

Tuesday, 10 October 2017, 15:00 - 18:00, Room XXVI (26)

Phase 2

## Break-out session 6

Towards a global reform effort – improving dispute settlement

10 IIA reform options

### Moderators

**Mr. David Gaukrodger**, Senior Legal Adviser, Organisation for Economic Co-operation and Development (OECD)

**Ms. Caroline Nicholas**, Senior Legal Officer, United Nations Commission on International Trade Law (UNCITRAL)

### Kick-off speakers

**Mr. Norberto Ariel Martins Mogo**, Head, Investment Treaty Negotiating Unit, Ministry of Foreign Affairs and Worship, Argentina

**Ms. Blanca Gómez de la Torre**, Director, International Affairs and Arbitration Unit, Attorney General Office, Ecuador

**Mr. Colin Brown**, Deputy Head of Unit, Dispute Settlement/Legal aspects of trade policy, European Commission

**Mr. Joe Zhang**, Legal Advisor, International Institute for Sustainable Development (IISD)

**Mr. Chanchal Sarkar**, Director of International Investment Agreements, Department of Economic Affairs, Ministry of Finance, India

**Mr. Gonzalo García**, Deputy Director General for International Trade in Services and Investment, Ministry of Economy, Industry and Competitiveness, Spain

**Mr. Jonas Hallberg**, Legal Adviser, Swedish National Board of Trade, Sweden

**Ms. Caroline Nicholas**, Senior Legal Officer, United Nations Commission on International Trade Law (UNCITRAL)

**Mr. Shaun Donnelly**, Vice President, Investment and Financial Services, United States Council for International Business (USCIB)

### Rapporteurs

**Mr. Jansen Calamita**, Head, Investment Treaty Law and Policy, Centre of International Law, National University of Singapore

**Mr. Steffen Hindelang**, Associate Professor of International Law, Free University of Berlin

# UNCTAD Annual High-level IIA Conference: Phase 2 of IIA Reform

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**Tuesday, 10 October 2017, 15:00 - 18:00, Room XXVI (26)**  
**Break-out session 6 – Report back**  
**Towards a global reform effort – improving dispute settlement**

*This report represents the views of the rapporteurs on the discussions among the participants of the respective break-out session. It does not represent the views of the UNCTAD Secretariat or its member States.*

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## Rapporteurs

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Break-out Session (BoS) 6 undertook discussion of options for improving dispute settlement between investors and host states both within the context of the existing investment treaty regime and without.

The discussion in BoS 6 was, at the same time, high-level and detailed, addressing over-arching concerns with respect to investor-state dispute settlement (ISDS) as well as specific proposals for reform, such as the establishment of a multilateral investment court (MIC).

Discussion in BoS 6 was informed in great measure by the individual experiences of the states present, many of which have been parties to investor-state arbitration, as well as by the experiences of representatives of industry whose members have used investment treaties in disputes with host states. The discussion benefited broadly from the prior work of UNCTAD with respect to potential options of reform of ISDS as well as the development of multilateral proposals for a MIC by the European Union

Against this background, there are a number of key points of the discussion to note.

## Key points

1. There was consensus among participants – states, business, civil society – that there are areas in which reform of the existing regime of ISDS would be beneficial, although there was a variety of opinion on (a) the extent of reform needed and (b) the specific areas requiring reform.
2. That said, there were a number of issues relevant to the settlement of investor-state disputes that participants identified as essential to address in ongoing reform efforts.
3. Many states raised concerns regarding the characteristics of the current pool of arbitrators.



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Specifically, participants noted concern regarding:

- a) Arbitrator qualifications. The view was expressed by a number of states that given the nature of investor-state disputes it was more important that arbitrators have backgrounds in public international law or constitutional/administrative law than commercial arbitration.
  - b) Diversity and representativeness. Many states noted ongoing concerns regarding the representativeness of arbitrators serving in investor-state cases and expressed the need for reform to ensure greater representation across cultural, legal, social traditions.
  - c) Regional representation. Many states, especially from Latin America and Africa, expressed concern with the lack of broad geographic representation among investor-state arbitrators, noting a preponderance of arbitrators from North America and Europe.
  - d) Gender. There was a widespread support for reform to promote greater gender balance in the appointments of arbitrators in investor-state cases.
4. Another area of concern raised by states was the costs associated with the current arbitral system. In this respect, participants acknowledged that concerns about costs are less about the costs of arbitration as such but of legal counsel in particular.
- a) In addition, states noted that although sources of funding for claimants appeared to be growing, eg, though the growth of third-party financing arrangements, the financing of arbitration defence by states remained difficult.
  - b) Moreover, many states raised concerns that even in the event of the successful defense of a claim, the recovery of costs remained unpredictable as a result of unclear arbitral rules and variable approaches by arbitral tribunals.
5. A substantial number of participants raised concerns with respect to the independence of arbitrators in the present investor-state arbitration regime. In particular, concerns were raised regarding perceived incentives, conflicts of interest and bias issues. Prominent among the specific points made were:
- a) The on-going relationships certain arbitrators have with certain law firms which appoint the same arbitrators in case after case; and
  - b) The conflicting interests raised by the practice of 'double hatting', whereby certain lawyers serve as counsel in some matters and arbitrators in others.



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6. A number of delegations also raised issues related to the structure of the system of appointments and selection of arbitrators:
  - a) In particular, doubts were raised by some states about the need to have arbitrators selected by disputing parties and their counsel. Many states indicated that from their perspectives the possibility of having a roster of pre-qualified arbitrators or a standing arbitral body was worth exploring. At the same time, some states, and representatives of investors, argued for the value of party appointments, suggesting that party appointments provided investors with a confidence in the dispute settlement system that would be absent with a system of purely government-appointed arbitrators.
  - b) A further concern raised by some delegates concerned the processes whereby appointing authorities make arbitral appointments, either in the event of party default or by rule. Participants observed that such appointments are not made with transparency and that appointing authorities need not provide reasons for their appointments.
7. For certain states, the structure of the current ISDS regime is a matter of concern. These states observed that under the great majority of investment treaties, it is only the investor which may initiate claims and that, considering jurisdictional limitations, the scope for state counterclaims in investor-state arbitration is often very limited. Other participants, however, noted that while states may not have wide scope to bring claims in investor-state arbitration, host states retain plenary powers to enforce domestic laws through domestic judicial systems, regardless of investor-state arbitration. It was further noted that if states wished to expand the scope of arbitrable matters under investment treaties, it was within the scope of their power to do so through negotiated reform.
8. Beyond discussion of concerns regarding the current system of investor-state arbitration, there was also discussion of the possibility of more fundamental reform, such as moving beyond the current regime of ad hoc arbitration, towards a new model, such as a standing multilateral investment court.
  - a) In that regard, European countries outlined in their presentations a vision of a prospective MIC. They stressed that investor-State disputes are public law issues. It is about the control of the exercise of sovereign powers. Hence, disputes need to be addressed in this spirit. This refers to characteristics such as using a standing court with tenured, government-appointed judges. These judges shall act independently, be of the highest calibre in terms of knowledge and expertise in public international law, and comply with highest ethical standards. To improve quality such multilateral court shall also have an appeals mechanism.



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- b) European countries stressed that such a MIC would bring about a major improvement in terms of integrity and legitimacy of dispute settlement in the area of international investment. In a similar direction, many participants expressed hope that a MIC would be able to address the issues noted above.
9. At the same time, a number of questions were raised with respect to the MIC itself, in particular, participants raised concerns along the following lines:
- a) How would a MIC be structured? Many states raised questions about how a MIC would be structured so as to reflect a growing membership. Under the proposal for a MIC under discussion, states would be able to opt-in to the MIC over time. For many states this raised questions as to how the MIC structure would be able to reflect such an evolving state membership, particularly with respect to numbers of judges, the identities of judges, the scope of the MIC's jurisdiction and the administration of the MIC's work, including the payment for its upkeep.
  - b) How would a MIC be staffed? There seemed to be a consensus that judges in a new MIC should possess expertise in public international law, international investment law or constitutional/administrative law rather than expertise in commercial arbitration as is the case with many current arbitrations. In addition, questions were raised as to how the staffing of a MIC would ensure that MIC judges would possess desired qualifications as well as be representative across cultural, legal, social traditions and provide regional and gender balance.
  - c) Relationship with domestic courts. A number of states noted that domestic courts, if well-functioning, perform a vital role and constitute an important building block of the rule of law. In conceiving and designing a MIC, therefore, a crucial question to be addressed is whether the proposed court will constitute an additional layer of justice or a competing layer in relation to domestic courts.
  - d) Extent of de-fragmentation effects flowing from a MIC. While a MIC would bring about consolidation in procedural aspects, several states noted the heterogeneity of the substantive protections available under existing IIAs. Accordingly, even if a MIC were to be established, it was suggested, the question of de-fragmentation of substantive protection standards remains to be addressed.
  - e) Compatibility with existing instruments of the investment treaty regime. Some participants expressed concern that, especially with respect to the recognition and enforcement of the awards/judgments of any future MIC, it was critical that the instrument leading to its creation be compatible with existing instruments of the investment treaty regime, in particular the ICSID Convention and the New York Convention. Concern was raised that as currently structured in treaties such as the CETA (Canada-European Union) and the European-Vietnam FTA, the awards produced by the 'investment courts' under those treaties would not qualify for coverage by the ICSID Convention and that the same would be true of the awards of a MIC with similar structure. Others disagreed with this position, although the importance of ensuring



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the enforceability of future MIC awards/judgments was accepted as an imperative for future work.

10. Following on that point, there was effective unanimity that given the importance and complexity of reform of ISDS and the need for new models and structures to be able to work with existing pillars of the regime, like the New York Convention and ICSID Convention, it is essential that international organizations like UNCTAD, UNCITRAL, ICSID and others, continue working together, coordinating their efforts and providing complementarity to one another.

Furthermore, in light of the current centrality of UNCITRAL's position for working debate on these issues, there was again effective unanimity that states ought to think very carefully about who they send to these meetings. A number of participants noted that given the nature of investor-state dispute settlement, as a process of resolving public-private disputes, and the nature of the MIC project – designing a new judicial structure for disputes between private and public actors under public international law – it would make sense for states to rethink whether persons with private international law or commercial arbitration expertise would be the best persons to represent their interests at the forthcoming meetings.

