

Could COVID-19 trigger 'localizing' of international investment arbitration?

By Danish *

1. Introduction

Given the wide-ranging impacts of the COVID-19 pandemic on economies globally, almost all countries enacted emergency measures to combat and mitigate its worst socio-economic impacts. These measures were put in place for regulating health and sanitary situations, fiscal conditions and social protection including for safeguarding the most vulnerable and preventing a large increase in the number of people falling back into poverty.

The COVID-19 crisis brought an unprecedented negative response from foreign investors, as "portfolio outflows from emerging markets were about \$100 billion—more than three times larger than for the same period of the global financial crisis"¹. With the disruption of many development programs and projects, foreign direct investment (FDI) inflows to developing countries are projected to fall to -40%², while estimates show that "bilateral donors have decreased aid commitments by 17% between 2019 and 2020, including a 5% decline in official development assistance (ODA) commitments"³. There is now little hope

Abstract

In light of the challenges and travel restrictions due to the COVID-19 pandemic, many developing countries have been unable to effectively participate in international investment arbitration proceedings, traditionally held in locations like Washington D.C. and The Hague. To ease the heavy burdens currently being placed on States and ensuring investor confidence, this Policy Brief argues for the 'localization' of investor-State dispute settlement (ISDS) proceedings in host States and regions where the investment is actually located. It highlights the various advantages that localizing ISDS can bring, and the different regional initiatives already working towards this purpose. The brief also considers relevant legal and policy aspects, and seeks to provide concrete suggestions for the localization of ISDS as a small step towards the holistic reform of international investment arbitration.

Compte tenu des difficultés et des restrictions de déplacement dues à la pandémie de COVID-19, de nombreux pays en développement n'ont pas été en mesure de participer efficacement aux procédures d'arbitrage international en matière d'investissement, qui se tiennent traditionnellement dans des lieux comme Washington D.C. et La Haye. Afin d'alléger le lourd fardeau qui pèse actuellement sur les États et de garantir la confiance des investisseurs, le présent rapport sur les politiques plaide en faveur de la « localisation » des procédures de règlement des différends entre investisseurs et États dans les États et régions où l'investissement est effectivement réalisé. Il souligne les divers avantages qui peuvent découler de la localisation de ces procédures, et les différentes initiatives régionales qui œuvrent déjà en ce sens. Il examine également les aspects juridiques et politiques liés à cette localisation et s'attache à formuler des suggestions concrètes afin qu'elle puisse constituer un premier pas vers une réforme globale des procédures d'arbitrage international en matière d'investissement.

A tenor de las dificultades y las restricciones a los viajes provocadas por la pandemia de COVID-19, muchos países en desarrollo no han podido participar efectivamente en procesos de arbitraje de inversiones internacionales, que tradicionalmente se han celebrado en lugares como Washington D.C. y La Haya. Para aliviar la pesada carga que sufren actualmente los Estados y garantizar la confianza de los inversores, en este informe sobre políticas se defiende la "localización" de los procesos de solución de controversias entre inversionistas y Estados (ISDS) en las regiones y los países anfitriones donde se ubica realmente la inversión. En este documento se destacan las diversas ventajas que puede aportar la localización de las ISDS, así como las distintas iniciativas regionales que ya se han puesto en marcha a tal fin. Además, el informe considera aspectos jurídicos y de políticas relevantes, y pretende proporcionar propuestas concretas para la localización de las ISDS como un pequeño paso hacia la reforma holística del arbitraje de inversiones internacionales.

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for achieving the ‘end of poverty in all its forms everywhere’ (Sustainable Development Goal (SDG) 1) by 2030 without significant resource mobilization by States. Attracting and retaining foreign investment is among the top priorities for many countries, with governments considering the provision of incentives and aftercare options for investors to kickstart the economic recovery⁴. At the same time, there is a push towards building domestic economic resilience, particularly in industries closely linked with global value chains that were disrupted due to the pandemic⁵.

However, in the present difficult economic climate, it is possible that new disputes may arise between foreign investors and host States for alleged breaches of vague standards included in international investment agreements (IIAs), in some cases encouraged by certain law firms and financial speculators⁶, which perceive the disputes themselves as investment opportunities⁷. The risks posed by investor-State dispute settlement (ISDS) mechanisms are well documented⁸ and have increased in the context of the pandemic.

There are already calls for a moratorium on ISDS claims in the context of COVID-19, for instance by Columbia Center on Sustainable Investment (CCSI), South Centre et al.⁹ The ‘Declaration on the Risk of Investor-State Dispute Settlement with respect to COVID-19 pandemic related measures’ adopted by the African Union Ministers of Trade on 5th November 2020¹⁰ recognizes the above mentioned risks. The Declaration is intended to raise awareness of COVID-19 related ISDS risks among African Union Member States, identify concrete actions that they can take to address treaty based ISDS risks, and give moral and political support to Member States in taking these actions¹¹.

Even in normal times, States generally require significant time to respond to ISDS claims as they need to coordinate among a number of authorities, to engage legal counsel and experts to defend their case, as well as to gather relevant evidence. Due to lockdowns instituted for protecting public health during the pandemic, government representatives from developing countries have recounted several incidents of the many difficulties they have faced in making their submissions and presenting a defence in existing ISDS proceedings. Most notably, “a tribunal at the Permanent Court of Arbitration refused to extend a deadline for Bolivia to submit its statement of defence in an investment treaty claim, even after the state argued that the coronavirus pandemic had made work on the submission ‘virtually impossible’”¹². The tribunal however justified its refusal of the extension on grounds that the State had already requested for multiple extensions.

The behaviour of the tribunal may be emblematic of the larger malaise within the ISDS system, where persons already far removed from the site of investment are also largely unaware of the impacts on and realities of people whose lives are affected by their decisions. Now, with air travel expected to be disrupted till 2024¹³

and the digital divide severely hampering the ability to effectively conduct and participate in international legal proceedings, States and investors should both reconsider whether holding international arbitrations in exotic venues like Washington D.C. or The Hague will allow for effective resolution of their investment disputes.

In the wake of the pandemic, all States, and particularly developing countries, should seek to leverage their existing national and regional institutions for effective dispute resolution with international investors. These could also be utilized for strengthening investor aftercare support and services provided by host States, encompassing “the range of activities from post-establishment facilitation services through to developmental support to retain investment, encourage follow-on investment and achieve greater local economic impact”¹⁴.

Use of ‘local institutions’ could also address some of the particular concerns raised around ISDS, even if with a limited scope. They could also supplement efforts by countries towards creating an attractive domestic landscape for FDI. This article therefore looks at the reasons, opportunities and advantages from such ‘localization’ of investment dispute resolution and how it can be operationalized by developing countries during and after the pandemic. Section 2 covers the issue of the ‘venue’ for investment arbitration, considering where the majority of ISDS disputes are currently heard, and what alternative fora are available in developing countries. It also lists the possible advantages to both investors and host States of utilizing these alternatives. Section 3 considers different regional initiatives towards ‘localization’ which are currently taking place. Section 4 provides the relevant legal and policy aspects, including concrete suggestions for States to implement such ‘localization’. It concludes by highlighting the need for a holistic reform of investment arbitration, of which ‘localization’ could be one small step to ease the burdens of ISDS during the COVID-19 pandemic.

2. Relevance of the venue in international investment arbitration

In simplest terms, every ISDS case requires identification of two key aspects: the procedural rules that will govern the case; and the ‘venue’ or ‘forum’ which is the physical location where the dispute will be heard. Globally, there are dedicated institutions which can play the role of the forum. At the same time, the domestic courts in host States are also competent to hear any investment related claims from foreign investors.

Many IIAs provide an option menu which allows foreign investors to decide the procedural rules under which to file their claim. The selection of forum thereafter depends on a variety of factors, including the treaty language, the selected arbitration rules, or even mutual agreements among the disputing parties.

Commonly, the ISDS forum options offered under IIAs (see Figure 1) include the following:

- the International Centre for Settlement of Investment Disputes (ICSID);
- the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL);
- the domestic courts of the host State; and
- others such as the Stockholm Chamber of Commerce, the International Chamber of Commerce, the Permanent Court of Arbitration.

2.1. Where are ISDS disputes being heard?

Information provided by the United Nations Conference on Trade and Development (UNCTAD) shows that ICSID (headquartered in Washington D.C.) and the Permanent Court of Arbitration (PCA, headquartered in The Hague) have together heard around 75 percent of the 1061 known treaty-based ISDS cases (see Figure 2). Despite the existence of other options, ICSID and the PCA seem to be the fora of choice for many investors to initiate their claims, irrespective of where the investment is located. While many disputes are heard in their headquarters, both institutions can also conduct proceedings in other places like Paris or Buenos Aires, having concluded agreements with arbitration institutions and dispute-settlement centres for this purpose¹⁶.

While the possibility exists, the actual utilization of these hearing facilities in other locations appears to be low. For instance, using quantitative indicators, Kidane shows that of the 64 completed cases involving at least one African state as the respondent in the ICSID database, “[i]n eighty-five percent of the initial case submissions, hearings took place in Europe exclusively with an additional thirteen percent of the initial case submissions holding hearings in Europe along with another location. North America was the hearing location for two percent of the initial case submissions. No case was heard in Africa”¹⁷.

The preference for these ‘traditional locations’ could also be seen as a function of where the arbitrators and law firms are located. Research from the Organisation for Economic Co-operation

Figure 1

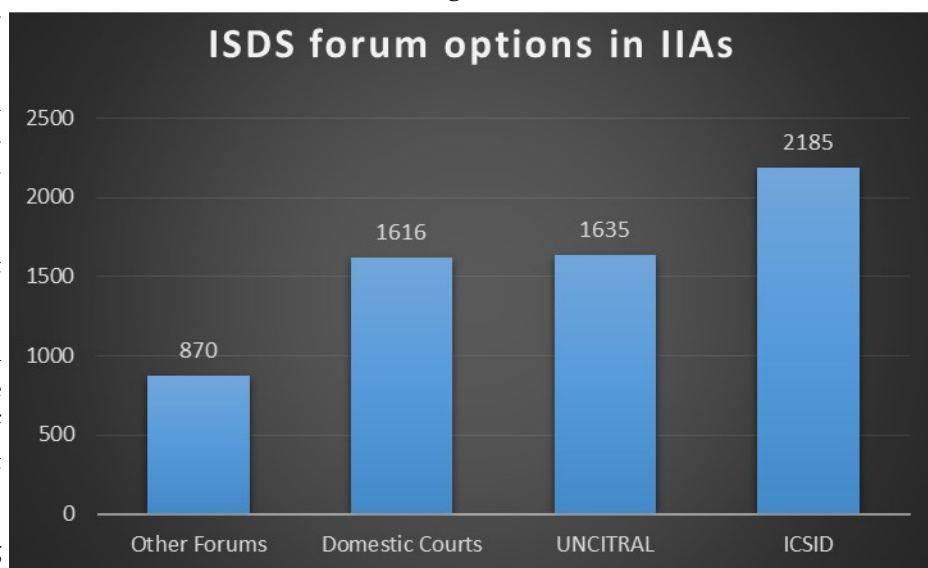


Figure based on UNCTAD IIA Navigator, which contains mapping of 2576 treaties¹⁵.

and Development (OECD) suggests that “the market [for investment arbitration] is characterised by reciprocal relationships among a small group of arbitration institutions and arbitrators/lawyers. For example, arbitration institutions select or have an influential role in selection of ISDS arbitrators who are often private sector lawyers while private sector lawyer/arbitrators have an influential role in the selection of arbitration institutions for ISDS cases; arbitration institutions seek to attract ISDS cases while private sector lawyer/arbitrators seek appointments as ISDS arbitrators”¹⁹. Given this close proximity, it is unlikely that a law firm would advise an investor to file their claims in fora outside its own ‘sphere of influence’.

2.2. Where could ISDS disputes be heard instead?

In many developing countries, there has been prolifera-

Figure 2¹⁸

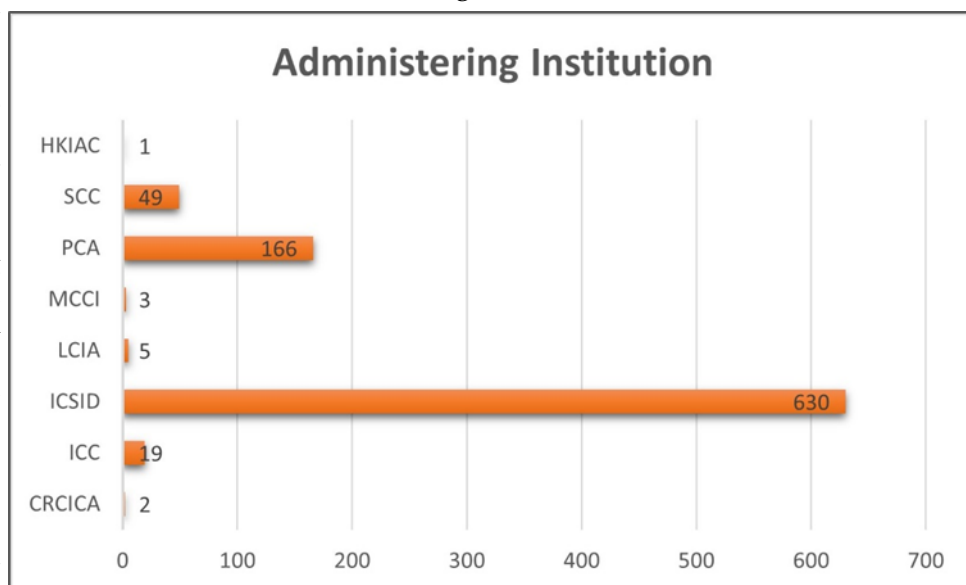


Figure based on UNCTAD IIA Navigator

tion of institutions for the non-judicial resolution of disputes. They generally provide commercial dispute resolution services, but have the capacity and competence for ISDS cases as well.

The idea of strengthening investment arbitration in developing countries has a significant history. During the 1970s, the Asian-African Legal Consultative Organization (AALCO) engaged in extensive discussions for the “establishment of a network of Regional Centres for Arbitration functioning under the auspices of the AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized”²⁰. This was based on a study titled ‘Integrated Scheme for Settlement of Disputes in the Economic and Commercial Matters’, which elaborated the following objectives: “In the first place, to establish a system under which disputes and differences arising out of transactions in which both the parties belong to the Asian-African and Pacific regions could be settled under fair, inexpensive and adequate procedures. Secondly, to encourage parties to have their arbitrations within the region where the investment made or the place of performance under an international transaction was a country within this region”²¹.

Two international institutions were thereafter set up in Kuala Lumpur in 1978, and in Cairo in 1979. Others institutions were also established on the same model in Lagos (1989), Tehran (1997) and Nairobi (2016). In addition, institutions such as the Center for International Investment and Commercial Arbitration in Lahore, Pakistan, the Kigali International Arbitration Centre in Rwanda, and the Center for Mediation and Arbitration (CEMEDAR) in San Jose, Costa Rica, among many others, have also been set up in developing countries, all of which could be used for hearing ISDS disputes.

2.3. What advantages can such new ‘localization’ offer?

There are several benefits to designating these institutions for dispute resolution as the forum of choice for countries in respect of any claims from foreign investors. First, it will clarify the scope of the States’ consent to arbitration included in their IIAs, investment contracts or national legislations with respect to the forum where ISDS claims could be heard. This would help governments provide clear indicators of their willingness to engage with foreign investors to resolve their investment-related disputes.

Further, UNCTAD has highlighted the importance of an express choice-of-forum selection, noting that “[p]arties to an investment agreement may help avoiding [jurisdictional] uncertainties by expressly designating a specific competent forum for the settlement of their disputes. Ideally, such a choice-of-forum should form part of the initial investment agreement but it can also be included in a subsequent agreement”²².

It is important to keep in mind that any investment

venture involves efforts by both the host State and the foreign investor, which builds a relationship between them. While the filing of an ISDS claim is a frustration of the investment, it does not instantly dissipate the links already forged between the investor and the relevant regulator.

In ISDS disputes, the defence of the challenged State measure is usually entrusted to its legal personnel in the central administration, while the measure itself may have been taken by a decentralized agency or regulatory entity. The initiation of formal proceedings in ISDS cases thus gets reduced to interactions among the lawyers representing the parties. This limits the immediate personal contact between the investor and the relevant State regulator, which could instead be used to find mutually acceptable solutions through direct negotiations²³. Hearing cases locally would allow more opportunities for informal dialogue between the disputing parties, and for pursuing amicable settlements.

There are also certain specific advantages for both investors and States if the dispute resolution process is carried out in an appropriate location either in the host State or in its region:

First, it will bring more **efficient dispute resolution** as many of the evidentiary and expert testimony procedures can be expedited, due to both being present locally. Discussions at UNCITRAL Working Group III (WGIII) have noted that the issues of complexity of cases, behaviour of the parties and their legal counsel, composition of the tribunal and the conduct of proceedings as possible reasons contributing to the increasing costs and duration²⁴. Document disclosures and witness testimony will not require expensive travel for long periods and avoid its associated costs. This proximity could help speed up the proceedings, which on average currently take more than 3 years²⁵.

Second, it will **increase transparency** of the process by allowing the public and local media to be aware of such proceedings. Currently, notification of such claims do not have to be made public, despite raising questions of public law and sovereign regulatory actions. Further, public access to these proceedings is allowed only with the consent of both disputing parties. Even if you stream the proceedings on YouTube²⁶, if people are not aware of its existence, they will simply not tune in (digital divide notwithstanding). Thus, the local constituency of the forum can make a difference in pursuing efforts to improve transparency.

Third, it will enable the parties to **control administrative costs** and reduce their overall expenses. For instance, an administrative charge of US\$ 42,000 is levied by the ICSID upon the registration of a request for arbitration, conciliation or post award proceeding, and annually thereafter²⁷. In comparison, for the Cairo Regional Centre for International Commercial Arbitration, administrative charges start at \$750 and increase in proportion to the sum in dispute²⁸. The latter model is also more affordable to small and medium sized investors, who otherwise would have to pay huge fees even for smaller claims, thereby

Box 1

A Financial Times article provides the illustrative example of the costs of ISDS when “Philip Morris brought a \$26m claim against Uruguay, arguing that the country’s tobacco regulations violated the Swiss-Uruguay BIT. The company lost the case and its legal fees and tribunal costs amounted to \$17m. Uruguay spent \$10m defending itself. The combined expenses for the case exceeded the claim.”

Source: Harry Broadman, “Time to modernise investor dispute arbitration”, Financial Times, 7 March 2020.

Available from

<https://www.ft.com/content/fca34d7f-0080-4b80-87ec-c47432887b2e>.

also enhancing access to justice.

Fourth, the relocation of ISDS procedures might help **limit forum shopping** by foreign investors. Investors seek to select the rules and forum which they believe would be most amicable to their interests for any number of reasons. By designating the forum within their territory or region, States should be able to curtail abuse of the process.

The designation of national and regional venues for ISDS could also **build local capacity** in developing countries. As UNCTAD notes, “capacity covers a wide range of issues. It may involve the capacity of individuals to function as effective third-party neutrals, whether as mediators, conciliators or those providing an ENE. It may also involve the capacity of parties to a dispute, particularly investors and State officials (...) It may also involve the capacity building of other stakeholders, including the public, to understand what is an appropriate settlement and help parties educate their own constituency or stakeholders ...”²⁹.

Conducting ISDS cases locally or regionally in developing countries could also provide more exposure to local officials and practitioners. Participation in international legal proceedings can be critical for building domestic capacity for future engagement. For instance, Gao suggests that “China has gained more and more experience in the WTO dispute settlement system by participating as main parties or third parties”³⁰. Similarly, for Egypt, an experienced State Lawsuits Authority (which represents the country in ISDS claims) has won several rulings in favor of Egypt, thus saving the state treasury over \$5.6bn claimed by the investors in these arbitrations^{31 32}.

Finally, the localization of investment arbitration will provide arbitrators the **necessary context and experience** to draw on while deciding claims, thus introducing an element of equity and fairness going beyond the legal arguments alone. It has been suggested that even “[a] site visit may give adjudicators a better sense of the place in question, the issues at stake, or the people and communities affected by the dispute. These perspec-

tives may influence the choice between different interpretations of the law or its application to the facts at hand”³³. However, given the generally limited duration and strict itineraries of such visits, it is difficult to discern their impacts in the final outcomes.

Most famously, in June 2015 the tribunal in the Chevron/Ecuador case³⁴ visited the contaminated sites in Ecuador, on the request of the Ecuadorian government to see for themselves the environmental damage and oil pollution caused by to the investor (see Box 2). Ultimately however, it still found itself in favor of the investor on entirely different legal grounds³⁵.

The current practice of ISDS limits the ability of arbitrators to fully appreciate the social ramifications of their decisions in the host State. This disconnect with the lived realities of people is further compounded with the lack of diversity in arbitrators and legal counsel involved in the disputes. This might also be exacerbated by the very limited number of large law firms which act as counsel in these disputes, which are mostly based in developed nations.

There is an urgent need to increase the level of awareness and public participation in ISDS disputes which relate to essential public interests and human rights issues, including the protection of environment³⁶, public health³⁷, access to clean water³⁸ and many others. There has been very limited participation from the people and communities who have been affected by the investment and this limits transparency, undermining the legitimacy of the entire system. As Perrone suggests, “[f]or developing countries, a holistic discussion of FDI would bring several advantages. It would emphasise the ramifications of FDI visibilising everybody’s concerns: i.e. foreign investors, home states, host states and non-state actors”³⁹.

3. Regional ‘localization’ of investment arbitration

Recent developments at the regional level have already

Box 2

“[T]he Lago Agrio Plaintiffs or the persons that you will see in the next few days who live close to these sites are not parties to this arbitration; but these residents are the true victims of the Claimants’ bad practices and their corporate acts. Thus, any decision that this Tribunal takes shall fundamentally affect them and the future of the Oriente and the Amazon River’s basin.”

- Statement by Ecuador Attorney General, Diego García Carrión

Source: Track 2 Hearing Shushufindi-34 Site Visit on June 7, 2015, p. 9, in Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23. Available from

<https://www.italaw.com/sites/default/files/case-documents/italaw4429.pdf>.

shown trends towards increasing ‘localization’ of investment arbitration. This section considers relevant regional initiatives.

In the African context, the negotiations for a new Protocol on Sustainable Investment to the African Continental Free Trade Area (AfCFTA) are scheduled to commence in 2021 and will be guided by the innovations in investment policymaking already undertaken by African Union Member Countries. Chapter 6 of the Draft Pan African Investment Code offers a possible option for how ISDS could operate in the future in Africa. As per its Article 42, States may, in line with their domestic policies, agree to utilize ISDS, which would be conducted at “any established African public or African private alternative dispute resolution center”. In the following section, it also allows States to file counter-claims if an investor or its investment is alleged to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law; and if found materially relevant, allow mitigating or off-setting effects on the merits of a claim or on any damages awarded.

There is already a significant innovation for hearing ISDS cases in Africa, even in the midst of a pandemic. As Hankings-Evans writes, “recent arbitral initiatives regarding the use of virtual hearings in times of COVID-19 have so far ignored the specific challenges and circumstances that may arise in relation to Africa. In response, the African Arbitration Academy developed a Protocol on Virtual Hearings in Africa which is custom-made for virtual hearings in Africa”⁴⁰.

Similarly, there have been some investment arbitrations taking place in Asia, mostly in institutions such as the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC). These institutions now have a matured record of dispute resolution and have also implemented effective policies for ensuring diversity and gender parity, as “arbitrators appointed by SIAC were geographically diverse and came from 25 different countries (...) and female arbitrators accounted for 36.5% of the total appointed arbitrators”⁴¹. As their caseloads continue to rise, these Asian institutions, being cheaper than, yet having same quality as their European or North American counterparts, will become more attractive for investors and States to resolve their investment disputes.

In Europe, European Union (EU) Members have recently terminated their intra-EU bilateral investment treaties (BITs)⁴². At the same time, the European Commission has been including its Investment Court System in bilateral agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Viet Nam free trade agreement (FTA). In discussions at UNCITRAL Working Group III, the EU is pursuing the establishment of a Multilateral Investment Court (MIC), which “would build on the EU’s groundbreaking approach to its bilateral

FTAs”⁴³. Other capital exporting countries may also follow suit, considering how both Norway and Switzerland have recently found themselves at the receiving end of ISDS claims⁴⁴.

Concerns about the legitimacy and functionality of such proposed MIC have already emerged⁴⁵. While there are attempts to build a new institution, the eventual physical location of the MIC seems uncertain at the moment. If the initiative moves forward despite such concerns, it might be worthwhile for developing countries to seek for such a MIC to be located in the Global South where the bulk of investment disputes arise.

Finally, the concerns around the lack of transparency, inclusiveness and legitimacy in the ISDS system as a whole are well-known, and some previous efforts to address them have met with limited success⁴⁶. There are also continuing problems around geographical and gender diversity⁴⁷ in the composition of arbitrators and tribunals. Further, the exorbitant costs and long duration of international arbitration has made it less attractive or even unaffordable to many investors. As some publicly available cost breakdowns show, the cost of even the most basic ISDS claim would run over \$1 million⁴⁸. While UNCITRAL Working Group III is mandated to consider the reform of ISDS, its currently limited scope and ambition leaves much to be desired⁴⁹. Incorporating national and regional developments from developing countries into its agenda could therefore help in pursuing better outcomes at the multilateral level.

4. Legal and policy measures for ‘localizing’ investment arbitration

As Schreuer et al. note, there are several factors affecting the choice of the place of proceedings, including in some cases that a proceeding should take place in the territory of a party to the ICSID Convention, the convenience of the forum for the parties, members of the commission or tribunal, and for facilitating access to evidence, especially witnesses. The authors add that “practical considerations would speak in favour of holding proceedings in the host State. Especially the taking of evidence would be greatly facilitated by such a solution.”⁵⁰

Legally, there are few barriers in designating the venue of the arbitration to be in the country or region where the investment was situated. As most investment arbitrations are carried out under the ICSID or UNCITRAL arbitration rules, the forum of the proceeding is decided in advance of the claim being heard⁵¹.

Under Chapter VII of the ICSID Convention, Article 63 allows arbitration proceedings to be held in places other than Washington D.C., with the agreement of the parties. The alternatives provided include “(a) the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.” There are already some encouraging arrangements in

place for ICSID arbitrations to be conducted in regional institutions in Egypt, Malaysia, Bahrain, Singapore and others⁵². Furthermore, such proceedings have even been known to take place in World Bank offices, particularly in Paris⁵³.

Similarly, under the UNCITRAL arbitration rules, Article 18 gives the prerogative to the parties to the dispute to agree on the place of arbitration. If they are unable to do so, then the determination is made by the arbitral tribunal having regard to the circumstances of the case. UNCITRAL also provides a list of arbitration centres which could be utilized for resolving investment disputes⁵⁴.

To implement this, States have to **clarify their consent to arbitration** encoded in their existing IIAs, investment contracts and national laws with respect to the forum for hearing the claim. Such consent to arbitration does not need to be in a specific format. Indeed, under the ICSID Convention, the only formal requirement with respect to the consent of the parties is that "such consent be in writing... However, the parties' consents may also be recorded in separate instruments. Nor is any special form of words required. [footnote omitted]"⁵⁵. Further, as the consent to arbitration given by States is unilateral in nature and given to any investor, such clarification will be deemed to have been accepted by the investor upon filing a claim.

The purpose of making such clarification would be to specify the venue of the arbitration within the host State or in its regional vicinity where any future dispute involving the country will take place. This could be carried out through joint interpretive statements or bilateral exchange of letters clarifying such understanding; or even via unilateral declarations by countries. This would thus preserve the dispute settlement mechanism for investors, while also giving it more clarity.

At this point, it is useful to consider what such a clarification of consent by a country might look like. Essentially, wherever applicable, it would designate the preference of the country for the arbitration venue to hear any ISDS claims. For instance, it could be framed as follows:

Wherever applicable, the place of arbitration for hearing any claim brought under any existing agreement regarding the protection of investment shall be: (Designated national or regional institution for dispute resolution).

This would then form part of the consent of the State and must be taken into account by the tribunal and administering entity which receives the notice to arbitrate under the relevant IIA, investment contract or national law. This would not override the ability of a foreign investor to choose any existing option for forum provided in the applicable IIA or national law. Rather, it is meant to fill a gap in IIAs where a venue is not defined at all, as is the case with many older generation agreements.

States might also consider including a requirement

on the exhaustion of local remedies, which would be applicable when the underlying IIA is silent on the issue. Taking inspiration from the ICSID Model Clauses, it could read as follows:

Before any foreign investor institutes a claim with respect to a particular investment related dispute, that foreign investor must have taken all steps necessary to exhaust the [following] [administrative] [and] [judicial] remedies available under the laws of the Host State with respect to that dispute [list of required remedies], unless the other party hereto waives that requirement in writing.

5. Conclusion

The COVID-19 pandemic has overturned many longstanding certainties. Globally, there has been an awareness of the need to place the person as the focus for rebuilding back towards a more equal, equitable global order. The international investment regime developed in the 1960s feels like an anachronism which has outlived its purpose⁵⁶. Indeed as South Africa stated in a submission to Working Group III, "the current international investment regime is detrimental to public budgets, regulations in the public interest, democracy and the rule of law. The current regime does nothing to protect the rights of people affected by foreign investment."⁵⁷

The localization of investment arbitration in host countries and their regional venues will therefore be only a small step in the process towards reforming the ISDS system. However, it is a step that can be immediately implemented to provide succour to countries still battling the ravages of the pandemic and ease the heavy burdens that ISDS claims may create. It will also signal to foreign investors that their needs will be heard and given due attention, bringing more confidence to the continuing rule of law in host States. Finally, it will also provide an opening for countries to engage with their treaty partners for clarifying more substantive standards included in their investment treaties, so that they can build back better by facilitating responsible investment that contributes to sustainable development and respects human rights.

Endnotes:

¹ Kristalina Georgieva, International Monetary Fund Managing Director, "Confronting the Crisis: Priorities for the Global Economy", 9 April 2020. Available from <https://www.imf.org/en/News/Articles/2020/04/07/sp040920-SMs2020-Curtain-Raiser>.

² United Nations Conference on Trade and Development (UNCTAD), "Global foreign direct investment projected to plunge 40% in 2020", 16 June 2020. Available from <https://unctad.org/news/global-foreign-direct-investment-projected-plunge-40-2020>.

³ Amy Dodd, Dean Breed, Daniel Coppard, "How is aid changing in the Covid-19 pandemic?", Development Initiatives, 9 November 2020, p. 4. Available from https://devinit.org/documents/871/How_is_aid_changing_in_the_Covid-19_pandemic.pdf.

⁴ UNCTAD, “Investment Policy Responses to the COVID-19 Pandemic”, Investment Policy Monitor, Special Issue No. 4, May 2020.

⁵ UNCTAD, *World Investment Report 2020*, UNCTAD/WIR/2020, p. 169.

⁶ Pia Eberhardt, “Cashing in on the Pandemic”, Corporate Europe Observatory and Transnational Institute, 19 May 2020. Available from <https://longreads.tni.org/cashing-in-on-the-pandemic>.

⁷ Zoe Williams & Florence Dafe, “Banking on courts: financialization and the rise of third-party funding in investment arbitration”, *Review of International Political Economy* (2020). DOI: 10.1080/09692290.2020.1764378.

⁸ See in general, South Centre, Investor-State Dispute Settlement (ISDS) System, <https://www.southcentre.int/tag/investor-state-dispute-settlement-isds-system/>.

⁹ CCSI, South Centre et al., “Call for ISDS Moratorium during COVID-19 Crisis and Response”, 6 May 2020. Available from <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>.

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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.

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