



The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime

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1. Introduction

The United Nations Commission on International Trade Law (UNCITRAL) Working Group III (hereafter referred to as WGIII) has become one of the main forums for multilateral deliberations concerning reform of investor-State dispute settlement (ISDS). Discussions are advancing with a significant pace and with increasing participation from States and non-State actors. The mandate entrusted with WGIII was established at UNCITRAL's fiftieth annual session held in July 2017. It is three-pronged and includes (1) identifying concerns regarding ISDS (2) considering whether reform is desirable, and (3) developing relevant solutions to be recommended to the Commission, taking into account the ongoing work of relevant international organizations¹.

Given this mandate, the multilateral debate on reform of ISDS is expected to largely be concentrated at UNCITRAL. Yet, this issue has been a matter of discussions for some years at the national, regional, as well as the multilateral levels, including at the United Nations Conference on Trade and Development (UNCTAD) in Geneva. Overall, the discussions at UNCTAD, which cover both the substantive as well as procedural aspects of international investment agreements, have pointed out that United Nations (UN) Member States agree that the "question is not whether or not to reform [the international investment treaty regime], but about the what, how and the extent of such reform"².

The discussions pertaining to reforming ISDS are com-

plex, and there are no one-shot fixes to the challenges arising from the current ad hoc system. Moreover, the reforms being discussed are inter-related and interdependent. While it is important to address and get a deeper look into each, it is important as well to consider how they interrelate in a holistic framework.

This brief addresses issues of process and substance pertaining to discussions of ISDS reform taking place at UNCITRAL. It is divided in five sections. After the introduction, the second section gives a summary overview of the challenges and critiques pertaining to ISDS. The third section provides highlights from some of the ISDS reform proposals and approaches already adopted by some countries. The fourth section gives an overview of the process at UNCITRAL and highlights of some of the major actors in this process. The fifth section discusses the nature and content of the deliberations taking place in WGIII. The last section discusses some issues concerning the way forward.

2. Investor-State Dispute Settlement - a regime under scrutiny

The majority of existing international investment agreements (IIAs) provide for international ad hoc arbitration as the mechanism to address disputes between the investor and the State³. The overview provided here is not meant to be an exhaustive dissection of the challenges and critiques associated with ISDS, as this paper is not intended for that purpose. The overview is meant to give a summary in order to serve as context for the points that the brief will make in regard to the discussions at UNCITRAL WGIII.

Abstract

Reform of investor-state dispute settlement (ISDS) is being deliberated at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, which will be meeting in New York between the 1st and 5th of April 2019. For several years, the ISDS regime has been under scrutiny from voices in both developed and developing countries. ISDS reforms have been addressed in multiple forums, including national, bilateral, regional and multilateral levels, such as the United Nations Conference on Trade and Development (UNCTAD). Reforms could include moving away from arbitration as the norm for dispute settlement between foreign investors and host states or end up by introducing adaptations that might make arbitration in ISDS cases perform in a more acceptable way. Finding one-size-fits-all solutions in these deliberations is unlikely. Advancing relevant reforms would require full and effective participation of interested countries, equal opportunity for different points of views to be heard and integrated into the design of any potential outcome, and effective mechanisms to address any potential conflicts of interest within this forum.

Overall, critiques targeted at ISDS have been varied and broad⁴. In 2014, the Chief Justice of the United States Supreme Court⁵, Chief Justice John Roberts, warned that ISDS arbitration panels hold the alarming power to review a nation's laws and "*effectively annul the authoritative acts of its legislature, executive, and judiciary*". ISDS arbitrators, he continued, "*can meet literally anywhere in the world*" and "*sit in judgment*" on a nation's "*sovereign acts*"⁶. More recently in September 2018, within the context of the renegotiation of the North American Free Trade Agreement (NAFTA), more than 300 State legislators from all 50 states of the United States stood against the inclusion of ISDS in any trade agreement⁷.

Generally, the dispute settlement system based on ad hoc arbitration poses multiple challenges, which have faced the respondent States, and had impact as well on claimants, non-disputing State parties, and other stakeholders whose rights have been impacted by ISDS arbitral decisions but have been excluded from the arbitration proceedings. The ISDS regime has been an exclusive mechanism available only to foreign investors to bring cases against States, where usually, no exhaustion of local remedies has been required. This meant that domestic judicial systems would be marginalized in this area of law. It also meant that the ISDS regime as we know it today provides preferences to foreign investors, in comparison to local stakeholders including domestic investors as well as third parties impacted by the foreign investment. Furthermore, counterclaims by States against investors have been usually hard to bring, especially given the limited legal basis for this purpose under investment treaties⁸.

Under IIAs, arbitration has been established as the norm for settling any dispute cases that emerges between the covered investor and the host State. Some cases challenged legitimate regulatory interventions in the public interest, such as regulations taken in fulfillment of human rights obligations or commitments under other international agreements. The ISDS cases brought by Philip Morris to challenge Australia⁹ and Uruguay¹⁰ with respect to their tobacco control and anti-smoking regulations have been considered prime examples of such cases against good-faith regulation in the public interest that are in line with commitments undertaken by these countries under the World Health Organization's Framework Convention on Tobacco Control¹¹.

Given the vagueness of the wording of the substantive rules under investment treaties, the interpretation of such rules by arbitrators often ended up constraining regulatory space of States wanting to regulate in the public interest. Moreover, claims or threats by investors to bring forward a case against a particular State have been used as ways to prevent new legislation and other measures from being adopted or applied, thus effectuating a 'chilling effect' on the regulatory process¹². For example, in March 2018, the United States Trade Representative Robert Lighthizer noted that there have been

examples "where real regulation which should be in place which is bipartisan, in everybody's interest, has not been put in place because of fears of ISDS"¹³.

The exclusive nature of the regime has led to conflicts of interests. For example, as investment arbitration cases under IIAs generally may only be initiated by investors, arbitrators would basically depend on investors initiating claims for future appointments and related remunerations for their services. Arbitrators could in consequence be inclined to cater to the investors' interests¹⁴. Furthermore, arbitral tribunals generally have extensive discretion in deciding sums granted as awards and in setting interest on the award, including pre and post award interest¹⁵. These payments ordered by arbitral tribunals are usually covered out of public budgets, and have often created a major strain on public money. According to UNCTAD, in known ISDS cases decided in favor of investors, the average amount claimed by investors was USD1.3 billion and the median was USD118 million, while the average monetary compensation awarded by the arbitral tribunal to the claimant (not including interest, legal costs or costs of arbitration) amounted to USD504 million and the median was USD20 million¹⁶.

The unrestricted mandate of arbitrators have led to cases where arbitral tribunals have also questioned decisions by the higher courts of several countries, such as in ISDS cases against India and Ecuador¹⁷. In the absence of a mechanism to engage the opinions of domestic courts when it comes to applying domestic law, there have been cases where arbitrators have interpreted issues of domestic law from a commercial rather than public policy perspective¹⁸. Furthermore, certain awards issued by investment arbitral tribunals have been shown to be inconsistent or sometimes even contradictory, while there has not been any appropriate mechanism in place to remedy or limit such inconsistencies.

Generally, the challenges arising from ISDS have not been limited to those arising from the way arbitration functioned, such as how much it cost, how long the proceedings lasted, or the ways the arbitrators were selected, although those elements indeed need fixing. Beyond that, many challenges arose from the way arbitration marginalized other mechanisms of dispute settlement, including the use of domestic courts. Concerns that have been expressed by commentators and many governments often arose in regard to the implications of ISDS on the State's policy space to regulate in the public interest. These challenges and concerns highlight the fundamental question of whether arbitration is the most fair and effective mechanism to deal with settlement of disputes between foreign investors and the State.

3. The multi-faceted discussions pertaining to reforming ISDS

ISDS reforms cover a multitude of issues and have been addressed in multiple forums, including at national, bilateral, as well as regional and multilateral levels. In the discussions held at UNCTAD, while there is an overall con-

vergence among the international community on the need for reform, the focus of these reform efforts and the end objective behind the proposals and actions presented as reform vary substantially. This is where deliberations at UNCITRAL could add value. Achieving such added value would require UNCITRAL to provide a space for multilateral deliberations fit for such purpose that would be free from conflicts of interest and is able to provide equal opportunity for the different point of views by States to be heard and be well integrated into the design of any potential outcome.

UNCTAD's 2018 World Investment Report (WIR)¹⁹ pointed out that within the broader IIA reform trends, 243 IIAs have been terminated up until March 2018, including 100 outdated IIAs terminated since 2012. These include expired treaties, treaties replaced by new ones, terminations by consent, and unilaterally denounced treaties²⁰. At the same time, some countries have been concluding new IIAs. Some of the new treaties concluded in 2017 exhibit significant differences in comparison to those concluded in the early 2000s. One of the areas of change includes limiting access to ISDS. UNCTAD's reports show that mechanisms used for that purpose include omitting ISDS from the treaties, limiting treaty provisions subject to ISDS, excluding policy areas from ISDS coverage, limiting time periods to submit claims, among other mechanisms of reforming ISDS²¹.

It is worth recalling that in 2015, UNCTAD had published a set of options for reforming investment dispute settlement, including two options dealing with replacing the existing investor - State arbitration and another related to reforming existing investor-State arbitration²². The former set would include options such as replacing ISDS by State-to-State dispute settlement, replacing ISDS by domestic dispute resolution, or creating a standing international investment dispute resolution body. The reforms to existing ISDS, as reviewed by UNCTAD in 2015, would include options such as limiting investors' access through reducing the subject-matter scope or the range of arbitrable claims, using filters for channeling sensitive cases to State-to-State dispute settlement, introducing local litigation requirements as a precondition or exhaustion of local remedies, and improving the arbitral process. Such reforms, UNCTAD proposed, could also include introducing an appeals mechanism and adding alternative dispute resolution to precede the existing ISDS²³.

Alternatives to ISDS have emerged in some country practices. For example, Brazil, under its investment facilitation and cooperation model, opts for State-to-State dispute settlement as one element of a broader 'dispute prevention' provision, which includes a 'joint committee for administration of the Agreement', composed of government representatives of both Parties designated by their respective Governments. The agreement also establishes 'focal points or ombudsmen', which have as their main responsibility the provision of support to investors from the other Party²⁴.

South Africa provided another reform experience after it assessed its IIAs. South Africa's Protection of Investment Act (2015), which was set in place after it terminated its IIAs, does not provide for ISDS through arbitration. Instead, investors could have recourse to domestic courts, as well as to the option of referring any investment dispute with the government to a mediation process facilitated by the South African Department of Trade and Industry.²⁵

Other reforms have attempted to fix the relation between arbitration and other dispute settlement bodies, such as national courts. For example, the Indian model bilateral investment treaty requires exhaustion of local remedies before pursuit of arbitration²⁶. The model provides time limitations for the window in which the investor can bring a claim²⁷. The Indian model also requires exhausting "all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question"²⁸.

Lately, in the renegotiations of NAFTA (renamed the United States-Mexico-Canada Agreement/ USMCA), ISDS was eliminated between the United States and Canada. Between the United States and Mexico, new dispute settlement rules were set in place that require exhaustion of local remedies through initiating domestic remedies and seeing them through until a final decision or until 30 months have passed with no decision²⁹. The new rules also limit ISDS to cases of direct expropriation and post-establishment discrimination including national treatment or most favored nation.

4. UNCITRAL as the site for deliberating on ISDS reform

With respect to the implementation of the mandate of WGIII as a key multilateral forum for discussing ISDS reforms, the UNCITRAL Secretariat's reports stated that "... the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led with high-level input from all Governments, consensus-based and fully transparent"³⁰. Furthermore, UNCITRAL agreed that broad discretion should be left to WG III in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solutions.³¹

4.1 Some reflections on the dynamics of UNCITRAL's WGIII process

Generally, the proliferation of forums addressing a policy or legal issue could often mean additional challenges on countries to effectively take part and reflect their views in such processes. In the area of international investment, the process of reform has been dispersed given the nature of the investment treaty regime itself, which is spread over more than 3,200 treaties³². As noted before, reform discussions have been taking place at the multilateral, regional

and bilateral and national levels. When it comes to ISDS specifically, the mandate given to UNCITRAL's WGIII adds to this proliferation.

UNCITRAL has not traditionally been a forum where developing countries are active as a group, such as is the practice in other multilateral forums. For example, at the World Trade Organization (WTO), developing countries have been working through multiple group configurations such as the African Group, the group of Least Developing Countries, the African, Caribbean and Pacific Group, among other configurations. At UNCTAD, developing countries have often been active as the Group of 77 and China. It has been acknowledged by the UNCITRAL secretariat that support is needed for developing countries to take a more active role in the deliberations of WGIII. A fund was created for this purpose.

A recent book that studied lawmaking at UNCITRAL, particularly looking into the participation of State and non-State actors in UNCITRAL deliberations, has pointed out that law is often created by a small number of countries within this forum, along with a heavy participation by professional groups and associations³³. In these processes, the voices of developing countries have often been absent or silent, as observed by the authors. Given that UNCITRAL is concerned with advancing transnational law, this limited participation could potentially lead to questioning the legitimacy of the process and its ability to advance global norms. This is especially important when the issues being deliberated impact the public interest and entail a review of public international law principles, such as is the case with ISDS.

UNCITRAL WGIII meetings take place twice a year, in New York and Vienna, on a rotating basis. From a procedural angle, the fact that meetings are organized in both New York and Vienna pose a challenge for many developing countries, especially those that face constraints in supporting the travel of their officials from capitals and hence would have to rely for representation on their diplomats in their diplomatic missions in New York and Geneva. Consequently, ensuring the effective participation of developing countries in these processes would require specific institutional arrangements that enable the effective coordination between their capital officials and their diplomatic missions in New York and Vienna. It would also require bolstering the level of expertise in the missions in order to effectively follow the technicalities of the portfolio discussed by WGIII.

While these institutional challenges can be resolved, they could put many countries in a catch-up position, while the discussions are swiftly moving forward. These institutional and procedural aspects could potentially influence the materialization of voices in the negotiations process.

4.2 Active contributions by non-State actors

UNCITRAL is a multi-stakeholder forum, where wide consultations with practitioners, especially legal experts, have been a long-standing practice by the Secretariat³⁴. In the context of WGIII, two groups of non-State actors were organized to accompany the process. The 'Academic Forum' is open for academics active in the field of ISDS, and aims at providing a space "to exchange views, explore issues and options, test ideas and solutions, and make a constructive contribution to the ongoing discussions on possible reform of ISDS"³⁵. The 'Practitioners Group' provides lawyers active in the field of ISDS as counsel or arbitrator "a forum to exchange views, explore issues and options, test ideas, and make meaningful contributions to the ongoing discussions on possible reform of ISDS, including in UNCITRAL's Working Group III"³⁶. It also provides "practice-based assessments of the proposals being tabled for consideration..." in WGIII.

The documents presenting the two groups clearly note that both Forums have no formal standing with the WGIII and do not participate in its sessions³⁷. At the same time, the UNCITRAL secretariat clarifies that, in exercising its discretion to seek assistance from outside experts, it contacts experts from both the Academic Forum and the Practitioners' Group and solicit their contributions in preparation of the background documents it presents to the WGIII.

It is important to note that the discussions throughout the meetings of WGIII usually follow the lineup of issues as presented in the note prepared by the UNCITRAL secretariat prior to each meeting of WGIII. For example, the discussions during the meeting of WGIII held in Vienna (29 October - 2 November 2018) were based on and guided by a note prepared by the UNCITRAL secretariat entitled "Possible reform of investor-State dispute settlement"³⁸. The Secretariat clarifies that such documents are produced at the request of WGIII, are based on the deliberations held during the previous sessions of WGIII, and are supported by various background reference documents it produces on specific topics being discussed³⁹. For these additional background documents, the Secretariat clarifies that they are prepared with contributions from the Practitioners Groups, members of the Academic forum and other experts. The extent and nature of these contributions remain undefined. While these notes and accompanying documents do not necessarily present comprehensive exhaustive coverage of the issues⁴⁰, they do carry weight in shaping the way the discussions proceed.

The nature of the constituency of the 'Academic' and 'Practitioners' groups, together with the lack of clarity about the extent of contribution by these groups to shaping the documents of the Secretariat, has raised certain concerns. For example, the representative of Friends of the Earth - Europe, taking the floor during the WGIII meeting in Vienna afternoon session on 30 November 2018, asked delegates to "make sure that the research which influence the ... discussions is free of conflicts of interest...", adding that "[they] understand that many active arbitrators and

legal counsels in arbitrations are members of [the] Academic Forum and there is no mechanism for disclosure of financial interests [in the arbitration system]⁴¹. In this regard, it has been pointed out that the academic forum consists of 103 individuals, including at least 26 members that have acted as arbitrator in ISDS or as counsel or expert witness, while the practitioners' forum consists of 32 lawyers from well-established law firms specialized in ISDS⁴².

Besides, deliberations of WGIII have been garnering the attention of many public-interest non-governmental organizations. For example, more than 300 civil society groups and trade unions urged governments participating in WGIII meetings to completely overhaul ISDS and demanded that, "instead of focusing on procedural tweaks on the margins of the ISDS system, governments in UNCITRAL should put their efforts into discussing how to move away from the current investment treaty system altogether. Thus, a more constructive focus for UNCITRAL would be to concentrate on the structural problems of the investment treaty regime and to facilitate a discussion on termination or wholesale replacement of existing agreements"⁴³. However, public interest groups constitute a small fraction of the overall non-State participation in the meetings of WGIII. Requests by some civil society groups for an invitation to attend the meetings have been rejected⁴⁴. It has been also observed that "the vast majority (85%) of the invited non-governmental organizations participating as an observer in the first two sessions of WGIII are directly or indirectly linked to the private arbitration industry (or broader transnational business interests), with only 14% representing wider public interests"⁴⁵.

Overall, it could be observed that besides the capacity to follow and situate oneself within this proliferation of forums, which is one challenge, the mere selection of the site for the discussion itself could carry structural bias towards or against effective participation by certain constituencies, whether certain States or non-State participants. Consequently, the effect of placing certain discussions in a certain forum does not remain a technical or procedural issue, but could eventually materialize in the form of influence on the political dynamics of the deliberations. Consequently, it could affect the negotiations, including issues such as whose voices are effectively reflected, whose voices are dominant, which questions are posed and from whose perspective, and how the discussion is linked to the other pieces of reform addressed in other forums.

5. Discussing concerns with ISDS and related reforms at UNCITRAL

5.1 The boundaries of the mandate

The mandate of WGIII is understood to focus on procedural issues. The report of the first meeting of WGIII stated that "ISDS provided a method to enforce the substantive obligations of States. It was noted that critical questions on possible ISDS reform involved the under-

lying substantive rules. Nonetheless, it was clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement rather than on the substantive provisions"⁴⁶.

It is worth noting that the mandate given by the Commission to WGIII provided that "[t]he Commission entrusted Working Group III with a *broad mandate to work on the possible reform of investor-State dispute settlement*" (emphasis added)⁴⁷. According to the report of the Commission's meeting that decided on the mandate, there was no concise and definitive discussion on the boundaries of the mandate. The only paragraph that relates to this discussion provides that "[i]t was mentioned that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements...Nonetheless, it was stated that work on substantive standards was deemed less feasible than work on the procedural aspects"⁴⁸.

The boundaries of the mandate has been often cast as strictly procedural. In the deliberations that took place over the first three meetings of WGIII, it was argued that certain issues of concern to some countries would fall outside the mandate given that they are not of such a nature. While there might be advantages to such a restricted mandate, as many stakeholders might rightly not want to see multilateral negotiations on substantive rules to regulate investment agreements at this point, the rigidity in approaching the mandate might lead to false boundaries when addressing many elements important for reforming ISDS. Indeed, it has been pointed out that "procedural and substantive concerns are inextricably linked and effective reform is unlikely if they are arbitrarily disassociated"⁴⁹. For example, re-envisioning the ISDS system and possible alternatives is closely linked to the discussion pertaining to the beneficiaries of the system and their access to ISDS, including obligations of investors. Such an issue could be seen as falling outside WGIII mandate if a procedural focus will be strictly enforced.

During WGIII deliberations, a few countries spoke on this issue. Indonesia pointed out that "the proposed ISDS reform discussion under UNCITRAL is built upon a substance-procedure dichotomy ...Indonesia sees that it may actually defeat the purpose of having a meaningful ISDS mechanism as it is difficult to separate between substance and procedure". Indonesia added its view that "procedural law is inherently substantive and vice versa. Substantive and procedural provisions in the international investment agreements are intertwined in nature"⁵⁰. From a similar view point, South Africa expressed that one "cannot look at procedural issues in abstract from the substantial issues"⁵¹.

5.2 Desirability of reform already agreed, while content and direction of reform still to be debated

At its third meeting, WGIII concluded its review of three broad categories of concerns laid out in an UNCITRAL secretariat document that attempts to summarize the dis-

ussions that took place in its first two meetings. Those three broad categories of concerns included: cost and duration of ISDS cases, the role of arbitrators and decision makers, and the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals⁵². The WG also agreed on the desirability of reform in these areas⁵³.

Yet, during the deliberations of the third meeting, it became clear that some concerns raised by certain developing countries were not captured in the secretariat's papers referred to above⁵⁴. Consequently, the report of the 2018 Vienna meeting provided that "[t]he Working Group took note that it would ... have to consider...other concerns not already covered by the broad categories of desirable reforms already identified"⁵⁵. Countries that wish to raise additional concerns were invited to submit them in writing before the fourth meeting of WGIII to be held in New York (1-5 April 2019).

UNCITRAL WGIII seems to be heading towards wrapping up the discussion on concerns regarding ISDS and the desirability of reforms, which constituted the first two layers of the mandate given to the WG, in order to commence discussions on what reforms are needed. While the three sets of concerns that have been captured in UNCITRAL's secretariat reports are important and relevant for reforming ISDS, they are clearly a small subset of the kinds of concerns that have driven many countries to either move away from ISDS or to reform it more holistically. In the context of the UNCITRAL deliberations, there have been multiple voices and suggestions pointing towards the need for a holistic discussion.

For example, the Group of 77 and China, which represent the largest grouping of developing countries under the auspices of the UN⁵⁶, posited in a common negotiated statement that "[a] discussion on the concerns relating to the existing ISDS system and possible reforms are of central importance to the developing states that adopt such regime, given the impact of ISDS on the development process. Many of the group's members are already actively taking part in this process through, inter alia, refining the existing ISDS system, revising or in some cases terminating existing bilateral treaties, developing new models for future agreements, and engaging in multilateral processes". The statement stressed that "any dispute settlement regime should appropriately address the rights and responsibilities of foreign investors" and that "the right to regulate and the flexibility of states to protect legitimate public welfare objectives should be respected". (emphasis added)

Thailand presented a formal submission to WGIII in which they propose that the "[d]iscussions on ISDS reform should be holistic and balanced, taking into account the different priorities of each State including: (a) the pursuit of public policy objectives of host States; (b) the promotion of responsible investment; (c) the protection of investors' rights; and (d) the attainment of global objectives such as sustainable development and food

security."⁵⁷ Thailand proposed that "[d]iscussions on ISDS reform should also be thorough and not limited to just one aspect of ISDS – that is, arbitration". They add that "[f]ocusing discussions on arbitration as a way to resolve investment disputes could deprive the Working Group of innovative solutions to the current problems."

Another perspective was presented by Indonesia in a paper circulated during WGIII meeting in Vienna in November 2018⁵⁸. Indonesia pointed out that "ISDS reform process should reflect an effort to strike a balance between the rights and obligations of all relevant stakeholders, protecting investors and their rights while preserving a state's policy space and right to regulate foreign investments in its territories". Indonesia added that among its concerns towards ISDS are the 'regulatory chill' resulting from the threat of ISDS, "where governments become hesitant to undertake legitimate regulatory measures within the public's interest for fear of claims, thus hindering the government's right to regulate". Indonesia pointed as well to the challenges of creating a parallel system of adjudication, as "ISDS enables foreign investors to circumvent domestic legal processes and sue the host country in international arbitration...and could even challenge the government's measure...in line with their constitution and laws". Indonesia pointed out frivolous claims and the credibility of the international arbitration system as other concerns.

South Africa has also expressed that "broader and holistic approach to reform" is needed and called for "conscious recognition of sustainable development through promoting and facilitating sustainable investment and ensuring responsible investment". South Africa stressed that "reforms should be aimed at developing an inclusive dispute settlement alternative"⁵⁹.

5.3 ISDS reform: between rethinking the role of arbitration and tweaking arbitration

Both the discussions taking place at UNCITRAL's WGIII as well as country practices in terms of reviewing and reforming IIAs, including their new treaty practice and their new model agreements, clearly show that there are significant divergences in countries' approaches to reforming ISDS⁶⁰. Any possible convergence at the multilateral level around ways to reform ISDS will require a mechanism that acknowledges and reflects these divergences, and does not impede countries' evolution on differentiated tracks of reforms.

If one considers the different strands of discussions and reforms pertaining to ISDS, such as at UNCTAD, UNCITRAL, and in the context of national processes, one could generally bundle different ideas, proposals and approaches to reform in two categories. One category would include the proposals that would potentially move the mechanism of dispute settlement between the investor and the State away from reliance on arbitration as the norm. Such ideas include either replacements of the current ISDS system or complementing it with elements that would introduce systemic changes. It is worth noting that, during the 50th session of UNCITRAL that adopted WGIII

mandate, “[t]he suggestion was made that it would be useful to consider the role of domestic courts, State-to-State dispute settlement mechanisms and any other means of investment dispute resolution”⁶¹. Another category would include suggestions and proposals that would preserve arbitration as the norm for dispute settlement between the foreign investor and the State, but would introduce certain changes or ‘tweaks’ that would make arbitration perform in a more acceptable way for developing countries.

The following will give an overview of ideas for reform that could fall under the first category and some examples from State practice, followed by an overview of ideas that could fall under the second category. It is important to point out that these are not meant as exhaustive demonstrations.

At the outset, it is important to underline a couple of points. The proposals that would fall under each category could be interrelated and interdependent in many cases. Consequently, they could produce differentiated results depending on the final package of reforms as well as the mechanism of reform to be adopted. Moreover, in many cases, moving away from arbitration as the norm will require States to exit from the existing commitment to advance consent to ISDS, which is provided under their international investment agreements⁶². A multilateral instrument for withdrawing the unilateral offers of consent to arbitration that States have provided under their IIAs, which operates as a successive treaty that applies to all existing IIAs, could provide an enabling tool for many States that might be contemplating such decisions, but are hesitant to go down the unilateral road of withdrawing consent one treaty at a time⁶³.

5.3.a Moving away from arbitration as the norm

The alternative of State-to-State dispute settlement

One of these reforms could be moving towards a system that is primarily based on State-to-State dispute settlement as the mechanism to address disputes between the investor and the State. This would resemble the WTO dispute settlement body, although it does not have to be based within a standing international body. Brazil’s model Cooperation and Facilitation of Investment Agreement adopted a State-to-State mechanism for addressing any arising disputes between the investor and the State, bolstered with a layer of prevention mechanisms⁶⁴. The Southern African Development Community (SADC) amended its Finance and Investment Protocol⁶⁵ in 2016 to exclude the ISDS clause, leaving State-to-State dispute settlement as the only option⁶⁶.

Using only domestic judicial systems

Another alternative could be to use only domestic judicial systems to address disputes between investors and the State. For example, South Africa withdrew from its investment treaties and developed a domestic bill that does not include recourse to international arbitration.

Another example appeared in the Australia–United States Free Trade Agreement (FTA) and the Australia–Japan Economic Partnership Agreement that do not include ISDS. Under these treaties, in case of a dispute, foreign investors must resort to domestic courts. Investors going abroad can insure their investment against political risks by purchasing private insurance, rather than relying on ISDS⁶⁷. A usual objection to such a proposition is the claim that domestic courts are usually overburdened with cases and not efficient in addressing investment cases where the investor is looking for a fast decision. While these critiques may apply to many domestic courts, they also apply to international arbitration of investment cases, which is evident by the fact that these issues are some of the concerns under discussion at UNCITRAL. Consequently, the fact that domestic systems might need improvement should not be a barrier for discussing their role in settling disputes between the investor and the State. For those purposes, the discussion could include a process towards strengthening domestic systems, including for example considering the utility of conferring certain courts, such as those dealing with administrative issues, exclusive competence to deal with investment disputes, or establishing specialized courts to deal with investment disputes.

The relation between domestic and international remedies

Some reforms could be designed in a way so as not to exclude arbitration, but to complement it in a way that addresses some of the challenges emerging from the nature of the ISDS system as we know it today, including the challenge of marginalizing the domestic judicial system and creating a parallel system of adjudication. One of such reforms is addressing the relation between domestic and international remedies. For example, one possibility is requiring exhaustion of local remedies⁶⁸. Lack of such a requirement is not in line with usual practice under international law where exhaustion and complementarity of regional and international institutions vis-a-vis domestic systems are the usual practice⁶⁹. As previously noted, India’s new model bilateral investment treaty requires exhaustion of local remedies before pursuit of arbitration.

The use of filters and carve-outs to limit arbitrable cases

Other ideas would be establishing filters for ‘sensitive’ cases or carve-outs for certain kind of cases, particularly those pertaining to non-discriminatory regulation in the public interest⁷⁰, from being subject to arbitration. Cases challenging such measures not only lead to regulatory chill but could also hinder the abilities of governments to implement the commitments they undertook under other treaties, such as health and environmental treaties⁷¹.

A filter could be set up as a State-to-State mechanism involving the States Parties to the investment treaty, or another type of autonomous mechanism set up by the States Parties to the treaty, and may serve to filter cases before they can proceed to arbitration. It could operate similar to a mechanism that addresses frivolous claims but with a wider scope, and could be used to deny jurisdiction over claims against legitimate, non-discriminatory,

and lawful decisions to protect the public interest. For example, the Australia--China FTA provides for a State-to-State filter, whereby both States could agree a potential ISDS claim is about a non-discriminatory regulatory issue and should not proceed to arbitration⁷².

A carve-out would exclude certain cases from the scope of ISDS coverage, such as cases that attempt to challenge regulation in the public interest. The scope of this category could be pre-defined or left to the State parties to the treaty to define on a case by case basis. An example of a carve-out is the 'tobacco carve-out' proposed by Australia under the Trans-Pacific partnership agreement⁷³, later the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which reads as follows: "*A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed*" (Article 29.5 on Tobacco Control Measures).

5.3.b Reforming arbitration to make it work better

This category could include a diverse set of proposals for change in the way arbitration is currently used for ISDS purposes. Different proposals would result in different outcomes, and consequently would change the ISDS system in different ways. Also, these proposals would work differently in conjunction with one another.

Two important propositions to consider under this category are preconditions for access of investors to ISDS as well as counterclaims. Currently, given that advance consent to arbitration by the State is assumed under IIAs, any foreign investor considered protected under the treaty is able to bring a claim, and in many cases even investors that have violated domestic or international obligations have been granted access to ISDS⁷⁴. A 'clean hands' requirement could condition the ability to use ISDS on respect of the host State's laws including those on human rights, labor, environmental, health and other public interest related laws⁷⁵. The requirement could also be expanded to require the fulfillment of certain obligations to the host State by the investor.

It is worth noting that several States are giving serious consideration to the issue of investor obligations in their new treaty practice, model approaches, and guidelines for investment treaty making. Examples can be found in the India model Bilateral Investment Treaty (BIT) and Nigeria-Morocco Investment Promotion and Protection Agreement, among others⁷⁶. Furthermore, UNCTAD has pointed out examples of treaties where the treaty coverage is conditioned on investors' contri-

bution to host State's sustainable development and economy, such as the Burundi-Turkey BIT, the Mozambique-Turkey BIT, and the Turkey-Ukraine BIT⁷⁷. This would shift ISDS from being a free entitlement taken for granted by foreign investors, to an acquired privilege preconditioned on the fulfillment of certain added-value obligations within the host country and community.

Facilitating counterclaims by the respondent State against the claimant investor would also help address the asymmetries in ISDS, which is currently primarily a 'one way street' that enables foreign investors to bring claims⁷⁸. States' attempts to assert counterclaims rarely succeeded, especially due to the limited legal basis under IIAs. One example of such a mechanism would establish, as part of the conditions that an investor has to fulfill in order to submit a dispute for resolution through ISDS, that the investor accepts the possibility of facing claims by the respondent against them⁷⁹. Counterclaims could also be used to prevent certain investors violating the law of the host State from benefiting from the IIA protections, including ISDS, or to limit the damages they can receive under ISDS⁸⁰. In this way, counterclaims could facilitate holding to account foreign investors that have violated the laws of the host State. It is worth noting that States are increasingly paying attention to investor obligations under IIAs, as highlighted above. Where counterclaims are linked to the rights of third parties impacted by a violation undertaken by the investor, the rights and participation of those third parties is an important issue to be addressed⁸¹.

Another proposition under this category would be building an appeals mechanism. The potential gains from this proposition in regard to enhancing predictability and coherence versus deepening fragmentation and expanding treaty-shopping ought to be considered. Other issues and proposals of relevance, some of which are already under discussion at UNCITRAL WGIII as noted above, include mechanisms to strengthen State Parties' role in interpretation of treaties and related questions, involvement of domestic institutions for questions of domestic law, mechanisms to address duration, costs and security of costs in proceedings, addressing third party funding of ISDS claims, advancing multi-stakeholder access to the dispute settlement mechanism, mechanism for dismissal of frivolous claims, enhancing transparency measures not already covered under the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, developing rules or guidelines on quantification of awards and interest rates, code of conduct for arbitrators, among other issues.

5.4 The added value of a new standing body for settling disputes between investors and States

The idea of establishing a new permanent multilateral investment court (MIC), or a standing mechanism for the settlement of international investment disputes, has been part of discussions pertaining to the mandate given to WGIII, even at the stage of setting up the mandate by the Commission. The report of the Commission's 50th session

(July 2017), during which the WGIII mandate was agreed, points out that “[a]s a possible solution for investor-State dispute settlement reform, a significant number of references were made to the establishment of a permanent multilateral investment court. It was suggested that, while not being the only possible solution, the idea of a permanent multilateral investment court should be given due consideration”⁸².

On 1 March 2018, the European Commission received from the Council of the European Union the negotiating directives for a convention establishing a multilateral court for the settlement of investment disputes⁸³. The directives provide that “negotiations... should be conducted under the auspices of the United Nations Commission on International Trade Law (UNCITRAL)...”⁸⁴, and establish that the Union shall be represented by the European Commission throughout the negotiations pertaining to the multilateral court and that “the Union should be in a position to become a Party to the Convention and the provisions of the Convention should be drafted in a way which allows their effective use by the European Union”⁸⁵. In January 2019, the European Union submitted a note to the UNCITRAL secretariat entitled “Establishing a standing mechanism for the settlement of international investment disputes”, which “sets out preliminary ideas, for discussion in the Working Group”⁸⁶.

The MIC proposal has been generating significant debates, especially the extent to which it could address the fundamental problems and challenges arising from the existing ISDS system⁸⁷. While this article is not meant to analyze this proposal, this section highlights some issues for consideration in that regard.

A standing body could improve on the current ISDS context, particularly in regard to the challenges emanating from the current ad hoc manner of establishing arbitral tribunals, often leading to conflicts of interest and distorted set of incentives among the arbitrators. For example, if needed safeguards were to be adopted, including in the methods of appointments, assignment of cases as well as remunerations, a standing mechanism could potentially enhance adherence to standards of independence and impartiality⁸⁸.

Yet, the EU’s proposal keeps unclear or unaddressed several issues that would be highly relevant in terms of achieving systemic or holistic reform of ISDS⁸⁹. For example, the negotiating directive given to the Commission and the EU’s submission referenced above do not address the relationship of the proposed body with the system of domestic remedies, including the possibilities for exhaustion of local remedies before proceeding to the multilateral court. Consequently, the new body could continue to marginalize domestic legal systems. The directive and submission do not clarify as well the relationship of the proposed body with the existing ISDS system that is based on ad hoc tribunals, although the general statements by the European Commission have noted that “[t]he ultimate aim is to establish a single

permanent body to decide investment disputes, thus moving away from the ad hoc system of investor to state dispute settlement (ISDS) which is currently included in around 3200 investment treaties in force today ...”⁹⁰.

Moreover, the proposed court, or standing mechanism, retains major aspects of the current traditional ISDS system, including being an exclusive system that provides only investors the ability to sue the sovereign State in relation to any measure or public policy issue that is considered as undermining their investments and is not carved out from the scope of the applicable IIA. While the EU proposed that “[t]he non-disputing party to the treaty in question should also be able to participate in the dispute”⁹¹, it does not clarify whether it will consider the right of standing for parties affected by cases that would be brought to the court, such as communities affected in a case that deals with natural resources or land to which communities have certain rights. Furthermore, it is not clear how the proposal would address the right of the Host States to bring counterclaims against the investor, nor whether it would address the right of the Host States and communities impacted by the investment to bring direct claims against investors⁹².

It has also been pointed out that an institutionalized court for foreign investors is likely to tend towards increasing its power by ruling expansively on its jurisdiction and in favor of the claimants, which could make the investor bias inherent in today’s private arbitration system even more intense in such a standing body⁹³. Furthermore, the EU’s proposal considers that the court could be funded through State parties’ financial contributions or/and user fees, while noting that “care should be taken not to tie these fees directly to the remuneration of the adjudicators”⁹⁴. It is an open question whether States will be willing to fund an institution that only gives benefits (access to adjudication of claims) to private investors. In case the Court is to be financed through users’ fees, then this could raise possibilities of conflict of interest, whereby the court’s adjudicators could be inclined to promote the bringing of ISDS disputes before the court in order to sustain the institution.

The EU’s submission to WGIII noted that “[a] standing mechanism will also be better positioned to gradually develop a more coherent approach to the relationship between investment law and other domains, in particular domestic law and other fields of international law”⁹⁵. This same point could be raised as a point of caution regarding the idea of a MIC, especially that such a court could create new law or set of precedent that would potentially be inclined towards the interests of investors. If the court will be addressing the relation of investment law to other bodies of law, such as human rights law, the fear could be that its jurisprudence would propose an understanding of coherence that is rooted in an investment lens and not necessarily prioritizing a human rights lens.

Generally, the potential reform to result from establishing a new standing body will largely depend on the extent to which the body is equipped with procedural and sub-

stantive elements in its functionality that would address the challenges resulting from the current system of ISDS. Thus, establishing a new body is not necessarily holistic reform by default.

6. Concluding reflections on the way forward

Reforming ISDS is central to reforming the investment protection regime, which has become a policy objective adopted by a large number of developed and developing countries. Deliberations of ISDS reform at UNCITRAL ought to be part of a broader holistic approach by States to reforming both substantive and procedural commitments under IIAs. For whatever dispute settlement system is to be adopted, problems cannot be resolved as long as substantive law under IIAs remains unreformed.

The next stage of deliberations at UNCITRAL WGIII will entail developing work plans that would allow moving from discussing concerns with ISDS to defining the reforms that are needed, including dealing with issues of sequencing and priority of reforms to be addressed in this process⁶. This will be the period for participating States to substantiate what would be systemic and holistic reform from their point of view. Active participation by States, through the submission of written contributions as well as participation in WGIII deliberations, is a prerequisite for a meaningful outcome from UNCITRAL's process.

Different deliberations and reform initiatives pertaining to ISDS, at national, regional and multilateral levels, show that States have varying approaches to this issue. Reforms could vary between changes that would move the mechanism of dispute settlement between the investor and the State away from reliance on arbitration as the norm, and others that would introduce certain changes or 'tweaks' that would make arbitration in ISDS cases perform in a more acceptable way. This is why it is not expected that a one-size-fits-all solution would be possible. It is worth recalling that several countries have already taken steps away from ISDS, whereby there are some choices to resort to domestic courts and/or State-to-State dispute settlement. Consequently, it is important to consider within UNCITRAL WGIII the utility of envisioning arbitration as an exception instead of the norm in dispute settlement between foreign investors and host States.

Advancing reform through the multilateral process of UNCITRAL would require from WGIII active mechanisms to ensure full and effective participation of countries wanting to take part, taking into consideration the limited capacities and resources available to delegations from developing countries. It is also crucial to afford equal opportunity for different point of views by States to be heard and be well integrated in the design of any potential outcome, as well as active mechanisms to address any potential conflicts of interest within WGIII.

Endnotes:

¹ Source: Report of WGIII on the work of its 34th session, available at: https://uncitral.un.org/en/working_groups/3/investor-state and the report of UNCITRAL 50th session that adopted WGIII mandate (A/72/17), available at: <http://www.uncitral.org/uncitral/en/commission/sessions/50th.html>. Between the 29th of October and the 2nd of November 2018, WGIII held its third meeting pertaining to its mandate on ISDS in Vienna, after two others in New York (April 2018) and Vienna (November 2017). Its fourth meeting is scheduled between the 1st and 5th of April in New York.

² See: UNCTAD World Investment Report 2015, chapter 4, page 120, available at: https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf and discussions during the UNCTAD annual IIA expert meetings (2016 and 2017).

³ The 2012 Organisation for Economic Co-operation and Development (OECD) survey of investment treaties showed that 96 % contained ISDS provisions allowing foreign investors to raise claims through international arbitration. Source: David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, p. 64, at <http://dx.doi.org/10.1787/5k46b1r85j6f-en>. Referenced in UNCITRAL Doc. A/CN.9/WG.III/WP.142, p. 3.

⁴ See: Johannes Schwarzer (December 2018), "Investor-State Dispute Settlement: An Anachronism Whose Time Has Gone", published as South Centre investment policy brief, available at: https://www.southcentre.int/wp-content/uploads/2018/12/IPB12_Investor-State-Dispute-Settlement-An-Anachronism-Whose-Time-Has-Gone_EN.pdf.

⁵ Roberts is the head of the United States federal court system (the judicial branch of the federal government of the United States) and the chief judge of the Supreme Court of the United States.

⁶ Chris Hamby, BuzzFeed News Reporter.

⁷ Letter directed to Robert Lighthizer, United States Trade Representative, from the National Conference of State Legislatures (September 12, 2018), available at: <https://www.citizen.org/sites/default/files/state-legislator-letter-isds-nafta-sept-2018.pdf>. In their argument, the signatories to the letter made the point that "when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations".

⁸ Dafina Atanasova, Carlos Adrián Martínez Benoit, Josef Ostránský, "Counterclaims in Investor-State Dispute Settlement Under International Investment Agreements", Trade and Investment Law Clinic Papers, The Graduate Institute (2012); Eric De Brabandere, "Human Rights Counterclaims in Investment Treaty Arbitration" (Section II entitled Counterclaims in Investment Treaty Arbitration), Grotius Centre Working Paper Series, Leiden University (2018).

⁹ Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, related documents available at: <https://www.italaw.com/cases/851>.

¹⁰ Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, related documents available at: <http://www.italaw.com/cases/460>.

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¹¹ See for example : Stefanie Schacherer (October 2018), Philip Morris v. Uruguay, IISD Investment Treaty News, available at : <https://www.iisd.org/itn/2018/10/18/philip-morris-v-uruguay/>.

¹² See: Cezary Wiśniewski and Olga Górska (2015), “A Need for Preventive Investment Protection?”, Kluwer Arbitration Blog.

¹³ Discussion between US Trade Representative Robert Lighthizer and Chairman of the Ways and Means Committee Kevin Brady on 21 March 2018. Available at: <https://www.c-span.org/video/?c4719932/brady-lighthizer-isdsdiscussion&start=1516> (last visited on 1.15.2019). Referenced in: Friends of the Earth International Remarks made during the 35th session of UNCITRAL Working Group III with regards to A/CN.9/WG.III/WP.142, Section D, Paragraphs 45- 57, available at: https://uncitral.un.org/sites/uncitral.un.org/files/friends_of_the_earth_international_remarks.pdf.

¹⁴ Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom* (Corporate Europe Observatory and the Transnational Institute, 2012).

¹⁵ Pre-award interest is supposed to compensate a party due to the delay between the time when the damage was caused and the date of the award. If the amount in controversy is substantial, and the harm alleged to have occurred was years before the claim was filed, then the pre-award interest may be significant, especially if the rate is compounded. See for example: Eric S. Waldman, “Pre-award interest - How do arbitrators figure it out in an International Arbitration?”, available at: <https://www.migallas.com/HotTopics/63,MI165087,81042-Pre-award+interest+How+do+arbitrators+figure+it+out+in+an> (last visited 3.26.2019).

¹⁶ See: UNCTAD IIA Issue Note (June 2018), “Investor-State Dispute Settlement: Review of Developments in 2017”, available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.

¹⁷ See: White Industries Australia Limited v. The Republic of India and Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador.

¹⁸ See : Johannes Schwarzer, *supra* note 4.

¹⁹ UNCTAD World Investment Report 2018, Chapter III, particularly the section pertaining to recent developments in the international investment regime, available at: <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2130>.

²⁰ *Ibid.*, page 99.

²¹ *Ibid.*, pages 96 and 97.

²² See: UNCTAD World Investment Report 2015, available at: <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>.

²³ *Ibid.*, page 147.

²⁴ See: Felipe Hees, Pedro Mendonça Cavalcante and Pedro Paranhos (May 2018), “The Cooperation and Facilitation Investment Agreement (CFIA) in the context of the discussions on the reform of the ISDS system”, South Centre Policy Brief, available online at <https://www.southcentre.int/investment-policy-brief-11-may-2018/#more-11005>.

²⁵ See: Protection of Investment Act South Africa, section 13, available at: <https://www.thedti.gov.za/gazettes/39514.pdf>. See also: Peter Leon and Ernst Muller (February 2017), “New Dispute Resolution Rules for Foreign Investors in South Africa”, available at: <https://hsfnotes.com/arbitration/2017/02/16/new-dispute-resolution-rules-for-foreign-investors-in-south-africa/>.

²⁶ See: See Article 15.1 of India’s model bilateral investment agreement. This analysis of the Indian Investment Model Treaty is based on the version released by the Indian Government in January 2016. It is worth noting that: The Indian Model Treaty requires, as one of the condition before an investor may submit a claim to arbitration, that they waive “their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach...” (Article 15.5.iii and 15.5.iv). It also includes a section on ‘prevention of conflict of interest of arbitrators’ (see Article 19) providing grounds based on which a party may challenge an arbitrator appointed under the Treaty, detailed criteria pertaining to assessing the ‘independence, impartiality and freedom from conflict of interest’ of the arbitrators (see Article 19.10), and a section on transparency in arbitral proceedings (see Article 22).

²⁷ See *ibid.*, Article 15.5.i, which sets the limit to no more than six years since the date on which the disputing investor first acquired or should have first acquired knowledge of the measure in question.

²⁸ See *ibid.*, Article 15.2.

²⁹ See: Annex 14-D of revised NAFTA entitled “Mexico-United States Investment Disputes”. See also Public Citizen’s “Analysis of the NAFTA 2.0 Text Relative to the Essential Changes We Have Demanded to Stop NAFTA’s Ongoing Damage”, available at: https://www.citizen.org/sites/default/files/nafta_2.0_text_analysis.pdf.

³⁰ For example, see para. 3 of UNCITRAL document A/CN.9/WG.III/WP.142 (18 September 2017), “Possible reform of investor-State dispute settlement (ISDS)”, Note by the Secretariat, Working Group III, Thirty-fourth session Vienna, 27 November-1 December 2017. See also UNCITRAL document A/72/17 para. 264, *supra* note 1.

³¹ See UNCITRAL document A/CN.9/WG.III/WP.141, Annotated provisional agenda, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-fourth session, Vienna, 27 November-1 December 2017.

³² See UNCTAD’s IIA Navigator <https://investmentpolicyhub.unctad.org/IIA>.

³³ See: Susan Block-Lieb and Terence C Halliday (2017), *Global Lawmakers: International Organizations in the Crafting of World Markets*, Cambridge University Press. The authors studied particularly the UNCITRAL deliberations pertaining to transport law, insolvency law, and secured transactions. The reflections in this section are based on a presentation by the authors given at the Graduate Institute in Geneva.

³⁴ See for example, statement made by the UNCITRAL secretariat on October 29th, first day of the 36th session of WGIII, morning session (minutes 10:43 to 10:46, time elapsed of the meeting), available at: <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/83610475-a980-4453-84e8-d6219731b3d6>.

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³⁵ See para. 6 of UNCITRAL document A/CN.9/WG.III/XXXVI/CRP.2 circulated by the UNCITRAL secretariat during the meeting of WGIII in Vienna in 2018. See also <https://www.cids.ch/academic-forum>.

³⁶ *Ibid.*, para. 9 of UNCITRAL document A/CN.9/WG.III/XXXVI/CRP.2.

³⁷ *Ibid.*

³⁸ See: UNCITRAL document A/CN.9/WG.III/WP.149 (5 September 2018), available at: https://uncitral.un.org/en/working_groups/3/investor-state.

³⁹ See for example UNCITRAL documents A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153, available at: https://uncitral.un.org/en/working_groups/3/investor-state.

⁴⁰ It has been stated in the Secretariat's notes that: "The topics discussed in the background documents are not intended to reflect a comprehensive set of issues regarding ISDS that the Working Group has discussed, or may yet wish to discuss. Additional concerns may have to be addressed". See para. 2 of UNCITRAL document A/CN.9/WG.III/WP.149, available at: https://uncitral.un.org/en/working_groups/3/investor-state.

⁴¹ Presentation by Friends of the Earth – Europe during UNCITRAL WG III meeting in Vienna, 2018.

⁴² Bart-Jaap Verbeek, "The limitations of the UNCITRAL process on ISDS reform", October 2018. Available from <https://www.somo.nl/the-limitations-of-the-uncitral-process-on-isds-reform/>.

⁴³ See: Statement by more than 300 civil society organizations from 73 countries urge fundamental

reform at UNCITRAL's ISDS discussions, available at: <https://drive.google.com/file/d/1s-bTcSjBRw1ShnQKGaxR8TSj2TPd1Mrs/view>.

⁴⁴ See: Bart-Jaap Verbeek, *supra* note 42.

⁴⁵ *Ibid.*

⁴⁶ See para. 20 of UNCITRAL document A/CN.9/930/Rev.1, available at: <https://undocs.org/en/A/CN.9/930/Rev.1>.

⁴⁷ See para. 263 of report of the 50th session of the commission A/72/17, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/PDF/V1705889.pdf?OpenElement>.

⁴⁸ *Ibid.*, para. 257 of the report A/72/17.

⁴⁹ Lorenzo Cotula and Brooke Guven, "Investor-state arbitration: an opportunity for real reform?", 7 December 2018. Available from <https://www.iied.org/investor-state-arbitration-opportunity-for-real-reform>.

⁵⁰ See: paper submitted by Indonesia, "ISDS Reform: a brief perspective from Indonesia" (November 2018), A/CN.9/WG.III/WP.156, available at: <http://undocs.org/en/A/CN.9/WG.III/WP.156>.

⁵¹ Intervention by South Africa during afternoon session of WG III on 31 October 2018. Audio available at: <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵² See documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.151-153 available on the UNCITRAL

website https://uncitral.un.org/en/working_groups/3/investor-state.

⁵³ See for example: Anthea Roberts (2018), "UNCITRAL and ISDS Reforms: Moving to Reform Options...the Process", available at: <https://www.ejiltalk.org/uncitral-and-isds-reforms-moving-to-reform-options-the-process/> and "UNCITRAL and ISDS Reforms: Moving to Reform Options...the Politics", available at: <https://www.ejiltalk.org/uncitral-and-isds-reforms-moving-to-reform-options-the-politics/>.

⁵⁴ For example, see statements by South Africa, the Center for International Environmental Law (CIEL), and the Centre for Research on Multinational Corporations (SOMO) during WGIII meeting in Vienna on 31 October 2018 morning session, available on audio recording at: <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁵⁵ See para. 137 of UNCITRAL document A/CN.9/964 available at: https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf. In that context, governments that wished to raise additional concerns were encouraged to submit them in writing before the next session of WGIII to be held in New York during April 2019.

⁵⁶ The full statement is available at the following link: www.g77.org/statement/getstatement.php?id=180423.

⁵⁷ See: document A/CN.9/WG.III/WP.147 (11 April 2018), available at: https://uncitral.un.org/en/working_groups/3/investor-state.

⁵⁸ See: submission by Indonesia, *supra* note 50.

⁵⁹ See: Audio recording of UNCITRAL meeting, 31 October 2018 afternoon session, available at: <http://www.uncitral.org/uncitral/audio/meetings.jsp>.

⁶⁰ Stephan Schill and Geraldo Vidigal, *Cutting the Gordian Knot: Investment Dispute Settlement à la Carte*, (ICTSD and Inter-American Development Bank, November 2018). See also: Kinda Mohamadieh and Daniel Uribe (2016), "Approaches to International Investment Protection: Divergent Approaches Between the TPPA and Developing Countries' Model Investment Treaties", South Centre Research Paper #68, available at: https://www.southcentre.int/wp-content/uploads/2016/06/RP68_Approaches-to-International-Investment-Protection-rev_EN.pdf.

⁶¹ Para. 256 of the report of the 50th session of the commission.

⁶² See: Lise Johnson, Lisa Sachs, Brooke Guven, and Jesse Coleman (2018) *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law*, Columbia Center on Sustainable Investment.

⁶³ Matthew C. Porterfield, "Aron Broches and the Withdrawal of Unilateral Offers of Consent to Investor-State Arbitration", IISD Investment Treaty News, 11 August 2014.

⁶⁴ See Felipe Hees, Pedro Mendonça Cavalcante and Pedro Paranhos, *supra* note 24.

⁶⁵ See: <http://www.sadc.int/documents-publications/protocols/>.

⁶⁶ SADC is constituted of 16 African States (see <https://www.sadc.int/index.php?CID=142>).

⁶⁷ See: Trishna Menon and Gladwin Issac (February 2018), "Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative?", available online at:

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<http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/>.

⁶⁸ See: Matthew C. Porterfield, “Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?”. *Yale Journal of International Law Online*, Vol. 41, Fall 2015, available at SSRN:

<https://ssrn.com/abstract=2735036>.

⁶⁹ The International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights all contain some form of exhaustion of local remedies requirement. See: Martin Dietrich Brauch (January 2017), “Exhaustion of Local Remedies in International Investment Law”, IISD Best Practices Series, available at <https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law>. See also: Lorenzo Cotula and Brooke Guven (2018), *supra* note 49.

⁷⁰ See the proposition for a public interest carve-out presented by Client Earth in the legal briefing entitled “Towards a more diligent and sustainable system of investment protection”, 15 March 2017, available at:

<https://www.documents.clientearth.org/wp-content/uploads/2017-03-15-towards-a-more-diligent-and-sustainable-system-of-investment-protection-ce-en.pdf>.

⁷¹ For example, Australia’s plain packaging tobacco laws in 2011 were unsuccessfully challenged by Philip Morris under the Australia-Hong Kong Bilateral Investment Treaty (BIT). Australia proposed the ‘tobacco carve-out’ under “TPP” (Article 29.5), which reads as follows: “A Party may elect to deny the benefits of Section B of Chapter 9 [ISDS] with respect to claims challenging a tobacco control measure of the Party.”

⁷² See: Trishna Menon and Gladwin Issac, *supra* note 67.

⁷³ See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) text at:

<https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf>.

⁷⁴ BuzzFeed report of 2016 by Chris Hamby, based on reporting from the Middle East, Central America, and Asia showed that companies and executives accused or convicted of crimes escaped punishment by turning to this special forum.

⁷⁵ See Client Earth, *supra* note 70.

⁷⁶ See for example: Pan African Investment Code (PAIC), Southern African Development Community model BIT, the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (signed 23/05/2007, not yet in force).

⁷⁷ See: UNCTAD World Investment Report 2018, page 96.

⁷⁸ See: Dafina Atanasova, Carlos Adrián Martínez Benoit, Josef Ošťanský, *supra* note 8.

⁷⁹ See Article 13 of the Colombia and United Arab Emirates BIT (2017), available at: <https://investmentpolicyhub.unctad.org/IIA/country/45/treaty/3797>.

⁸⁰ Sanya Reid Smith, “Preliminary analysis: Are counterclaims likely to be allowed under the leaked TPP investment chapter?”. Available with the author.

⁸¹ Lorenzo Cotula and Brooke Guven, *supra* note 49.

⁸² See: Para. 255 of the Report of the 50th session of the UN-

CITRAL Commission, *supra* note 1.

⁸³ See : Council of European Union (March 2018), Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, Document 12981/17, available at :

<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

⁸⁴ *Ibid.*, para. 4.

⁸⁵ *Ibid.*, para. 6.

⁸⁶ Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1 (24 January 2019), in preparation for UNCITRAL Working Group III thirty-seventh session, available at :

<https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1>.

⁸⁷ See for example: Markus Krajewski and Rhea Tamara Hoffmann (March 2017), “The European Commission’s Proposal for Investment Protection in TTIP”, paper by Friedrich – Ebert Stiftung; “EU Proposal for a Multilateral Reform of Investment Dispute Resolution”, Position Paper by Center for International Environmental Law (CIEL).

⁸⁸ See for example : Gus Van Harten, “A Case for an International Investment Court” Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper (June 30,2008). Available at SSRN: <https://ssrn.com/abstract=1153424> or <http://dx.doi.org/10.2139/ssrn.1153424>.

⁸⁹ This is based on the information provided in the non-paper co-sponsored by the European Commission and the Government of Canada entitled “Establishment of a multilateral investment dispute settlement system” (December 2016), and the Recommendation by the EU Commission for a Council Decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes 13.9.2017, COM(2017) 493.

⁹⁰ According to statements by the European Commission, “[t]he ultimate aim is to establish a single permanent body to decide investment disputes, thus moving away from the ad hoc system of investor to state dispute settlement (ISDS) which is currently included in around 3200 investment treaties in force today ... [it] would be open for all interested countries to join and would adjudicate disputes under both future and existing investment treaties. For EU level agreements, it would also replace the bilateral Investment Court Systems included in EU level agreements with FTA partners”. Source: press release by the European Commission, available at:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1600>.

⁹¹ *Supra* note 86, page 6.

⁹² See for example : An Open Letter (by academics) to the Chair of the UNCITRAL Working Group III and to all Participating States Concerning the Reform of the Investor State Dispute Settlement : Addressing the Assymetry of ISDS, available at : <https://www.eur.nl/en/news/erasmus-institute-public-knowledge>.

⁹³ See: M. Sornarajah, “An International Investment Court: a panacea or purgatory?”, Columbia FDI Perspectives No 180, August 2016, available at: <http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf>, referenced in “ISDS at a dangerous crossroads”, S2B position on the European Commission proposal for a multilateral investor-state dispute settlement (ISDS) mechanism.

⁹⁴ *Supra* note 86, page 8.

This brief is part of the South Centre's policy brief series focusing on international investment agreements and experiences of developing countries.

While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Systemic reforms that would safeguard the sovereign right to regulate and balance the rights and responsibilities of investors would require more concerted efforts on behalf of home and host states of investment in terms of reforming treaties and rethinking the system of dispute settlement.

Experiences of developing countries reveal that without such systemic reforms, developing countries' ability to use foreign direct investment for industrialization and development will be impaired.

The policy brief series is intended as a tool to assist in further dialogue on needed reforms.

*** The views contained in this brief are attributable to the author/s and do not represent the institutional views of the South Centre or its Member States.

⁹⁵ Ibid, page 10.

⁹⁶ See report (advance copy) of UNCITRAL WGIII meeting in Vienna, 29 October- 2 November 2018, A/CN.9/964, available at: https://uncitral.un.org/en/working_groups/3/investor-state.



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