12th Annual Forum of Developing Country Investment Negotiators

February 27 – March 1, 2019, Cartagena, Colombia

IISD International Institute for Sustainable Development

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MEETING REPORT

Shifting International Investment Law Toward Sustainable Development: Strategies for renegotiation, reform and defence

COMMONWEALTH SECRETARIAT

TAF 2 TRADE AND INVESTMENT ADVOCACY FUND

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UNITED NATIONS UNCTAD

Executive Summary

The 12th Annual Forum of Developing Country Investment Negotiators (the Forum) was held in Cartagena, Colombia, from February 27 to March 1, 2019. It was co-organized by the National Agency for the Legal Defence of the State, Colombia, the International Institute for Sustainable Development and the South Centre. Building upon the success of previous forums, the event gathered over 90 participants representing 50 developing country governments and 11 regional and international organizations.

The theme of the Forum was Shifting International Investment Law Toward Sustainable Development: Strategies for Renegotiation, Reform and Defence. Participants considered priorities and objectives for substantive and procedural reforms of investment treaties and investor–state dispute settlement (ISDS), including at ongoing regional and multilateral reform processes, as well as bilateral options such as termination and renegotiation. Participants also explored a range of strategic options for developing countries to leverage developments in investment treaty law and policy to achieve their objectives and improve defence strategies.

The discussions centred on a number of new developments, processes and trends taking place in the international investment law and policy arena at the current time. These include the United Nations Commission on International Trade Law Working Group III process, the European Union's proposal of a Multilateral Investment Court, the conclusion of the Canada–United States–Mexico Agreement and the decision of the Court of Justice of the European Union in *Slovak Republic v. Achmea B.V* (the *Achmea* decision). It also includes the African Continental Free Trade Area investment protocol process and the growing trend of treaty terminations renegotiations. Participants also shared national and regional experiences of designing and implementing reform agendas and strategies, as well as practice in negotiation and dispute settlement processes.

Views expressed by panellists and participants at the Forum coalesced around a number of key ideas, including:

- Developing countries have shaped, and can continue to shape, substantive and procedural reforms in international investment law and policy and should leverage national- and regional-level positions to influence change in multilateral forums.

- While ongoing reform processes have sought to divorce matters of procedure from matters of substance (focusing only on the former), the two should inform and shape each other. Matters of substance are critical to ensuring sustainable development objectives are mainstreamed into international investment law and policy.

Therefore, developing countries should preserve the ability to engage in broad and comprehensive reforms, at national, regional and multilateral levels, if the outcomes of the current processes fail to address the problems in a holistic way.

- The key to developing countries' abilities to influence change and shape reforms in multilateral forums is enhancing coordination and cohesiveness among themselves, sharing experiences and options for policy innovation, and cooperating for capacity development.

- Several alternatives to the traditional ISDS model exist and should be thoroughly explored, adapted to context and adopted where appropriate.

The Forum agenda can be found at https://www.iisd.org/event/12th-annual-forum-developing-country-investment-negotiators

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Abbreviations and Acronyms

BIT	bilateral investment treaty
CARICOM	Caribbean Community
CETA	Comprehensive Economic and Trade Agreement
CFIA	Cooperation and Facilitation Investment Agreement
CJEU	Court of Justice of the European Union
CUSMA	Canada–United States–Mexico Agreement
MIMID	International Energy Charter's Model Instrument for Management of Investment Disputes
EU	European Union
FDI	foreign direct investment
FET	fair and equitable treatment
ICSID	International Centre for Settlement of Investment Disputes
IISD	International Institute for Sustainable Development
ISDS	investor–state dispute settlement
MFN	most-favoured nation
MIC	Multilateral Investment Court
PAIC	Pan-African Investment Code
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

DAY 1, WEDNESDAY, FEBRUARY 27, 2019

Opening Ceremony

The Forum was jointly opened by **H.E. Mr. José Manuel Restrepo** (Minister, Ministry of Industry, Trade and Tourism, Colombia), **H.E. Mr. Camilo Gómez Alzate** (Director, National Agency for Legal Defence of the State [ANDJE]), **Ms. Nathalie Bernasconi** (Group Director, Economic Law and Policy, International Institute for Sustainable Development [IISD]) and **Mr. Carlos Correa** (Executive Director, South Centre).

Welcoming participants on behalf of the Colombian government, **Mr. Alzate** highlighted the growing number of costly investment arbitrations faced by governments, including Colombia, which has received a number of notifications of disputes in the last three years. Mr. Alzate noted that, while Colombia is not considering terminating its current treaties, the content of investment treaties needs to be adapted to better reflect the interests of developing countries, particularly in the investor–state dispute settlement (ISDS) process. **Mr. Restrepo** highlighted a number of recent developments in international investment law that make this year's Forum particularly important. He highlighted the importance of the United Nations Commission on International Trade Law (UNCITRAL) process, the conclusion of the Canada–United States–Mexico Agreement (CUSMA) and the *Achmea* decision[1] as three key developments that would no doubt inform the discussions.

Ms. Bernasconi and **Mr. Correa** thanked the hosts, sponsors and participants of the event, flagged some of the key themes for discussion, and looked forward to discussing the common interests and objectives of developing countries.

Session 1: Recent Developments Concerning International Investment Law and Policy Making

The first session of the Forum discussed recent trends and developments in international investment negotiations, law and policy making. The session was facilitated by **Ms. Yewande Sadiku** (Executive Secretary/CEO, Nigerian Investment Promotion Commission).

Ms. Elisabeth Tuerk (Chief, International Investment Agreements Section, Division on Investment and Enterprise, United Nations Conference on Trade and Development

[1] *Slovak Republic v. Achmea B.V.* See case documents at http://curia.europa.eu/juris/documents.jsf?num=C-284/16

[UNCTAD]) presented global trends on investment policy making based on the 2017 UNCTAD *World Investment Report*, preliminary data for 2018 and UNCTAD's International Investment Agreements database. She noted that the number of treaties being concluded each year is flattening out, and there is evidence that terminations (mostly unilateral) are taking place, although this is more difficult to track. Investors are continuing to use ISDS against states based generally on "old-school" treaties. Ms. Tuerk presented a comparative analysis between old (concluded before 2000) and recent (concluded in 2017) treaties, showing that new treaties look substantially different and are generally better from a sustainable development perspective. Turning to the issue of broader reforms, Ms. Tuerk touched on the range of different options being used by states, including joint interpretations, amendments, termination and renegotiation, engaging multilaterally and abandoning unratified treaties. She emphasized that reform should be holistic (encompassing substance and process), inclusive and focused on achieving sustainable development objectives.

Mr. Marcelo Salazar (Director of Foreign Trade, Ministry of Industry, Trade and SMEs, Dominican Republic) provided an update on the UNCITRAL process, with a focus on the outcomes of the second regional meeting that took place in the Dominican Republic in February 2019. Mr. Salazar reiterated the three-stage mandate given to UNCITRAL Working Group III and then provided a summary of the three main sets of concerns identified by the working group: 1) concerns about the consistency, coherence, certainty and accuracy of arbitral rulings; 2) concerns about the quality of decision makers in ISDS proceedings, including qualifications, impartiality and diversity; and 3) concerns regarding the time and expense of ISDS proceedings. Moving to the outcomes from the Latin America regional meeting, Mr. Salazar noted that 30 states participated in an event, along with non-governmental organizations and other stakeholders, playing an important role in raising awareness of the UNCITRAL Working Group III process. The meeting emphasized the need for balanced treaties with rights and obligations for investors and states, the need for Latin American states to engage with the reform process at both domestic and multilateral levels, and the need for training and education on ISDS issues.

Mr. Prudence Sebahizi (Chief Technical Advisor & Head of CFTA Unit, Department of Trade and Industry, African Union Commission) provided the Forum with an update on the status of the African Continental Free Trade Area (AfCFTA) Investment Protocol. Mr. Sebahizi began with some background to the AfCFTA Free Trade Agreement, which covers trade in goods and services and provides for protocols to be included on investment, intellectual property and competition. The AfCFTA Agreement will soon come into force, having received 19 out of the 22 ratifications required. A previous process to the conclusion of the AfCFTA was the negotiation of the Pan-African Investment Code (PAIC) between 2008 and 2016. Mr. Sebahizi noted that the PAIC is a non-binding instrument, whereas the

Investment Protocol, once adopted, will form an integral part of the AfCFTA Agreement. Another key distinction is that the PAIC does not create any institutional framework, including on dispute settlement, to govern investment regulation on the African continent. Mr. Sebahizi emphasized that the PAIC will inspire the drafters and negotiators of the AfCFTA Investment Protocol.

Ms. Samira Sulejmanovic (Head of Department for Bilateral Trade Relations, Ministry of Foreign Trade and Economic Relations, Bosnia and Herzegovina) provided the Forum with an update on investment law and policy developments at the European Union (EU) level. Ms. Sulejmanovic spoke of the EU Parliament's new foreign investment screening mechanism intended to manage risks associated with foreign investors gaining control over key inputs, infrastructure and sensitive information. Ms. Sulejmanovic went on to highlight the *Achmea* decision, in which the Court of Justice of the European Union (CJEU) concluded that an ISDS provision in a bilateral investment treaty (BIT) between Slovakia and the Netherlands was incompatible with EU law, prompting the EU Commission to direct member states to take steps to terminate all their intra-EU BITs. Ms. Sulejmanovic also noted two recent developments in EU treaty making: the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and the EU–Singapore Investment Protection Agreement. The EU has submitted its Multilateral Investment Court (MIC) proposal to UNCITRAL Working Group III, arguing that it adequately addresses all three concerns with ISDS identified in the UNCITRAL process. Ms. Sulejmanovic noted that developing countries that want to resist these multilateral reforms will need to coordinate to effectively defend their position.

Mr. Daniel Uribe Terán (Researcher, South Centre) addressed the Forum on the issue of investment and human rights. He opened by emphasizing that, while the push to codify the prohibition of human rights abuses by multinational enterprises is relatively recent, the issue has been recognized since the 1960s. There is now a cross-governmental working group chaired by Ecuador and South Africa with a mandate to develop a binding treaty on business and human rights that provides a redress mechanism for victims of human rights violations by multinational enterprises. The most recent draft text includes obligations on both transnational enterprises and states. Mr. Uribe explained that the draft text seeks to achieve four key objectives: (1) preventing human rights violations in the course of business activities; (2) ensuring victims' access to effective remedies and justice; (3) enhancing cooperation between home and host states, including for investigations of violations; and (4) providing an international mechanism for monitoring. Mr. Uribe closed by emphasizing the links between this process and ongoing BIT and ISDS reforms. He noted that a binding business and human rights treaty will allow for better implementation of the sustainable development goals and will help arbitral tribunals interpret investor obligations on human

rights. Mr. Uribe called for the inclusion of the mechanism developed by the human rights treaties in future BITs.

During the plenary Q&A session, participants emphasized the need not just for coordination of efforts among developing countries in reform processes, but continuity of efforts to avoid duplication. Participants also reflected on the *Achmea* decision and its relevance and implications for non-EU countries having BITs with EU member states.

Break-Out Session 1: Sharing Experiences on Countries' Priorities and Objectives for Reform

This session was facilitated by **Ms. Sarah Brewin** (International Law Advisor, Agriculture and Investment, ELP Program, IISD), who began by presenting some of the key results from the survey of developing country investment negotiators that IISD conducted in 2018.

The break-out groups discussed their most pressing investment law and dispute settlement reform priorities and their objectives in the UNCITRAL, International Centre for Settlement of Investment Disputes (ICSID) and regional reform processes, as well as the challenges they are facing in negotiations and renegotiations.

Session 2: Understanding Ongoing Multilateral and Regional Processes in Investment Treaty Law and Policy

The second session of day one took an in-depth look into ongoing reform mechanisms at international and regional levels. It was convened by **Ms. Roslyn Ng'eno** (Manager, Policy Advocacy, Kenya Investment Authority, Kenya).

Mr. Carlos Correa (South Centre) opened the discussions by underlining that the purpose of the Forum is not just to talk about the status quo, but to discuss how to deliver reforms in line with sustainable development objectives. He acknowledged the challenge of achieving reform when certain interests and powers want to maintain the status quo to the detriment of developing countries. Mr. Correa asked if systemic reform is possible. In seeking to provide an answer to that question, Mr. Correa traced the history of the status quo to the era of the Washington Consensus, when the paradigm shifted to privileging investor protection over host states and community interests. While this had negative consequences for developing countries, Mr. Correa considered that it illustrates the magnitude of the paradigm shift that is possible, especially with the collective will and cooperation of states. Mr. Correa's key message for the Forum was that change is necessary and change is possible.

Mr. Martin Dietrich Brauch (International Law Adviser, IISD) spoke about the ongoing discussions at UNCITRAL regarding ISDS reform. Mr. Brauch recalled the mandate given in July 2017 by the UNCITRAL Commission to Working Group III to discuss ISDS reform across the three phases noted above. The mandate emphasizes that the process must be government led, consensus based and fully transparent, while benefiting from the widest possible expertise. Mr. Brauch highlighted that states may still make additional recommendations and raise new concerns throughout the process. Moving to the next working group meeting in New York this April, Mr. Brauch noted that the main issues on the table are third-party funding and the development of a work plan to address the concerns identified. There have been only two submissions from member states so far. The first is from Indonesia, setting out concerns about regulatory chill, protection of policy space and the lack of an exhaustion of local remedies requirement. In the second submission, the EU put forward its idea of an MIC. Mr. Brauch noted that the agenda item described as "Other Concerns" is currently not included in the matters for discussion in April. Mr. Brauch encouraged delegates to sign up and attend the upcoming meeting (even if they are not UNCITRAL member states), read the relevant documents, strategize and intervene.

Ms. Ana María Ordóñez Puentes (Director of International Legal Defence, ANDJE, Colombia) spoke on Colombia's experience in the multilateral negotiation space. Ms. Ordóñez Puentes stressed that involvement in multilateral discussions is a high priority for Colombia, to foster understanding, protect national interests, convey concerns and ultimately shape the final outcomes. Ms. Ordóñez Puentes went on to outline Colombia's key positions on these reforms: (1) third-party funding and the need for greater transparency, (2) regulation of arbitrators' conduct, for example, through limiting the number of cases an arbitrator can take on to ensure cases related to public policy issues are given adequate time and focus and through subjecting awards to an internal review process before they are issued. Finally, Ms. Ordóñez Puentes noted that Colombia has been actively engaged in the UNCITRAL Working Group III process to seize the opportunity to make improvements to the current ISDS regime. Finally, she noted that Colombia is wary of the EU's MIC proposal, as this institution would make access to ISDS a standard rather than an exceptional process and undermine domestic mechanisms and local remedies.

Mr. Wamkele Mene (Chief Director, Africa Multilateral Economic Relations, International Trade & Economic Development Division, Department of Trade & Industry, South Africa) opened by commenting on the remarkable progress achieved by developing countries in advancing investment in the sustainable development agenda over the last 10 years. He highlighted the backlash that South Africa experienced when it decided to terminate many BITs but noted that none of the predictions about foreign direct investment (FDI) flight have been validated. Turning to the current reform agenda, Mr. Mene

commented that the proposals on the table are a step in the right direction but do not go far enough. In particular, there are fundamental issues with ISDS that will persist even if some procedural flaws are addressed, such as infringements on the right to regulate and the lack of balance between investors and community rights. Mr. Mene turned to the current AfCFTA Investment Protocol process, noting that Africa currently has the opportunity to craft legally binding rules for investment promotion and facilitation that will apply in 55 countries—the largest free trade area in the world. This opportunity means the ability to translate and codify in a legal text all of the reform issues that developing countries have been promoting for many years. Mr. Mene closed by noting that Africa is on the cusp of a very exciting opportunity to craft an agreement that serves the interests of communities and developing countries and ultimately reduces poverty.

During the plenary discussions, participants noted that there are some inherent limitations to the effectiveness of multilateral processes, and that it seems as though the level of ambition is set much higher for regional initiatives than for multilateral initiatives. It was also noted that reforms made at the regional level, such as the AfCFTA process, could influence multilateral mechanisms. Several participants also voiced support for Colombia's reform priorities, particularly with respect to third-party funding, reducing the time and costs of proceedings and the need for an arbitrator code of conduct.

Session 3: Leveraging Developments in Investment Treaty Law and Policy to Achieve Developing Country Objectives and Improve Defence Strategies

The closing session of day one took a closer look at critical developments in recent negotiations and arbitrations, with a view to identifying new opportunities to leverage ongoing processes and developments to achieve developing country objectives. The session was moderated by **Ms. Patience Okala** (Deputy Director, Legal Adviser, Nigerian Investment Promotion Commission).

Mr. Makane Moïse Mbengue (Professor of International Law, Faculty of Law, University of Geneva) opened the session with three reflections on African developments in international investment law that show how developing countries can be trendsetters in this space. The first was the decision of the PAIC drafts to exclude the standard of fair and equitable treatment (FET), and to include substantial investor obligations. The second was the decision of the Southern African Development Community to revise its protocol on finance and investment to remove recourse to ISDS. All of these decisions attracted fierce criticism at the time, yet they are now seen as trendsetting reforms. Mr. Mbengue went on to describe two major developments in the international investment law arena in 2018, both of which validated and reinforced the trends set by developing countries described above. These were the *Achmea* decision and the conclusion of the CUSMA, both of which sounded

a "death knell" for ISDS. Mr. Mbengue explained that the three driving principles behind the *Achmea* and CUSMA developments are sovereignty, the right to regulate and regulatory autonomy. He called on developing countries to integrate these three principals into their strategies for reform, renegotiation and defence.

Ms. María Paula Arenas Quijano (Attorney, ANDJE, Colombia) shared Colombia's strategy for the prevention and management of investment disputes, in light of the International Energy Charter's Model Instrument for Management of Investment Disputes (MIMID). After the presentation of the main features of the MIMID, Ms. Arenas Quijano went on to share Colombia's strategies for preventing and managing investment disputes, developed through its recent experiences as a respondent state. This has included a clear regulatory and institutional framework for handling complaints and disputes, efficient handling of information, documentation and evidence, and coordination procedures to be followed in the event of a dispute. However, Ms. Arenas Quijano emphasized that this has not been sufficient to prevent further disputes, and so a number of additional strategies are now in the pipeline. This includes creating greater awareness among government entities of Colombia's investment treaty commitments, including the meaning of key substantive protections; establishing a communications protocol for officials engaging with foreign investors; and developing clear and simple guidance for government entities on how to handle an ISDS claim.

Mr. Vaibhav Rundwal (Deputy Director, Investment Division, Department of Economic Affairs, Ministry of Finance, India) opened his intervention with an overview of the substantive and procedural issues resulting in the current backlash against investment treaties. He then proceeded to highlight the key issues for developing countries coming out of the CUSMA, the International Energy Charter's MIMID and UNCITRAL processes. Mr. Rundwal noted that key developments regarding CUSMA text includes clarifications to the standards of FET and full protection and security, clarifications on the concept of indirect expropriation and compensation. He emphasized that these elements do not constitute a policy change but rather a reassertion by states of the original intent behind these obligations. Moving onto the Energy Charter Treaty, Mr. Rundwal noted some challenges in implementing the MIMID, including striking the right balance between efficient resolution and regulatory chill, coordination challenges in developing countries and the difficulty for those holding public offices to agree to settlements on behalf of the state. In implementing the MIMID, Mr. Rundwal stressed that developing countries should develop a solution that works for their circumstances. In turning to the UNCITRAL process, Mr. Rundwal focused on the EU's MIC proposal, noting the pros the cons. In closing, Mr. Rundwal provided advice to developing country investment negotiators, including to not neglect other avenues for attracting FDI, such as institutional reforms and adopting predictable, transparent and efficient national policies.

Mr. Nicolás Palau van Hissenhoven (Director of Foreign Investment, Services and Intellectual Property, Ministry of Trade, Industry and Tourism, Colombia) spoke about the impact of the *Achmea* decision on extra-EU BITs—those between EU member states and non-EU member states. In this respect, Mr. Palau highlighted two key elements of the CJEU decision: that arbitral tribunals operate, by their very nature, outside of the EU legal system, and that, despite this, tribunals still apply EU law. This led the CJEU to conclude that it cannot be ensured that those arbitral tribunal interpretations will be consistent with the EU legal framework and will reflect mutual trust among the EU countries. Mr. Palau argued that, despite the recent statement of the Attorney General of the EU that the *Achmea* decision had no bearing on the CETA, it follows that the decision would indeed apply to extra-EU BITs. Indeed, proceedings brought under those BITs would still very often require an extra-EU tribunal to interpret and apply EU law. As such, Mr. Palau concluded that the CJEU will need to make a determination on its position with respect to the 1,400 extra-EU BITs. Regardless of that determination, the uncertainty of the outcome is likely to further fuel the EU's MIC proposal and sense of urgency to negotiate for such a forum to replace ISDS arbitration.

Ms. Opeyemi Temitope Abebe (Adviser Trade Competitiveness, Trade, Oceans and Natural Resources Directorate, Commonwealth Secretariat) expressed her doubts that the CUSMA truly spells the beginning of the end for ISDS, as other speakers have suggested. However, she noted that it is critically important for developing countries to take note of this development and leverage it in their negotiations with CUSMA countries. Indeed, these countries could be challenged on their ambivalent position that ISDS is not appropriate in some cases but required in negotiations with developing countries. The same can be said of other substantive and procedural reform elements found in the CETA. Ms. Abebe also argued that the MIC similarly does not mean the end of ISDS and should not distract from the fundamental questions: Do developing countries want to reform ISDS? Or do they want to raise multilateral consensus that ISDS doesn't work and about the need to try something else? In the latter respect, key alternatives are exhaustion of local remedies and state–state dispute settlement. Developing countries need to carefully consider how to use the current reform processes to start implementing reforms at bilateral or multilateral levels that are in line with developing country goals. Ms. Abebe concluded by warning delegates of the regulatory chill potential of the International Energy Charter's MIMID and advising them to avoid specific and binding commitments that might lead to the withdrawal of policy measures to prevent and manage disputes.

During the plenary session, participants raised concerns about the circular formulations of the right to regulate that required regulation be taken "in a manner consistent" with the agreement and the need to ensure the effectiveness of this key principle

for developing countries. They also reflected on the ambivalent position of some developed countries on ISDS reforms.

DAY 2, THURSDAY, FEBRUARY 28, 2019

[*Before the commencement of the main Forum sessions, African delegates were invited to a breakfast briefing session on the AfCFTA investment protocol negotiations conducted by Mr. Prudence Sehahizi, Chief Technical (Advisor & Head of AfCFTA Unit, Africa Union Commission) and Mr. Martin Kohout (Associate Economic Affairs Officer, UN Economic Commission for Africa) and facilitated by IISD.*]

Session 4: Recent Developments in Treaty-Based Investment Arbitration and Negotiations and Their Impact on Reform: A practitioner's perspective

In this session, panellists shared their experiences with developments in investment arbitration and negotiations and analyzed how such developments have affected international negotiations, processes and debates, including at UNCITRAL and ICSID. This session was facilitated by **Mr. Mauricio González Cuervo** (Director, Center of Arbitration and Conciliation, Chamber of Commerce of Bogotá, Colombia).

Mr. George Kahale III (Chairman, Curtis, Mallet-Prevost, Colt & Mosle LLP) noted first that virtually all states were willing participants in the investment treaty regime, thinking that BITs were inherently good, even necessary to promote foreign investment. Now states have realized they are victims, rather than beneficiaries. Mr. Kahale argued that ISDS is the "wild west" of international practice, without judges, a body of law or a process to prevent and correct errors and indicated that the problem states face in ISDS is both procedural and substantive. Procedurally, the system of party appointment distorts arbitrators' incentives to make impartial decisions, so that the composition of a tribunal is now more important than the legal questions or facts at issue. Regarding substantive obligations, Mr. Kahale noted that states have been victims of expansive interpretations of treaty provisions, such as FET, which can easily morph into any government action that disappoints an investor. In addition, billion-dollar claims are now commonplace. As a result, Mr. Kahale pointed out that more and more states are becoming skeptical of ISDS, realizing that its supposed benefits are grossly exaggerated and its costs can be exorbitant. This skepticism has sometimes resulted in the denunciation of treaties and has fed into the establishment of UNCITRAL Working Group III. Mr. Kahale stated that he is not very optimistic of the outcome of this process, as any premise that the existing system is good and only needs minor tinkering is unlikely to serve the interests of the states. Mr. Kahale concluded by

encouraging states to explore options to terminate BITs or issue joint interpretations of key provisions to ensure, for instance, that FET only covers the minimum standard of treatment and that the most-favoured-nation (MFN) treatment clause refers to nationality-based discriminatory treatment only. According to Mr. Kahale, substantive progress can be made incrementally. Mr. Kahale closed by saying that the days of signing BITs for the photo op should be over.

Ms. Blanca Gómez de la Torre (Partner, Pactum Dispute Resolution Consulting, Ecuador) highlighted the fact that investment treaty reforms being made by developing countries are being echoed in the EU and the United States, even if, there, the reforms are not underpinned by sustainable development motivations. For instance, the United States is moving away from ISDS to keep investment in country, rather than to promote sustainable development. Ms. Gómez de la Torre noted that developing countries are experiencing a radical period of change for ISDS, emphasizing that states should be cautious and have an informed look at all the options, rather than just assume that reform is a good thing. She explained that the EU's MIC proposal is a partial solution that doesn't address the underlying problems with costs, third-party funding, coherence and consistency. Developing countries need to carefully assess what benefits investment treaties have brought and what, if any, benefits new treaties can bring. Ms. Gómez de la Torre warned that, although the costs are very high, countries continue to be afraid that if they withdraw entirely from the system, investors will not come. Adhering to the ISDS system, however, raises fundamental philosophical problems of inequality, including between local and foreign investors and between states and investors. In terms of treaty reform, Ms. Gómez de la Torre considered that states are now realizing that if something is not clear, it should not be put in a treaty. Thus, FET is now being seen as something so vague that it must be excluded, the concepts of "investor" and "investment" are being carefully defined and indirect expropriation is being limited.

Ms. Soaad Hossam (Counsellor, Ministry of Justice, Egypt) emphasized the importance of practitioners discussing ISDS issues with negotiators. She noted that victims of ISDSs are not just developing countries but developed countries now too. The question for all countries is whether to disengage from the system or think about restructuring the system. Ms. Hossam noted that the key question is not *whether* to reform, but rather *how* to reform. Ms. Hossam illustrated her point by sharing some of the Egyptian experience with ISDS, as third in the world behind Venezuela and Argentina as a defending state in ISDS cases. She noted that Egypt is an example of a country that has many BITs, yet still struggles to attract FDI and has had a huge number of claims brought against it, in part due to the "multiple proceedings phenomena." According to Ms. Hossam, this is one of the major problems in the system. Egypt has had several experiences with one government measure giving rise to a contractual arbitration and two or more investment treaty arbitrations on the same facts.

In one such instance, there were four parallel arbitrations with total damages of over USD 7 billion. For Ms. Hossam, Egypt's lesson learned is that practitioners who defend claims need to be involved in treaty drafting and negotiation. To avoid the multiple proceedings problem, treaties need a sophisticated definition of corporate nationality; not one that protects all shareholders and creates a never-ending chain of claims. Treaties also need a clause requiring investors to waive their right to future proceedings once they start arbitral proceedings.

Mr. Trung Pham (Acting Deputy Head, Division of Legal and Economics, Department of International Law and Treaties, Ministry of Foreign Affair, Vietnam) opened by noting that reform processes will not bring meaningful results if directed not only at ISDS procedure. He encouraged countries to actively engage in discussions at UNCITRAL Working Group III by identifying concerns arising from cases faced by the state and proposing provisions to address them. Mr. Pham provided examples from the recent Vietnam–EU Investment Protection Agreement. That agreement clarifies FET and addresses some of Vietnam's concerns regarding ISDS, including a short list of adjudicators who are subject to strict ethics requirements and a code of conduct. There is also a post-award review mechanism to permit correction of errors. Mr. Pham echoed the sentiment that states are frustrated by the status quo. Mr. Pham also stressed that third-party funding increased the danger posed by ISDS to states, as it encourages investors to bring claims and may prevent amicable settlements of disputes. Mr. Pham encouraged states to consider a three-pronged approach: 1) actively engaging with UNCITRAL Working Group III, 2) actively exploring termination of ISDS provisions in investment treaties and 3) devoting reform efforts to issues of substance.

During the plenary session, participants picked up on the speakers' points regarding counterclaims, third-party funding and consolidation of multiple proceedings, emphasizing the need for practical solutions to these issues. Participants also questioned the evidence base on the effectiveness of BITs in attracting FDI.

Session 5: Engaging Bilaterally and Multilaterally on Renegotiation and Termination: Sharing experiences

In this session, panellists reflected on how discussions in the previous sessions of the Forum relate to developing countries' strategies at the bilateral level, and shared experiences and knowledge on the steps that countries are taking with respect to the stock of old-style treaties. **Ms. Kekeletso Mashigo** (Director, Multilateral Organizations, South Africa) moderated this session.

Ms. Suzy Nikièma (International Law Adviser, IISD) spoke on the topic of treaty termination in the context of BITs, noting that the global context is more favourable to terminations today. She noted that most treaties have a provision allowing for unilateral termination subject to certain requirements. Ms. Nikièma emphasized that the parties can always terminate by mutual consensus and that states should always consider that possibility as a first step. Ms. Nikièma then highlighted the pros and cons of unilateral termination and by mutual consent. She also noted the difference between a bilateral (one-by-one) approach to treaty termination and a multilateral approach (terminating many treaties at once), which may be useful in the context of new regional investment treaties replacing existing BITs among member states in the region. Ms. Nikièma also underscored the importance of addressing the survival clause, which is able to extend the life of a treaty and create what she described as a "zombie treaty." She shared options for neutralizing this clause, all of them requiring mutual consent. The question of renegotiation should be considered on a case-by-case basis, noting that renegotiation opens the possibility to neutralize the survival clause and replace the old rules with new ones. However, unilateral termination might be the only option available in some circumstances. Ms. Nikièma encouraged states when considering renegotiation to ensure readiness to renegotiate, including with a new model and a well-prepared negotiation team, to ensure the new treaty will be better than the terminated one. In her conclusion, Ms. Nikièma emphasized that terminating a BIT, when done in accordance with the treaty is perfectly legal under international law, is no more an extraordinary action and is an important option to deal with old stock of BITs, as part of phase 2 of UNCTAD's road map.

Mr. Sebastian Espinosa Velasco (International Public Law Adviser, Legal Secretariat, Presidency of the Republic, Ecuador) provided insights from the Ecuadorian experience in terminating BITs. Mr. Espinosa explained that, in 2008, out of its 27 BITs in force, Ecuador terminated nine. This followed the promulgation of a new constitution in 2008 and 2009, and the constitutional court determining that ISDS provided for under BITs is contrary to the new constitution. Mr. Espinosa also explained that Ecuador commissioned a study from the domestic point of view on how BITs undermine the sovereignty of the state, as well as how these treaties affect FDI. This study found that FDI accounted for just 1.1 per cent of GDP in Ecuador, and there was no correlation between BITs and FDI in the country. Nevertheless, Ecuador has not stopped signing contracts with ISDS provisions. Mr. Espinosa noted that Ecuador has recently developed a new model BIT, which provides clarifications on the precise content of the substantive protections, removes indirect expropriation, clarifies the meaning of FET and provides for an appeal mechanism and roster of judges. Regarding ISDS, Ecuador is trying to follow the Brazilian model of dispute prevention mechanisms and state–state dispute settlement.

Mr. Rahmat Kurniawan (Legal Advisor, Directorate of Legal Affairs and International Treaties, Ministry of Foreign Affairs, Indonesia) shared details of Indonesia's experience with termination and renegotiation of investment treaties. Mr. Kurniawan explained that Indonesia took this route due to its exposure to ISDS cases—it had 12 cases in a short period of time. Indonesia terminated several BITs, drafted a new BIT model and then renegotiated treaties with select countries. Mr. Kurniawan shared some recommendations with the Forum based on Indonesia's experience. He encouraged countries to try to terminate treaties that are set to expire within their period of validity. In the assessment step, Mr. Kurniawan suggested trying to closely analyze the most problematic provisions in the BIT and then draft a better model based on the analysis. He then highlighted some of the main challenges with respect to termination. One of these was that the termination of an investment chapter of a free trade agreement is not legally possible, and so free trade agreements going forward should include a clause allowing termination of specific chapters. With regards to the survival clause, Mr. Kurniawan recommended shortening the survival time period by mutual agreement. Mr. Kurniawan closed by highlighting the three main improvements in Indonesia's recent BIT with Singapore: the inclusion of provisions on corruption, corporate social responsibility and the right to regulate.

Mr. Félix Zongo (Director of Industry, Ministry of Trade, Industry and Handcraft, Burkina Faso) shared Burkina Faso's experience in terminating its BIT with the Netherlands in 2018. As background, Mr. Zongo explained that, over the past eight years Burkina Faso received technical assistance to assess its current investment agreements. Based on the assessments, it developed a roadmap that included the termination of outdated agreements. Mr. Zongo noted that Burkina Faso had a large number of such treaties. Burkina Faso found that FDI did not increase as a result of these BITs, informing its decision to engage in terminations, including the Burkina Faso–Netherlands BIT one month before the close of the "termination window" period. Mr. Zongo explained the challenge of getting the official approval for termination in such a short period. Mr. Zongo noted that the Netherlands responded to Burkina Faso's request for termination by acknowledging that the BIT was not a good treaty and agreeing to terminate it. Mr. Zongo highlighted that the key takeaways for Burkina Faso as a result of this experience were that there is a need to be organized and aware of the termination deadlines for each treaty to make sure that they are not taken by surprise. Mr. Zongo closed by hoping that other countries could draw lessons from Burkina Faso's experience.

During the plenary discussions, participants queried whether the states involved in terminations had experienced any changes in FDI flows as a result; the answers were unanimously that FDI did not decrease after termination. Participants also focused on practical issues such as the importance of reaching agreements on survival clauses, how to

terminate without damaging diplomatic relations and how to address termination of investment chapters in FTAs.

Break-Out Session 2: Designing Strategies to Deal with Outdated Treaties

Break-out session 2 looked at the questions of what options countries have to deal with their stock of outdated treaties, what steps can be taken, and how countries can best prepare and organize themselves. Groups were asked to develop a roadmap for how they would implement several different options to deal with older-generation treaties. The options were: 1) renegotiating and amending existing investment treaties, 2) jointly interpreting existing investment treaty provisions and 3) terminating existing investment treaties.

Session 6: Relationship Between Issues of Process and Issues of Substance

During this session, participants debated how ongoing processes and developments—including UNCITRAL and regional negotiations such as the AfCFTA Free Trade Agreement—can help orient outcomes toward objectives and priorities set by developing country governments. This session was moderated by **Mr. Carlos Correa** (South Centre).

Mr. Howard Mann (Senior International Law Adviser, IISD) critiqued the approach of the UNICTRAL Working Group III process, noting it has a very narrow interpretation of its mandate and divides substance and process in a very siloed way. As a result, Mr. Mann considered that the worst (and likeliest) outcome is one that tinkers at the margins while preserving the system overall, and stifles further calls for real reform. According to Mr. Mann, the best result would consider broad systemic reform and focus on how international law should promote the relationship between FDI and sustainable development. Mr. Mann described the EU's MIC proposal as a "middle ground" that changes some elements of the process but with no fundamental changes, and that disempowers domestic processes in favour of international ones. Unfortunately, there is no direct avenue through the UNICTRAL process for the best available result, so countries must start with avoiding worst available result. Developing countries need to stay together and, if necessary, deny a consensus to the Working Group III. Mr. Mann encouraged developing countries to continue forging trends that create pressure for real reform, such as terminations, renegotiations and new treaty designs. In order to change the options on the agenda, developing countries should be the change they want to see, for instance through South–South BITs processes and regional agreements such as the AfCFTA Free Trade Agreement. An additional option would be for current member states of the UNCITRAL Commission to make this latter change and broaden the mandate of Working Group III. In closing, Mr.

Mann remarked that the old BIT model failed to achieve the goals of developing countries and that, equally, tinkering at the margins will not achieve those goals.

Ms. Silvina González Napolitano (Investment Agreements, Ministry of Foreign Affairs and Worship, Argentina) shared the experience of Argentina, the country with the most ISDS claims against it (approximately 60 arbitrations). Ms. González Napolitano explained that, in 2016, Argentina started negotiating new BITs with the objective of encouraging new investments, while also making some changes based on the lessons learned. These new BITs are more balanced, provide for narrower standards of protection, and seek to make arbitration more transparent, efficient and predictable. Ms. González Napolitano noted that one of the key elements of reform for Argentina has been the MFN clause. In Argentina's experience, this clause was used by investors to import more favourable dispute settlement provisions, resulting in what she described as a "Frankenstein" treaty. Argentina's new approach is to explicitly state that MFN cannot be applied to ISDS and cannot be used to import broader standards from older BITs. The reformed MFN clause also cannot not be used to include standards that were not included in the new treaty or to avoid investor obligations. Ms. González Napolitano emphasized the importance of reaffirming the right to regulate in the treaty and to allow for state counterclaims. Ms. González Napolitano also referred to Argentina's new approaches to avoiding treaty-shopping and ensuring the ethical standards of arbitrators.

Ms. Yasmin Sultana (Joint Secretary, Ministry of Industries, Bangladesh) shared the experiences of Bangladesh, noting that the country is currently attracting increased investment and, with it, expects more investment disputes. Although it currently has a limited number of BITs, Ms. Sultana explained that Bangladesh is currently negotiating with several countries. Usually the negotiating process is very slow, and countries with investors already in Bangladesh are very hesitant to agree to investor obligations, especially related to human rights and the environment. Ms. Sultana illustrated problems related to the lack of such provisions by describing a case against the government regarding a gas well explosion in which the government was ultimately held liable for the environmental damage caused by the investor. Ms. Sultana noted that the biggest sticking points for Bangladesh in negotiating BITs include the definition of investment, FET, indirect expropriation, conditions of transfer, reservations and exceptions, ISDS and human rights. At the moment, Bangladesh does not have its own model treaty, but it is planning on developing one based on an international model, adapted to Bangladeshi interests and striking a balance between investor and state obligations.

Mr. Makane Mbengue (University of Geneva) began his intervention on the relationship between substance and procedure by noting that, in public international law, substance is not supposed to follow procedure. He noted that procedure should achieve four things in

relation to substance: 1) it should preserve the rights of states in the system of public international law, 2) it should ensure security and predictability, 3) it should clarify existing provisions in accordance with customary rule of public international law and 4) it should not add to or diminish from the rights or obligations that have been carefully negotiated. Mr. Mbengue argued that ISDS has failed on all four counts and, as such, reform of the investment regime must achieve a careful and balanced integration of procedure and substance. Mr. Mbengue noted that the current dominant model BIT has led to a self-contained system of dispute settlement that is critically isolated from substance. Reform needs to ensure that procedure serves substance and not the other way around. Mr. Mbengue emphasized that ISDS is unbalanced by nature, thus a new generation of BITs balanced at the substantive level cannot be based only on ISDS reform. In referencing a recent decision by the U.S. Supreme Court rejecting absolute immunity for the World Bank, Mr. Mbengue posited that international investment law reform should consider making a similar change and protect people living in affected communities.

During the plenary session, participants discussed the impact of treaty reform on investment promotion objectives, with commentators explaining that *quality* investment is unlikely to be deterred by investor obligations and other sustainable development elements. Some participants raised concerns about bringing substantive reform issues at the multilateral level such as UNICTRAL, if a multilateral agreement in investment was not desirable. Commentators agreed that regional and domestic approaches to substance and dispute settlement are preferable. Participants discussed the pros and cons of a local remedies requirement and expressed doubts that the EU's MIC proposal would adequately address the issues of imbalance and inequity, regulatory chill and coherence in investment arbitration. Commentators and participants discussed strategies and tactics for developing countries to influence the agenda and outcomes at the UNCITRAL Working Group III.

[*Following the conclusion of the main Forum sessions, all participants were invited to an evening session focusing on corruption, run by ANDJE with Mr. George Kahale III and Ms. Blanca Gómez de la Torre.]*

DAY 3, FRIDAY, MARCH 1, 2019

Session 7: Engaging Multilaterally to Redesign Investment-Related Dispute Settlement

This session focused on multilateral processes to reform dispute settlement, looking in-depth at potential outcomes in UNCITRAL Working Group III, alternative dispute

settlement and issues of stakeholder inclusion. The session was facilitated by **Ms. Chantal Ononaiwu** (Trade Policy & Legal Specialist, Office of Trade Negotiations, Caribbean Community [CARICOM] Secretariat).

Ms. Nathalie Bernasconi (IISD) explored potential outcomes at UNCITRAL and other potential options for reform outside of that process. Of the potential outcomes at UNCITRAL, she flagged: 1) negotiations failing, with no reform, meaning that the status quo is maintained, 2) retaining the current ISDS regime with some procedural improvements, 3) ISDS with a roster system, 4) ISDS with an appellate mechanism or 5) the EU's MIC proposal. Beyond these mainstream outcomes, Ms. Bernasconi flagged other possible reform elements, such as: 1) replacing ISDS with state–state dispute settlement, 2) allowing access to ISDS to affected stakeholders, 3) requiring exhaustion of local remedies, 4) limiting the scope of ISDS to exclude investors involved in corruption or fraud and 5) thinking creatively about mediation or accountability processes. Ms. Bernasconi noted that, by agreeing to whatever reform comes out of UNCITRAL, countries are not automatically signing onto the implementation agreement. As with the Mauritius Convention on Transparency in ISDS, a new framework could be elaborated, for example, setting up a court, but the framework would only apply when countries opt-in through a second agreement. In any event, this would take time, so she concluded by suggesting that, in the meantime, developing countries could consider how to address their most pressing problems around ISDS. Interim measures could include a moratorium on ISDS, a requirement for the exhaustion of local remedies, setting up interim rosters of adjudicators, provisions on costs, or an agreement to suspend or terminate outdated treaties.

Ms. Kekeletso Mashigo (Director, Legal, International Trade and Investment, Negotiations Unit, International Trade & Economic Development Division, Department of Trade and Industry, South Africa) began by sharing South Africa's reform experience. She noted that South Africa's current policy is informed by a BIT review concluded in 2009, which found no correlation between the country's BITs and FDI flows and an imbalance in the substance of those BITs, especially with respect to dispute settlement. As a result, Cabinet approved a strategy including: 1) no new BITs, 2) passage of the Protection of Investment Act, 3) development of a new BIT model and 4) establishment of a cross-government investment committee. South Africa's new model does not contain FET, ISDS or MFN, but guarantees procedural rights, in line with regional developments in Africa. Ms. Mashigo shared South Africa's view that the UNCITRAL discussions have been too narrowly defined and should include certain substantive issues, exploring alternatives to ISDS that encompass the SDGs, public policy and wider stakeholder interests. Ms. Mashigo noted that South Africa does not believe the MIC addresses developing country priorities such as regulatory chill, exhaustion of local remedies, participation of other stakeholders, consistency and coherence. She stressed that, while there is a lot of developing country

consensus on these issues, there is a lack of cohesion and coordination among those countries at UNCITRAL.

Mr. Pedro Paranhos (Diplomat, Ministry of Foreign Affairs, Brazil) shared insights on Brazil's Cooperation and Facilitation Investment Agreements (CFIA). Mr. Paranhos explained that the CFIA is a BIT model conceived by Brazil with the objectives of fostering institutional cooperation, increasing investment, and offering jurisdictional protection to investors and their investments. The CFIA emphasizes facilitation to increase investment and adopts a preventive approach to addressing potential disputes. Mr. Paranhos explained that a key institutional element of the CFIA is the National Focal Point, which assesses suggestions and complaints from the other party or its investors and recommends actions to improve the investment environment. The National Focal Point seeks to prevent differences in investment matters, but should a difference arise, it is addressed by the Joint Committee set up under the CFIA. The Joint Committee receives the request, may invite representatives of the affected investor and other stakeholders to appear, and prepares a report with findings. Once these procedures have been exhausted, Mr. Paranhos explained, the state–state dispute settlement procedure can be used, either with an ad hoc arbitral tribunal or at a permanent institution that is mutually agreed upon. Matters excluded from the scope of arbitration include security, domestic legislation, corporate social responsibility, measures on combating corruption and illegality, and provisions on environment, labour and health.

Ms. Chantal Ononaiwu (Trade Policy & Legal Specialist, Office of Trade Negotiations, CARICOM Secretariat) shared perspectives from CARICOM. She noted that the Revised Treaty of Chaguaramas establishing the CARICOM Single Market and Economy provides guarantees of the right of establishment and free movement of capital to Community nationals. Further, investment chapters feature in some of CARICOM's external trade agreements, and every CARICOM country (except Montserrat) has signed at least one BIT. She noted that these investment treaties provide for a range of different dispute settlement mechanisms. Ms. Ononaiwu indicated that CARICOM countries have had relatively little experience with ISDS. Only eight of 15 CARICOM countries have been respondents in ISDS cases under UNCITRAL or ICSID rules, and the majority of these cases were contractual claims, with only one rendered award being in favour of the investor. Despite this limited ISDS experience, CARICOM countries have been exploring different dispute settlement models at the regional level and in external trade negotiations. Ms. Ononaiwu explained that CARICOM has been developing an intra-regional agreement for the protection, promotion and facilitation of investment (the CARICOM Investment Code). Despite not being engaged currently in negotiations with third countries, CARICOM also has developed a template for investment treaty negotiations with external partners, which defines substantive standards of protection with greater precision and includes investor

obligations. In terms of ISDS procedure, the template circumscribes the claims that can be submitted to arbitration or conciliation, specifies various preconditions for the submission of claims and includes a code of conduct for arbitrators, as well as provisions for joint interpretations, transparency, preliminary objections and consolidation, non-party interventions and amicus curiae. Ms. Ononaiwu emphasized that there is an interest in the region in initiatives that can reform ISDS, including UNCITRAL. Ms. Ononaiwu stressed that, whether or not countries have had extensive experience with ISDS, they should make interventions at UNCITRAL. If countries are not able to table their own solution, they should weigh in on the desirability, effectiveness and workability of others' proposals. In closing, Ms. Ononaiwu encouraged countries to also highlight concerns that they have with the ISDS regime not being addressed in the UNCITRAL process.

In the plenary session, participants echoed the need for greater coordination and cohesion among developing countries and the need to discuss certain substantive issues at UNCITRAL. Some participants also stressed the importance of dispute prevention, including through alternative dispute settlement processes such as mediation, while others agreed but noted that dispute prevention should not preclude ISDS reform.

Break-Out Session 3: Designing Optimal Outcomes in the UNCITRAL Process for Developing Countries

During this session, groups of participants considered the various outcomes of the UNCITRAL Working Group III process. Building on the previous session, the groups discussed the advantages and disadvantages of eight different potential outcomes: 1) no outcome, no reform at UNCITRAL; 2) procedural improvements in investor–state arbitration; 3) opening up access to the process to affected stakeholders as claimants or intervenors; 4) ISDS remains, with a requirement added to exhaust local remedies prior to use; 5) limiting the scope of investor–state arbitration (e.g., in cases of corruption, fraud, etc.); 6) ISDS with an appellate mechanism; 7) multilateral investor–state court with an appellate mechanism; and 8) ISDS replaced by state–state dispute settlement. The results of these discussions have been summarized in an outcome document (see Annex 1).

Open Discussion: Building Groups and Coalitions and Strategies to Advance Developing Country Priorities in International and Regional Processes

The final session of the Forum was an open discussion in which participants were invited to raise ideas for developing countries to coordinate to achieve preferred outcomes in reform processes, as well as to reflect on their main takeaways from the Forum. This session was moderated by **Ms. Opeyemi Abebe** (Commonwealth Secretariat).

Participants reflected that there was a lot to be gained from studying other countries' model agreements, to extract elements that could enhance their own models, especially exceptions and explanatory notes to ensure the text reflects the country's priorities. Many noted that some of the greatest benefits from this type of event are the experience sharing and the ability to learn from the reform processes of other countries, knowing that they are not alone in the challenges they face.

Participants emphasized the importance of developing a national position on the UNCITRAL process, to ensure they can meaningfully participate. A national or even regional position would be the necessary first step to developing countries establishing a common position, some noted. In this sense, some participants considered that coordination needs to start at the national level, and in many countries there is still a lot of fragmentation within the government. Some noted that their next steps upon returning to the office would be to brief those attending the next UNCITRAL meeting on the key issues (if the delegates are different), especially now that they have a clearer sense of the potential outcomes and options following discussions at the Forum.

Participants underlined the need for better coordination and cohesiveness among developing countries at UNCITRAL and other forums, including cooperation on capacity building among the cohort. Participants also flagged the importance of acknowledging the ability to "walk away" from the UNCITRAL process without achieving an outcome. A key message for many participants was the importance of opening the UNCITRAL process to discussions on certain issues of substance, and not only procedure.

Closing Ceremony

Ms. Nathalie Bernsaconi (IISD), **Mr. Daniel Uribe** (South Centre) and **Ms. Ana María Ordóñez** (Colombia) formally closed the Forum by thanking the co-organizers and co-sponsors for their support, as well as the participants for their active engagement in the discussions throughout the three-day program. Participants were encouraged to continue the reflection on an alternative system to foster sustainable investment and to engage in current discussions at various levels, particularly in the next UNCITRAL meeting on ISDS reform in April 2019.

ANNEX 1: Potential Outcomes at UNCITRAL Working Group III: Pros and Cons (Break-Out Session 3)

This document summarizes the results of a break-out group working session conducted at the International Institute for Sustainable Development (IISD) 12th Annual Forum of Developing Country Investment Negotiators, held from February 28 to March 1, 2019, in Cartagena, Colombia. IISD compiled this document at the request of Forum attendees.

The document is designed to assist countries as they prepare to participate in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III process, which addresses reform of investor–state dispute settlement (ISDS). It summarizes eight potential outcomes from the UNCITRAL process and outlines potential benefits and drawbacks ("pros" and "cons") that Forum attendees identified for each outcome. The document does not necessarily reflect the views of IISD.

Potential Outcome 1: No outcome, no reform at UNCITRAL

The UNCITRAL Working Group III process concludes without any agreed outcomes on reforming ISDS.

Pros	Cons
Keeps reform focused on bilateral investment treaties for now, while leaving open other multilateral forums and new forums (e.g., the UN Conference on Trade and Development [UNCTAD])	Wastes the time and resources already committed to the UNCITRAL process
Walks away from a potentially "bad deal" at the multilateral level	ISDS status quo will be solidified
Retains focus on local remedies as a preferred alternative	Risks losing momentum and opportunities for further multilateral reform
Does not legitimize ISDS; may even further delegitimize it	Developing countries may lose the leverage that they have in a multilateral forum, relative to other forums

Pros	Cons
Keeps open scope for new options	Incentivizes the use of new "developments" from developed countries, e.g., the EU's Multilateral Investment Court
Allows for joint interpretations on procedural issues	Creates frustration among country governments, who may lose confidence in UNCITRAL as an institution, as well as in the multilateral system as a whole
Strengthens regional efforts and diplomatic approaches	Increases tension and creates new differences between countries
Allows for the opportunity to re-open substantive *and* procedural issues	Legitimizes the current ISDS system
Less proliferation of forums; greater efficiency	
May allow for autocorrection, self-improvement of ISDS	
Keeps pressure on the multilateral system for more significant improvement and reform than what the UNCITRAL process may have allowed	
Reserves resources for capacity building at the local level	

Potential Outcome 2: Procedural improvements in investor–state arbitration

States at UNCITRAL agree on adopting a set of changes that would apply to how investor–state arbitration operates in practice.

Pros	Cons
Serves as a more realistic, plausible and acceptable option in the short term	Legitimizes, strengthens or locks in ISDS as the most readily available option
Keeps the discussion on the global agenda	Impedes more serious, bolder reforms
May be better than no reform, if the procedural improvements include, among other things: quality and impartiality of arbitrators, efficiency of the process, transparency of proceedings, costs, third-party funding, etc.	Involves technical, detailed discussions that takes attention away from discussions on objectives and policy goals
	Consumes small countries' negotiating time and capacity in developing these procedural improvements
	Distracts from other potential solutions
	Continues with private adjudication that involves arbitrators and practitioners, close to investors' interests
	Keeps the ISDS industry going
	Harms prospects for domestic court reforms and improvements, while limiting the power of domestic courts

Potential Outcome 3: Opening access to the process to affected stakeholders as claimants or intervenors

States at UNCITRAL agree on reforming ISDS to introduce additional "affected stakeholders" into the overall process, with the ability of stakeholders who are not investors to make claims or otherwise intervene.

Pros	Cons
Enhances transparency and communication with other affected stakeholders	Leaves unclear who bears the costs associated with access to the process for affected stakeholders
Allows state parties to provide direct interpretations because home state can also participate	May be difficult to identify stakeholders and ensure claimants or intervenors are legitimately "affected"
Avoids parallel and multiple proceedings	Distracts the tribunal from the core issues, making the process longer and more cumbersome
Gives communities an international forum to raise their concerns with investors' activities and affirm their rights	Opens the process to the possibility of abuse, e.g., from lobby groups
Allows tribunals to develop a holistic understanding (or new perspective) of the issues	May be counterproductive for states
Provides a platform for integrating and expressing public opinion, which may strengthen a state's case where public policy issues are involved	New participants in the process may not be fully protected, having not been involved in its design
De-escalates public tension	Confidentiality may be compromised
Enhances investor and state accountability to communities and other interest groups, strengthening rights protection	ISDS could become more politicized, potentially harming diplomatic relations

Pros	Cons
Strengthens democracy	Distracts from the core reform agenda
	Requires that adjudicators have a more diverse level of expertise

Potential Outcome 4: ISDS remains, with requirement added to exhaust local remedies prior to use

States at UNCITRAL agree to leave ISDS in place, but adopt language requiring that investors and states pursue local remedies before resorting to international dispute settlement.

Pros	Cons
Reduces risk of states being sued in international forums	Governments can frustrate the resolution process
Increases the possibility of retaining an investor	The courts lack the technical competency to understand underlying issues
Gives states time to solve problems and resolve disputes	If investors' claims not resolved, can lead to divestment
Reduces costs associated with frivolous claims	Doubles the cost of the overall process
Strengthens the domestic administrative and judicial process	Increases interest due to lengthy process
Reduces costs for states	Allows arbitrators to serve as an "appeals" instance, reviewing decisions of the highest domestic court
Gives states the option to defend cases with local lawyers	Potential inconsistency in "fork-in-the-road" clauses that require investors to choose between ISDS and local remedies

Pros	Cons
Legitimizes state court systems/policy space/sovereignty	The domestic courts lack the mandate to deal with matters of international law
Application of local/national laws	Creates enforcement challenges since judgements are harder to enforce internationally
Familiarity with procedure/laws	Local procedures might be more prone to corruption by the state and the investor
No fragmentation of laws	May lead to investors not being interested in making the investment due to competitiveness reasons
Predictability, consistency in legal interpretation	Increases risk of political interference
Gives states an advantage in the legal process	Creates unpredictability for investors, who may be unfamiliar with how jurisprudence differs across countries
Increases dispute prevention/amicable resolution	Weak domestic court systems can frustrate the process
Might be faster than going straight to ISDS	Question of independence of the judiciary
More time to prepare for ISDS case, as it is easier to predict when those cases will advance to that stage	Investors may not trust the local process
Prioritizes national legislation and policy objectives	
Allows third-party participation by the local community	

Potential Outcome 5: Limiting the scope of investor–state arbitration (e.g. in cases of corruption, fraud etc.)

States at UNCITRAL agree to set boundaries on what cases qualify for ISDS, excluding those cases where corruption, fraud or similar problems are found.

Pros	Cons
Attracts and incentivizes responsible investors making genuine investments	Creates difficulties in defining limitations to the scope of ISDS and establishing proof of corruption, fraud, etc.
Limits arbitration to an extraordinary measure available to well-behaved investors, reducing cases	Limits investors' access to justice in a corrupt state or where states abuse the process
Strengthens states' laws, institutions and local judges	Generates resistance from arbitral tribunals, who may be hesitant to limit cases to only those falling within a particular scope
Prioritizes alternative dispute resolution methods like mediation and conciliation, making sure ISDS is not the only available option	In some cases, could lengthen the ISDS process
Prevents states from having to assume the costs of defending ISDS cases from corrupt or illegal investors	May necessitate an international mechanism to detect corruption, increasing costs
Reaffirms a zero-tolerance approach to corruption as a key public policy issue, in line with international norms and frameworks, including the United Nations Convention Against Corruption	

Potential Outcome 6: ISDS with an appellate mechanism

States at UNCITRAL agree to leave investor–state arbitration in place but require that these arbitrations have a mechanism in place for appealing rulings.

Pros	Cons
Allows for correction of errors of substance and process	Investor–state arbitration as such remains
Improves first instance decision making and due diligence of arbitrators	Potential clash between the different spirit of arbitration in the first instance compared with a legalized judicial appeal process in the second
Improves coherence, consistency and predictability of arbitral decisions	Coherence in appeal decisions difficult to achieve across 3,000 BITs
Reduces time of deliberations in first instance, and therefore costs due to increased clarity in the jurisprudence	"Bad law in, bad law out" issue remains: the process cannot fix substantive deficiencies
Lowers the risk of domestic courts overturning decisions ("set aside" procedures)	Provides opportunity for investors to appeal, making countries more vulnerable
Practical and can be implemented/set up faster than court	Challenges of enforcement and potential overlap with domestic court processes
Precedents exist (e.g., World Trade Organization, Vietnam–EU Investment Protection Agreement, although here the first instance is managed through a roster system)	Increases cost and time associated with ISDS process
	No operational examples of this, and indeed the World Trade Organization's Appellate Body is on the verge of collapse
	Creating a new institution causes new problems, such as an overly powerful secretariat, a lack of diversity and the risk of being stuck with bad judges

Potential Outcome 7: Multilateral investor-state court with an appellate mechanism

States at UNCITRAL decide to set up a multilateral mechanism that would replace the existing ISDS mechanisms in current bilateral investment treaties with the court.

Pros	Cons
Enhances coherence and predictability in arbitral awards	Further institutionalizes ISDS
Removes the problems of judges having multiple roles ("double-hatting") and associated conflicts of interest because judges are tenured	Increases costs of managing the court system
Fosters greater impartiality and independence of arbitrators	Politicizes the operation of the system, particularly in the appointment of judges
Contributes to the development of international law and reduces its fragmentation	Potential for lack of diversity among judges, insufficient representation of judges from developing countries
Addresses the deficiencies associated with party appointments of arbitrators	Potential for the multilateral court process to overlap or conflict with local court proceedings
Allows for the development of specialized expertise among decision makers	Prolongs the dispute settlement process
Facilitates review of the merits of the decision	Makes investor access to disputes against the state an "ordinary" process rather than an extraordinary one
Encourages disputing parties to settle amicably due to the length of the process	From an investor's perspective, no say in the appointment of the decision makers
Removes management of ISDS from the investor	Potential for lack of appreciation of state's particular legal system

Pros	Cons
Could reduce profitability of third-party funders due to increased predictability	Problem of bilateral investment treaty proliferation persists
Creates more confidence in the system	State funding a system that could operate against them
	Currently unclear how the court would work or its operation would be funded
	Risk of fragmentation of international law
	Prioritization of investor protection over other values
	Potential difficulty in securing participation of countries
	Deficiencies of substantive rules remain
	Creates a bureaucracy to manage

Potential Outcome 8: ISDS replaced by state–state dispute settlement

States at UNCITRAL recommend ending the use of ISDS, with countries instead addressing investment-related disputes under state–state mechanisms. The claims of foreign investors would be represented by their home country government.

Pros	Cons
Reduces volume of cases, especially frivolous cases, because states will take a more pragmatic approach to disputes	Lack of effective and timely redress for investors, potentially decreasing foreign direct investment
May increase the chance for an amicable/diplomatic settlement	Inappropriate to have state acting on behalf of private capital; states may not take investor issues seriously

Pros	Cons
Preserves state sovereignty	Multinationals may not have a strong relationship with a home state, making it difficult to get that state to lobby on their behalf
May promote earlier prevention and resolution of disputes, and reduce cost and time of dispute settlement	Creates difficulties for states in how to decide which investors to represent
Preserves state and investor relationship	Politicizes investment disputes and damages relationships between states, with potential for disputes to escalate
May strengthen domestic courts	Problems could arise from power imbalances between states
Allows for more authentic interpretation of the agreement by those who negotiated it (i.e., states) in accordance with their intentions	There may be an initial lack of expertise among diplomats to resolve/address investment disputes
There are already examples to follow (e.g. Brazil Cooperation and Facilitation Investment Agreements, World Trade Organization dispute settlement mechanism, Southern African Development Community)	Creates greater bureaucracy
	Requires states to bear costs for investors' justice
	Disadvantages smaller investors and those who lack good connections or close ties to their home country government
	An impractical proposal to put forward in the UNCITRAL forum because of vested interests and ideological positions, making the suggestion "a tough sell"