Remarks by Lisa Sachs*

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In evaluating the investor state dispute settlement (ISDS) system, and the numerous reform proposals circulating, it is worth remembering that the entire history of ISDS is quite recent. Almost all concluded cases have been decided in the last fifteen years.[1] And even within the last ten years, there have been notable changes in the types of cases that are brought, the size of damages both claimed and awarded, and tribunals' interpretations of key provisions. So current discussions about reform are a timely and appropriate stock-taking of the ISDS mechanism, and whether its use has met the aims and objectives of the system, and with which outcomes and impacts.

As the number of cases has increased and more states have faced disputes, we have seen a corresponding increase in concern about both the procedural aspects and the substantive effects of ISDS, from a wide array of stakeholders that includes states, investors, counsel, arbitrators, and the public. This growing concern has indeed driven some reforms, of both international investment agreements (IIAs) themselves, as well as the rules that govern disputes. In terms of the treaties, these reforms, where implemented, have taken the form of narrowed scopes of protections, joint interpretive statements, more explicit right to regulate provisions, and more filter mechanisms and exclusions that narrow the jurisdiction of arbitrators. Some states have determined that ISDS—at least in its current form—is itself contrary to the national interest, or has led to outcomes that are, so have taken steps to terminate their treaties altogether.

Meanwhile, several of the arbitral institutions have focused on procedural reforms to ISDS, revising or working to revise their rules and governing framework. Most notably, the UN Commission on International Trade Law (UNCITRAL) amended its rules to make disputes more transparent,[2] and several institutions have attempted to address concerns around arbitrator conduct and conflicts, non-party submissions, controlling costs, and other procedural concerns.

* Director, Columbia Center on Sustainable Investment. With gratitude to Nathan Lobel for his assistance in preparing this summary and Brooke Güven for her review and improvements.

[1] United Nations Conference on Trade and Development (UNCTAD), Investor State Dispute Settlement: Review of Developments in 2016, at 2 (May 2017), *available at* http://investmentpolicyhub.unctad.org/Upload/Documents/diaepcb2017d1_en.pdf.

[2] Rules on Transparency in Treaty-Based Investor-State Arbitration (Transparency Rules), Report of the United Nations Commission on International Trade Law, Forty-Sixth Session (July 8–26, 2013), Gen. Assem., Supp. No. 17, para. 128, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf. The Transparency Rules only apply to disputes under treaties concluded after April 1, 2014 and pursued under UNCITRAL arbitration rules, or in cases in which the treaty parties or the parties to the dispute have opted into the Transparency Rules. As such, the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention), adopted by General Assembly Resolution 69/116 (December 10, 2014; entered into force October 18, 2017), establishes a mechanism pursuant to which all parties to existing investment treaties can efficiently and effectively implement the Transparency Rules to automatically apply to disputes that arise under treaties that were in force prior to April 1, 2014, and also to disputes under all treaties including those conducted under rules other than the UNCITRAL arbitration rules. As of June 28, 2018, four states are parties to the Mauritius Convention, bringing its overall effectiveness into question. *See* Columbia Center on Sustainable Investment [formerly named Vale Columbia Center on Sustainable International Investment], Center for International Environmental Law, and International Institute for Sustainable Development, *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps* (Aug. 2013), *at* http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf; *See also* Lise Johnson, *The Mauritius Convention on Transparency: Comments on the Treaty and Its Role in Increasing Transparency of Investor-State Arbitration* (CCSI Policy Paper, Sept. 2014), *available at* http://ccsi.columbia.edu/files/2013/12/10.-Johnson-Mauritius-Convention-on-Transparency-Convention.pdf.

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Several other multilateral fora have also become focal points for discussions of reform: the UN Conference on Trade and Development (UNCTAD) has its roadmap for reform,[3] the Organisation for Economic Co-operation and Development (OECD) has supported governments' critical analysis of how the system has been used and of the costs and benefits of ISDS,[4] and now UNCITRAL has undertaken a substantial mandate to assess the problems with ISDS and how they could be addressed.[5]

In order to contextualize and assess these various reform processes and proposals, it is advisable to take a step back to consider the original objectives of ISDS and IIAs more generally, and to evaluate reform efforts against the features and objectives of the system as a whole.

First and foremost, IIAs are premised on the idea that investment flows contribute to economic development. Even the earliest treaties recognize this; the first bilateral investment treaty (BIT) between Germany and Pakistan in 1959 explains in its preamble that the parties entered into the agreement based on an understanding that it was "likely to promote investment … and to increase the prosperity of both the states."[6] The primary objective of investment treaties is not to protect or promote investment as an end goal, but rather as a means to provide for economic development. This is an important distinction to make and premises the value of IIAs on the assumption that granting certain protections to foreign investors will increase the *quantity and quality of foreign direct investment (FDI), which will in turn provide for the ultimate economic development of both states*.

Other oft-stated objectives of IIAs include the depoliticization of conflicts between home and host countries, the promotion of good governance reform, and strengthening of the rule of law, particularly in host states.[7]

Therefore, a basic starting point for critically evaluating the current system and considering reforms is to evaluate whether these objectives are being met. Notably, the extensive empirical and anecdotal evidence about whether IIAs have promoted *new* investment—or are a significant consideration for investors in making an investment—is inconclusive at best.[8] In contrast, treaties *may* shape how investors *structure* investments that would or are already being made, especially as law firms are advising clients to structure investments to benefit from treaty protections.[9]

[3] Joerg Weber & Catherine Titi, *UNCTAD's Roadmap for IIA Reform of Investment Dispute Settlement,* UNCTAD ISSUE NOTE (Dec. 2015), *available at* http://investmentpolicyhub.unctad.org/Upload/Documents/Joerg%20Weber%20Cath%20Titi%20article_with%20copyright.pdf.

[4] Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* (OECD Working Papers on International Investment, 2018:1), *available at* http://dx.doi.org/10.1787/e5f85c3d-en; *see also* Lise Johnson, Lisa Sachs, Brooke Güven & Jesse Coleman, *Costs and Benefits of Investment Treaties: Practical Considerations for States* (CCSI Policy Paper, 2018), *available at* http://ccsi.columbia.edu/files/2018/04/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf.

[5] International Institute for Sustainable Development, *UNCITRAL and Reform of Investment Dispute Settlement*, *at* http://www.iisd.org/project/uncitral-and-reform-investment-dispute-settlement.

[6] Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (1959), *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387.

[7] Johnson, Sachs, Güven & Coleman, *supra* note 4.

[8] Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009)

[9] *See, e.g.*, Mark Mangan & Henry Defriez, *How to Protect Investments in Indonesia Despite the Termination of Its Bilateral Investment Treaties*, DECHERT ON POINT (Sept. 8, 2015). This note states that, even if Indonesia were to terminate its BITs, investors could still seek investment protection through its multilateral investment treaties (MIT) or free trade agreements (FTA) with investment chapters. It further states: however, not any BIT, MIT or FTA will do. They each vary according to their terms. Dechert's international arbitration team is available to advise investors on which investment treaties provide the optimal range of protections for a particular investment depending on the jurisdiction in which the investment is made and the types of disputes that the investor is likely to encounter. Id. at 6.

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We also now recognize that not all investment contributes to development. While foreign investment is critical to meeting development needs, many investments have major social and environmental impacts, and/or have no development benefits in the host country; the extent to which an investment contributes to a host country's development depends entirely on the type and activities of the investment, on the laws and policies in place to realize those benefits and mitigate harms, and on the tools that governments have to implement those.

So as a starting point, one could say that at least the important goal of attracting more and better *quality* investment to achieve sustainable development is not necessarily being met through these treaties and ISDS, and certainly needs to be approached with more nuance.[10]

The ability of ISDS to deliver on the other goals is similarly unclear. With respect to depoliticizing disputes, evidence shows that having a treaty with ISDS does not seem to influence whether or not an investor's home state is likely to place diplomatic pressure on—or take adverse diplomatic action against—the host state in connection with an investor-state dispute.[11] And in terms of strengthening rule of law: ISDS removes disputes from domestic legal and administrative systems, limiting their ability to strengthen and develop domestic law, particularly regarding the very important and sensitive balance between private rights and public responsibility and/or sovereignty.

Proponents of ISDS argue, at least in part, that foreign investors are discriminated against—by policymakers and by domestic courts—justifying extra protections for foreign investors and an international means of resolving disputes. One might expect, therefore, that many ISDS cases would be based on either discriminatory conduct on the basis of nationality and/or lack of due process in local courts. But in practice, those two types of cases make up only a tiny fraction of ISDS cases. This is not to say that investors do not face corruption or delays in local courts, but it does not seem from the cases that companies are addressing those concerns through ISDS. And indeed, to the extent that concerns about the local courts are valid, we ought to find better ways to address those insufficiencies, not least because they affect all stakeholders (not just foreign investors) and also because bypassing courts and administrative processes on important policy questions and legal issues has such major consequences and is at the heart of much discontent with the system.

Currently, ISDS appears to be largely used as a system of supranational administrative law for foreigners to secure legal determinations and compensation they otherwise would not, and arguably should not, have been entitled to. Indeed, the root of states' and others' increasing concern about ISDS is that a much greater percentage of cases are challenging measures taken in good faith and that may be important from a public policy perspective. Challenged actions include:

- Regulations to protect the environment or public health, for instance by issuing moratoria on certain types of extractive investments or issuing compulsory licenses for life-saving drugs;[12]
- Revocations of permits or licenses in cases of investor misconduct;[13]
- Measures taken in response to grievances or security threats of local citizens—or measures not taken to protect an investor from a country's citizens;[14] and
- Measures to ensure that host countries benefit from investments, through fiscal or other economic linkages.[15]

[10] Johnson, Sachs, Güven & Coleman, *supra* note 4, at 8.

[11] *Id.* at 9.

[12] *See, e.g.*, Glamis Gold v. United States; Lone Pine v. Canada; Achmea B.V. v. The Slovak Republic; HICEE B.V. v. The Slovak Republic; Eli Lilly and Company v. The Government of Canada.

[13] *See, e.g.*, Renco v. Peru; Gold Reserve v. Venezuela.

[14] *See, e.g.*, Copper Mesa v. Ecuador; Bear Creek v. Peru; Metalclad v. Mexico; RDC v. Guatemala.

[15] *See, e.g.*, Mobil v. Canada; Occidental v. Ecuador; Federal Elektrik Yatirim v. Uzbekistan.

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So, not only are the original objectives not being met, but the ways in which the mechanism is being used is in fact undermining the original objective of harnessing investment for development.

A meaningful reform effort should be against the backdrop of the original objectives and further updated for our shared twenty-first century global goals. Investment has a critical role to play in achieving the sustainable development goals, so we should begin by asking ourselves how international treaties can facilitate that contribution. What are the limiting factors impeding the types of investment state parties would want to encourage, or states' ability to harness benefits and limit harms, and what are the appropriate policy tools for overcoming those limits?

Reforms that just address some of the (albeit not insignificant) procedural critiques of the system—relating, for instance, to cost, conflicts, arbitrator qualification and selection, and participation of third parties—miss this bigger picture, and will likely not resolve the core concerns about ISDS.

Remarks by Natalie Y. Morris-Sharma*

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These remarks approach the panel topic of investor-state dispute settlement (ISDS) at the crossroads, by reflecting on the ongoing discussions on ISDS reform that are taking place at the United Nations Commission on International Trade Law (UNCITRAL). There are three sets of factors likely to inform how ISDS is being transformed.

First, real or imagined issues.

It had to be acknowledged that ISDS is facing a legitimacy crisis. That said, opinions have diverged over whether the crisis was one of perception, or one grounded in fact. This divergence in views was apparent at the 50th UNCITRAL Commission session in July 2017, when UNCITRAL's mandate for future work on ISDS was decided on. It was also discernible at the first session of UNCITRAL Working Group II (ISDS reform) in November 2017.

Under a three-pronged mandate, UNCITRAL Working Group II (at the time of the panel) was at the phase of identifying and considering concerns. It would then move on to consider (1) whether reforms are desirable; and (2) if so, whether to develop any reforms.

The current phase of identifying concerns was important. In the same way that the diagnosis of a malaise would determine the need and form of remedy to be prescribed, the current phase of UNCITRAL's work focused on defining the problem, which definition would impact the solution.

One aspect of discussion during the first session of UNCITRAL Working Group II in November 2017 that showcased the difference in views on whether an issue was real or imaged was the exchange over coherence or consistency of arbitral decisions. Is there a problem of incoherence if what we are dealing with are different treaties with different negotiating intents? Or is there a problem with inconsistencies because we are dealing with treaties with a high degree of similarity in core obligations, sometimes identical language?

Ultimately, what the Working Group will need to work toward is ways of dealing with what are actually problems with ISDS, while taking into account issues of perception.

Second, old or new generation investment treaties.

In more recent years, states have sought to conclude investment treaties that respond to developments in the ISDS universe. For example, in order to aid in the interpretation of treaties, states have drafted more perspective clauses to clarify the substantive obligations, and provided for

* Director, Singapore Ministry of Law. The views expressed herein are the views of the author and do not necessarily represent the views of the Government of Singapore.

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