

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.

## **UNCTAD High-level IIA Conference**

**13 November 2019**

### **Break-out sessions: Multilateral processes related to investment policymaking and their contribution to Phases 1 and 2 of SD-oriented IIA reform “Reforming investment dispute settlement”**

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There was broad consensus among the participants in the break-out session that there is a need to reform the current ISDS systems.

A number of issues were prominent in the discussions, notably:

- Enhancing predictability of the outcome of ISDS, and the related issue of
- Improving consistency between decisions;
- Enhancing the independence and impartiality of adjudicators;
- Increasing transparency of the proceedings, notably as concerns third-party funding;
- Reducing costs.

These issues were discussed against the background of a possible link with the preservation of the right to regulate. It was observed that lack of predictability may undermine the effectiveness of the right to regulate.

An important matter of debate was whether the aforementioned objectives should be addressed by a systemic reform, or by incremental measures improving the current system of investor-state arbitration present in most international investment agreements.

Systemic reform can be achieved in many ways, among them by

- the establishment of an appeals mechanism combined with arbitration as first instance,
- a full-fledged multilateral investment court sitting as first instance and on appeal, or
- by an international court with broader jurisdiction, not only over investment protection claims initiated by investors, but over all kinds of investment-related cases brought by all possible stakeholders, including host States and individuals or groups affected by investment decisions or operations.

By looking into a different direction, a systemic reform can also be brought about by

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- a refocus on the domestic legal systems, which could take the form of a requirement of exhaustion of local remedies. Refocusing on domestic litigation was also presented as a means to address excessive damages awards;
- not providing prior and general consent to arbitration but considering arbitration on a case-by-case basis;
- to use State-State dispute settlement.

In between systemic and incremental reform, the appointment of arbitrators may be entrusted entirely to arbitration institutions.

The aforementioned solutions could be accompanied by, or replaced with, mediation or an ombudsman-system.

A multilateral investment court and an appeals mechanism would, so was said by some participants, provide the most comprehensive solution towards the identified issues. Other participants observed that such a system will not easily achieve legal certainty as long as the substantive provisions found in thousands of IIAs are not harmonised.

Those favouring an incremental improvement of the ISDS system took the position that the currently prevailing system has worked overall in the way envisaged. A comprehensive reform might impede expertise on the arbitration panels and raises concerns of lengthy proceedings.

It was also observed that the creation of an investment court composed of judges appointed by States could give rise to political appointments of judges who might be influenced in their decision-making by their wish to obtain a new mandate on the court. Another participant observed that the current arbitration system, with arbitrators who need to safeguard their future appointments on a case-by-case basis, is far more deficient in this respect.

To wrap up, while consensus emerged that the prevalent ISDS system needs to be reformed, and a reform process is well under way, diversity as to the means persists. The points highlighted in the discussion in many ways drew and benefited from UNCTAD's reform work on IIAs.