ISDS, promoting ADR, introducing and strengthening the States’ role in interpreting treaties, limiting investors’ access to ISDS, and confining the scope of the definition of “investor.” Besides, with regard to establishing an appeals body, he particularly stressed that developing countries should ask whether such a body could really provide consistency in the interests of developing countries given that arbitrators and judges in international tribunals and courts today were primarily from developed countries. He reiterated that once the procedure was created, the law was created, meaning that arbitrators and judges would create law once they are empowered by procedure to interpret. Hence, he said he was against establishing a permanent court because it would continue to create law disfavoring developing countries.

Discussion

The participants supported the idea of developing a new model conducive to sustainable development. It was suggested that counterclaims and investors’ obligations be included in such a model. One participant commented that ADR was a good means of dispute settlement, but the difficulty of promoting it lay in how to prove its usefulness to investors as a substitute to ISDS.

Extensive discussion was devoted to the relationship between investment treaties and other areas of international law, such as treaties on human rights, the environment and public

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health. It was noted that in the vast majority of cases arbitrators either only looked at investment protection in investment treaties by completely ignoring State's arguments based on human rights or environmental treaties, or considered these arguments when deciding on the quantum of violation. Only in very rare cases did they give weight to these arguments in determining the constitution of violation. A participant advocated that investment treaties be interpreted by taking into account the protection of the environment and human rights. Another participant further noted that in terms of hierarchy, human rights should supersede investors' property rights.

One participant emphasized the importance of transparency. He noted the challenge for governments to educate the public with regard to the implications and risks of investment treaties and ISDS so as to let the public properly participate and contribute to the negotiation of investment deals.

Breakout discussion 2

This breakout discussion was chaired by **Ms. Kinda Mohamadieh**, Senior Researcher, South Centre.

The participants were divided into six groups to discuss how States can be most effective in dealing with challenges relating to investor-State dispute settlement (collectively, regionally, bilaterally, or unilaterally).

The participants defined appropriate reform options, processes and alternatives to address specific issues arising under existing treaties, systemic challenges, and the lack of institutional structures as follows:

- To strengthen regional collaboration, for instance, to establish an appeals body at the regional level.
- To establish an independent, impartial, and neutral appeals process.
- To strengthen capacity building for developing countries' negotiators on technical issues.
- To set the precondition of exhausting local remedies in the case of ISDS.
- To preclude domestic judicial decisions from being reviewed by investment tribunals.
- To reform the existing arbitral institutions.
- To decrease the cost of dispute settlement.
- To create an arbitrator roster, whose members should be selected by reflecting geographical diversity, and from which arbitrators should be appointed based on expertise and free from conflicts of interest.
- To develop a binding code of conduct for arbitrators.
- To further explore the dispute settlement approaches of investment contracts, domestic legal remedies and regional dispute settlement arrangements as alternatives to ISDS.

Session 7: The Way Ahead for Developing Countries: Recommendations for next steps

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This session was chaired by **Ms. Veniana Qalo**, Economic Advisor, Economic Affairs Division, Commonwealth Secretariat. She said that it was critical to know what economic benefits could be derived from signing investment treaties, particularly in the light of the current, costly arbitration system.

Commentary

Mr. Howard Mann, Associate & Senior International Law Advisor, Investment and Sustainable Development Program, IISD underscored the importance of promoting awareness at the highest political level that the *quantity* of investment does not equate to the *quality* of investment, investment policies should be supportive to sustainable development, signing investment treaties does *not* attract FDI, and ISDS poses high risks on policy space. Given that investment treaties were unlikely to promote investment, he further questioned how, then, ISDS embedded in such treaties have that effect.

He advanced the shift from the zero-sum game widely used in the past to the pursuit of sustainability development, and he summarized three options in ranking: 1) no treaties or no ISDS; 2) real alternatives; and 3) fix the current system.

As to the third option, he stated that bad law *in* equated to bad law *out*. Also, he remarked that fixing only some of technical legal issues instead of the whole system was not sufficient to solve the problems. He further noted that the approach of abandoning ICSID and switching to relying on other arbitration forums was not a wise choice as he considered those forums (e.g., PCA and SCC) had similar deficiencies as found in ICSID, such as the lack of transparency, the review of domestic courts' decisions, and the existence of conflicts of interest of arbitrators. In addition, he did not recommend relying on exceptions to protect policy space. He said exception provisions had rarely been tested by arbitral tribunals, so it was unknown how they would be applied in practice. Therefore, he stated a more productive way was to establish unambiguous rights and obligations.

In this regard, **Ms. Elisabeth Tuerk**, Officer in Charge, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD, noted that UNCTAD recognized the challenges the current system posed. In response, UNCTAD had developed its Investment Policy Framework for Sustainable Development (IPFSD) as a new framework for investment policy making and related strategic issues. She stressed that the IPFSD combined national and international policies, and aimed at integrating investment policies into development goals and sustainable development objectives into investment policy making. Lastly, she emphasized the importance of intergovernmental consensus building, noting that the Forum was very valuable in this regard, and that also UNCTAD offered a forum for inter-governmental consensus building.

Open-floor discussion regarding a common position for reactions

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The participants were encouraged by Chair **Ms. Veniana Qalo** to share their reactions and comments based on the discussions over the days of the Forum. The participants' comments included the following:

- It was critical to promote awareness across government departments.
- Fixing the current system was preferred insofar as maintaining political relationships, and the imminent need was to design technical solutions, e.g., setting a compensation cap, excluding or constraining the MFN clause and the umbrella clause. A different view, however, held that ISDS was a toxic system, not able to solve problems, so that strengthening domestic rules and interstate dispute settlement was a better option.
- It was important to seek solutions, both short-term and long-term.
- Given the lack of a clear connection between signing BITs with ISDS and FDI attraction, there should be a shift from a "lawyer-and-arbitrator-business" approach to an approach that focused on the real considerations of investors in making investment decisions, such as facilitating investment processes.
- It was desired to have investment treaties negotiators coming from different backgrounds, including economy and finance, because the negotiation involved many interdisciplinary issues.
- Protecting human rights and the environment should not be seen as an exception to investment protection. Instead, the right of investors should be subordinate to the right of States to regulate in the interest of the public.
- It was constructive to establish an appeals body at the regional level.

Possible topics for next forum

The Chair centered on the issue of recommending a topic of discussion for next year's forum. The recommendations put forward by participants included the following:

- **Investor obligations:** How to develop a treaty model that balances investment protection and States' policy objectives by incorporating investor' obligations, and turning CSR standards into legally binding obligations for investors.
- **Alternative investment treaty model for developing countries:** How to draft a treaty model that focuses on attracting investment instead of investment protection, taking the new Brazilian model as a basis for discussion.
- **Domestic laws and policies:** How to develop sound domestic foreign investment legislation and how to deal with its relationship with international investment treaties.
- **Risks of ISDS:** How to address the risks of ISDS and the challenges posed by investment treaties and dispute settlement, especially for small countries.
- **FTA negotiation dynamics:** How to deal with FTA negotiations that extend to investment, given the urgent need to reform ISDS and the current investment treaty system.
- **Alternative dispute settlement:** How to implement ADR in resolving investment disputes.

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- **Relationship to other areas of law:** How to deal with the relationship between investment treaties and other treaties, e.g., treaties on human rights and environment.
- **South-South cooperation:** How to strengthen the cooperation of South–South as a means to equilibrate the North–South agreements.
- **Dealing with challenges facing developing countries today:** How to fix the current model and how to address the short-term challenges.

Finally, the Chair asked the participants for five volunteers in assisting IISD and partners in preparing for the next year's forum. She also mentioned that next year's forum would be held in an African country still to be chosen.

The representatives from Cameroon, Colombia, Ecuador, India, Lebanon, Sri Lanka and Tunisia offered themselves as volunteers in preparing next Forum. The Chair and **Ms. Nathalie Bernasconi** thanked the volunteers.

Closing Ceremony

Mr. L. Amrih Jinangkung, Deputy Director for Treaties on Economics, Social and Cultural Affairs, Ministry of Foreign Affairs, Indonesia, provided closing remarks. He stated that the Forum was very fruitful as developing countries had the chance to share experiences. Indonesia, in particular, benefited from learning from others. He further called upon developing countries to take follow-up actions to address the risks and challenges identified and discussed. Lastly, he expressed gratitude to IISD and South Centre for organizing this forum.

Mr. Manuel Montes, Senior Advisor on Finance and Development at South Centre said that the current investment treaty system was essentially following the rule of might as well as the rule of money, but not the rule of law. He said the arbitration system was incompatible with the objective of the investment policies of developing countries, i.e., to attract quality investment. He accordingly stated that it was time to review BITs as well as to terminate or renegotiate BITs, given that a number of BITs would expire in the coming years. He emphasized that it was important for developing countries to work together and international organizations could offer assistance at both political and technical levels. In the end, he thanked the co-organizers, the Ministry of Foreign Affairs of Indonesia as well as IISD.

Ms. Nathalie Bernasconi, on behalf of IISD, thanked all the participants and the co-organizers. She hoped that more new ideas and approaches could be put forward by exchanging views and sharing experience in the investment policy network of developing country negotiators.