



Fourth round of break-out sessions: Reform of investment dispute settlement Investor access to ISDS (e.g. defining subject-matter scope, exhaustion of domestic remedies)¹

Chair: Mr. Manuel Monteagudo Valdez

Peru

Kick-off speaker: Ms. Rebecca Verghese Buchholz

Traidcraft

Kick-off speaker: Mr. Winand Quaedvlieg

The Business and Industry Advisory Committee (BIAC)

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The break-out session on investor access to investor-State dispute settlement (ISDS) was characterized by a robust exchange of diverse views and ideas about the need for reform.

One school of thought within the session maintained that there is no need to continue to provide investor access to ISDS. This school of thought raised concerns over the legitimacy and advisability of ISDS as a threshold matter. In contrast, others in the break-out session pointed to historical difficulties faced by companies when investing abroad and argued that there was an ongoing need to maintain international treaties which set international standards and provide internationalized mechanisms for resolving disputes.

Some of the critiques which were raised about the ISDS mechanism were that ISDS creates a fundamental imbalance of rights by offering foreign investors better treatment than investors hailing from host States. There were also doubts about the evidence that investment treaties and ISDS in particular increase investment flows into host States, as well as doubts about the need for ISDS specifically in the class of agreements which are currently being negotiated between developed States, such as the European Union and Canada, Singapore, and the United States. There were questions as to precisely what problems ISDS in that context between States with developed legal systems would be solving.

Doubts were also expressed by some experts that more careful drafting with respect to these treaties could act as a sufficient constraint on interpretation by arbitral tribunals. The case was put forward that the better alternative for some States might be to focus on developing domestic rule of law institutions and improving the quality and access to justice in national judicial systems and other domestic institutions. With States having limited resources, it was argued, focusing on national institutions was the

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

better alternative. The relevant speakers suggested that, at a minimum, there should be a rule for pursuance of local remedies first (either for a certain minimum amount of time, or until all local remedies had been exhausted).

In contrast, other experts noted the historic and ongoing difficulties that investors have faced when investing abroad. It was argued that the power imbalance between investors and governments and the latter's capacity to amend domestic law unilaterally necessitated international standards and international dispute resolution mechanisms. It was put forward that in almost all jurisdictions there is a natural favoritism towards domestic institutions and domestic investors which investment treaties were designed to address. It was also pointed out that in many respects today's investment treaties are not the same as the investment treaties entered into 20 or 30 years ago but have developed in ways that the experts have discussed throughout the Expert Meeting to reflect various changes based on lessons learned through States' experience in arbitration and negotiation. On this view, the focus of discussion was better directed towards identifying quality, state-of-the-art improvements to the ISDS system, rather than discarding it altogether.

Reforms suggested in the breakout session included:

- increasing transparency of ISDS proceedings, including the adoption of codes of conduct for arbitrators in treaty-based arbitrations;
- setting up appellate mechanisms, either for specific treaties or for the investment treaty regime more generally;
- addressing the rules applicable to collective claims;
- enhancing and clarifying provisions on the dismissal of frivolous claims, and the exhaustion of local remedies;
- rethinking umbrella clauses, which some viewed as having been used by investors to circumvent contractual dispute resolution clauses;
- including "cooling off" periods and limitation periods for the raising of claims and using the time wisely to engage in serious negotiations, at the highest government levels, with the aim to finding solutions to problems at an early stage;
- considering expansion of the practice in certain treaties whereby specific classes of claims, whether sectoral or whether based upon the type of regulation being challenged, are subject to distinct regimes for investor State arbitration (e.g. financial services in the Canada and United States Model BITs);
- including express treaty provisions on consolidation to address the possibility of collective actions by smaller investors or to ensure the efficient adjustment of related claims; and
- adopting clearer rules with respect of the allocation of costs in arbitration.

Finally, it was suggested strongly that UNCTAD undertake in-depth work on remedies and compensation with a view towards consolidating understanding of State practice in this area, including with respect to the calculation of interest.