Developing a Progressive Agenda for Reform of International Investment Law: Canadian perspectives

REPORT OF THE EXPERT MEETING HELD IN OTTAWA, CANADA, JUNE 13, 2018

Hosted by the International Institute for Sustainable Development (IISD)

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Executive Summary

Canadian government officials, academics and civil society representatives gathered in Ottawa, Canada for an interactive expert meeting hosted by the International Institute for Sustainable Development (IISD) on June 13, 2018. Discussions focused on global developments in international investment negotiations and disputes, as well as on challenges and opportunities facing the Government of Canada in developing a progressive agenda on investment, particularly in the upcoming revision of the Foreign Investment Promotion and Protection Agreement (FIPA) model.

A context-setting introductory session provided an overview of the evolution of international investment law and policy. It was said that the primary rationale behind the traditional investment treaty model developed in the post-colonial 1950s is to protect investments abroad. In this context, several participants said that most empirical studies do not support a claim that investment treaties have had a meaningful role in promoting investment flows. Building on this view point, a number of participants considered how to move away from the narrow lens of investment protection toward a model that supports and promotes investment for sustainable development.

The Government of Canada affirmed its firm commitment to a progressive trade and investment agenda, reflected in strengthened provisions on environment, labour, gender, Indigenous Peoples, small and medium-sized enterprises, and other cross-cutting public interest topics. It announced that it will hold broad public consultations on these areas. It is also committed to promoting responsible business conduct by Canada and Canadian companies operating abroad. Other participants welcomed these initiatives, emphasizing the need to hold ongoing consultations and to break the path dependence of investment treaties to allow genuine transformation.

Canadian academics and civil society experts discussed the impacts of investment treaties and chapters on socioeconomic development, gender, labour, human rights and environmental matters. Several participants stressed that current investment treaties could pose obstacles to achieving many of the 17 Sustainable Development Goals (SDGs), rather than advance them. Investment treaties and investor–state dispute settlement (ISDS) mechanisms were considered to:

Sommaire exécutif

Le 13 juin 2018, des représentants du gouvernement canadien, des universitaires et des représentants de la société civile se sont rencontrés à Ottawa, Canada, lors d'une réunion d'experts interactive organisée par l'Institut international du développement durable (IISD). Les discussions ont été axées sur les évolutions mondiales dans le domaine des négociations et des litiges connexes aux investissements internationaux. Elles ont en outre porté sur les difficultés que rencontre le gouvernement du Canada et sur les possibilités qui s'offrent à lui dans le cadre de l'élaboration d'un ordre du jour progressiste sur l'investissement, et plus particulièrement de la révision du modèle d'Accord sur la promotion et la protection des investissements étrangers (APIE).

Une séance liminaire destinée à dépeindre le contexte a fourni un aperçu de l'évolution du droit et des politiques en matière d'investissements internationaux. On y a affirmé que la principale justification du modèle traditionnel de traité sur l'investissement établi pendant la période postcoloniale des années 1950 est de protéger les investissements effectués à l'étranger. Dans ce contexte, plusieurs participants ont dit que la plupart des études empiriques n'appuient pas l'affirmation selon laquelle les traités sur l'investissement ont joué un rôle important dans la promotion des flux d'investissement. Se fondant sur ce point de vue, un certain nombre de participants ont envisagé les moyens de passer de la stricte optique de protection de l'investissement à un modèle qui appuie et promeut l'investissement aux fins du développement durable.

Le gouvernement du Canada a affirmé son ferme engagement envers un ordre du jour progressiste en matière de commerce et d'investissement reflété par des dispositions plus rigoureuses concernant l'environnement, le travail, l'égalité des sexes, les Peuples autochtones, les petites et moyennes entreprises et autres enjeux transversaux d'intérêt public. Il a annoncé son intention d'effectuer de vastes consultations publiques dans ces domaines. Il s'est en outre engagé à promouvoir une conduite responsable de la part du Canada et des sociétés canadiennes exploitées à l'étranger. D'autres participants ont loué ces initiatives, soulignant la nécessité d'organiser des consultations régulières et de mettre un terme à la dépendance des traités sur l'investissement envers les résultats obtenus pour permettre une authentique transformation.

Les universitaires canadiens et les experts de la société civile ont discuté des répercussions des traités et chapitres sur l'investissement sur le développement socioéconomique, l'égalité des sexes, le travail, les droits de la personne et les enjeux environnementaux. Plusieurs participants ont souligné le fait que les traités sur l'investissement actuels pourraient constituer des obstacles à la réalisation d'un grand nombre des 17 Objectifs de développement durable (ODD) au lieu

reinforce power imbalances within and across countries and lead to violations of human rights, and Indigenous Peoples' rights specifically; aggravate gender inequality; endanger natural environments; and hinder urgently needed action against climate change. They are also perceived to encroach on the policy space of host states to regulate in the public interest, particularly, but not exclusively, in the developing world. The participants expressing these views agreed that the Government of Canada should not protect Canadian investors' "right to profit" when operating abroad at the expense of environmental, labour and human rights in the host state.

Government officials presented the evolution of the Canadian approach to ISDS, from traditional arbitration clauses to the permanent system of investment tribunal and appellate mechanism (also known as the Investment Court System [ICS]) included in the Comprehensive Economic and Trade Agreement (CETA) with the European Union and the potential expansion of such an approach into a multilateral investment court. They underscored Canada's engagement in multilateral processes at the United Nations Commission on International Trade Law (UNCITRAL) to adopt transparency rules and, more recently, to consider possible deeper reform of ISDS.

Several participants voiced their concerns regarding ISDS and the power of private arbitrators to interfere with policy matters in Canada and in its partners states. These participants expressed uneasiness with respect to the very existence of ISDS, based on the perception that it undermines the role of Canadian courts and discriminates against domestic stakeholders who do not have the same level of access to justice.

The expert meeting was not designed or intended to produce a consensus report on all the concerns over ISDS or pathways for reform. Rather, it sought to provide an understanding of the scope of issues that many Canadian academics and civil society experts believe should be included for discussion in the upcoming consultations on a revised model FIPA, the rationale for these concerns and ways to address them. It was an opportunity for a range of government officials to engage with other stakeholders on these issues.

Throughout the meeting, several ideas were posited by different participants as proposed solutions to the various problems identified in investment treaties and ISDS mechanisms:

de les promouvoir. Il a été considéré que les traités sur l'investissement et les mécanismes de règlement des différends entre investisseurs et États (RDIE) renforcent les déséquilibres des pouvoirs entre les pays et en leur sein même et conduisent à des violations des droits de la personne, plus précisément ceux des Peuples autochtones, aggravent les inégalités entre les sexes, compromettent les milieux naturels et entravent la prise immédiate de mesures pour lutter contre les changements climatiques. Ils semblent en outre empiéter sur la capacité des États d'accueil de légiférer dans l'intérêt public, particulièrement mais pas exclusivement, celle des pays en développement. Les participants exprimant ces opinions ont convenu que le gouvernement du Canada ne devrait pas protéger le « droit de faire des profits » des investisseurs canadiens qui exploitent des entreprises à l'étranger au détriment des droits connexes à l'environnement, au travail et au droit des personnes dans l'État d'accueil.

Les représentants du gouvernement ont présenté l'évolution de l'approche canadienne des RDIE, allant des clauses d'arbitrage traditionnelles au système permanent de tribunal d'investissement et de mécanisme d'appel (aussi connu comme le système juridictionnel des investissements (SJI)) prévu dans l'Accord économique et commercial global (AECG) passé avec l'Union européenne, avec la possible expansion d'une telle approche vers la création d'une cour d'investissement multilatérale. Ils ont souligné la participation du Canada à des initiatives multilatérales de la Commission des Nations Unies pour le droit commercial international (CNUDCI) visant à adopter des règles sur la transparence et, plus récemment, à envisager une réforme plus approfondie du RDIE.

Plusieurs participants ont exprimé leurs préoccupations quant au RDIE et au pouvoir des arbitres privés de s'immiscer dans les décisions politiques du Canada et de ses partenaires étatiques. Ils ont dit que l'existence même du RDIE les inquiète, car ils ont l'impression que ce mécanisme porte atteinte au rôle des tribunaux canadiens et opère une discrimination à l'encontre des intervenants nationaux qui ne jouissent pas du même degré d'accès à la justice.

La réunion d'experts n'a pas été conçue, tant au niveau de sa forme que de ses intentions, pour produire un rapport de consensus sur toutes les préoccupations connexes au RDIE ou aux voies menant à la réforme. Elle avait plutôt pour objet de permettre de comprendre la portée des enjeux, dont un grand nombre d'universitaires canadiens et experts de la société civile pensent qu'ils devraient figurer au nombre des discussions dans le cadre des prochaines consultations au sujet d'un modèle d'APIE révisé, les fondements de ces préoccupations et les façons d'y remédier. Cela a permis à un certain nombre de représentants du gouvernement de discuter de ces enjeux avec d'autres intervenants.

Au cours de la réunion, différents participants ont avancé plusieurs idées au titre de solutions aux divers problèmes relevés dans les traités sur l'investissement et dans les mécanismes du RDIE.

- A cost-benefit analysis of investment treaties should be carried out, considering the views and interests of Canadian stakeholders and Canada's commitment to achieving the SDGs.
- Broad impact assessments should be conducted prior to the negotiation of any investment treaty, covering environmental (including climate change), social (including gender) and human rights risks of such treaties in Canada and abroad, with impact mitigation measures included in the treaties and enforced with the assistance of periodic reassessment.
- The focus of treaties should shift toward sustainable development, as tinkering with existing language or slightly reformulating the existing model FIPA will not suffice: there is a critical need to re-examine the goal, legitimate scope and language of provisions, and discuss them at both policy and technical levels.
- Beyond hortatory language on corporate social responsibility and responsible business conduct, investor rights must be balanced with obligations to investors, covering areas such as corruption, taxation, labour, environment and human rights, and such obligations may be included in investment treaties as well as other legal instruments.
- Governments should be able to implement their obligations under other international agreements without being challenged by investors under investment treaties. In particular, experts noted that it would be important provide a safe harbour to measures adopted by countries to achieve climate change objectives.
- On dispute settlement, all options must be on the table, from eliminating ISDS to providing for state–state dispute settlement in certain or all cases to expanding access to justice to a broader range of investment-related stakeholders through transparent, comprehensive and inclusive mechanisms, such as fact finding, multiparty mediation and accountability mechanisms.

- Il faudrait effectuer une analyse de rentabilité des traités sur l'investissement compte tenu des opinions et des intérêts des intervenants canadiens et de l'engagement du Canada à atteindre les ODD.
- Il faudrait réaliser de vastes études d'impact avant d'entamer toute négociation de quelque traité sur l'investissement que ce soit. Ces études couvriraient leurs risques environnementaux (y compris les changements climatiques), sociaux (y compris l'égalité des sexes) et les risques qu'ils font courir aux droits de la personne tant au Canada qu'à l'étranger. Il faudrait inscrire des mesures d'atténuation de l'impact dans ces traités et les appliquer en se fondant sur des réévaluations périodiques.
- Les traités devraient désormais être axés sur le développement durable puisque ni les simples modifications du libellé existant ni une légère transformation du modèle actuel d'APIE ne suffiront. Il est impératif de revoir l'objectif, la portée légitime et le libellé des dispositions, et d'en discuter tant au plan politique que technique.
- Outre un libellé apparenté à l'exhortation au sujet de la responsabilité sociale d'entreprise et de la conduite responsable, il faut trouver un équilibre entre les droits des investisseurs et les obligations envers eux, en couvrant des domaines tels que la corruption, la fiscalité, le travail, l'environnement et les droits de la personne. Lesdites obligations peuvent être incorporées dans les traités sur l'investissement ainsi que dans d'autres instruments juridiques.
- Les gouvernements devraient pouvoir s'acquitter des obligations qu'ils ont contractées en vertu d'autres accords internationaux sans que les investisseurs puissent s'y opposer en se fondant sur les traités sur l'investissement. Les experts ont plus particulièrement souligné qu'il importerait de protéger les mesures adoptées par les pays pour atteindre les objectifs en matière de changements climatiques.
- S'agissant du règlement des différends, il faut envisager toutes les options, allant de l'élimination du RDIE à l'établissement d'une possibilité de règlement des différends d'État à État dans certains cas ou dans tous, en passant par l'ouverture de l'accès à la justice à un plus vaste éventail d'intervenants connexes aux investissements grâce à des mécanismes transparents, exhaustifs et inclusifs tels que la recherche des faits, la médiation entre des parties multiples et les mécanismes de responsabilisation.

- If maintained, ISDS should be considerably improved, by limiting it to certain substantive standards or reforming its procedural aspects (for example, to prevent conflicts of interest and "double hatting," require exhaustion of local remedies or provide for screening mechanisms, etc.). Even if maintained between developing and developed countries, ISDS could be eliminated between developed countries as part of the reform process.
- Beyond investment treaties, political risk insurance and investor–state contracts (with ISDS clauses) should be considered as possible approaches to protect investors abroad.
- Reform options at the national and international levels should be regarded as potentially complementary rather than mutually exclusive.

At the conclusion of the expert meeting, participants agreed that the debates were challenging, enriching and fruitful, providing the Government of Canada with enlightening and useful input as it prepares an online consultation process on the revision of the Canadian model FIPA in light of Canada's progressive trade and investment agenda.

Civil society experts and academics committed to continuing to engage with the Government of Canada throughout this process. IISD is committed to following the consultation process closely and to organizing other expert meetings to continue the discussions begun and focus on specific issues identified in greater depth, including through more technical research and proposals.

- S'il est conservé, il faudrait considérablement améliorer le RDIE en le limitant à certaines normes de fonds ou en remaniant ses aspects procéduraux (par exemple, pour prévenir les conflits d'intérêts et le « cumul des fonctions », exiger que tous les recours locaux soient d'abord épuisés ou prévoir des mécanismes de sélection). Même s'il est conservé en cas de différend entre des pays en développement et des pays développés, dans le cadre de la réforme on pourrait éliminer le RDIE lorsque seuls des pays développés sont parties au litige.
- Outre les traités sur l'investissement, on pourrait envisager l'assurance des risques politiques et les contrats entre investisseur et État (comportant des clauses de RDIE) comme des approches possibles de la protection des investisseurs à l'étranger.
- Il faudrait considérer que les options de réforme tant au niveau national qu'international peuvent se compléter au lieu de les envisager comme s'excluant mutuellement.

À la fin de la réunion d'experts, les participants ont convenu que les débats avaient été stimulants, enrichissants et fructueux, fournissant au gouvernement canadien des éléments instructifs et utiles alors qu'il conçoit un processus de consultation en ligne sur la révision du modèle canadien d'APIE à la lumière de l'ordre du jour progressiste du Canada en matière de commerce et d'investissement.

Les experts de la société civile et les universitaires se sont engagés à poursuivre leur collaboration avec le gouvernement du Canada pendant toute la durée de ce processus. L'IISD s'est engagée à suivre de près le processus de consultation et à organiser d'autres réunions d'experts pour poursuivre la discussion qui a été entamée et centrer une attention plus soutenue sur des enjeux particuliers, y compris au moyen de davantage de recherches techniques et propositions.

Contents

List of Acronyms

BIT	bilateral investment treaty
CETA	Canada–European Union Comprehensive Trade and Economic Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSO	civil society organizations
CSR	corporate social responsibility
EIA	environmental impact assessment
FIPA	Foreign Investment Promotion and Protection Agreement
FTA	Free Trade Agreement
IIA	international investment agreements
IISD	International Institute for Sustainable Development
ISDS	investor–state dispute settlement
JRP	Joint Review Panel
NAFTA	North-American Free Trade Agreement
SADC	Southern African Development Community
SDG	Sustainable Development Goals
SME	small and medium-sized enterprises
RBC	responsible business conduct
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

1.0 Introduction by the International Institute for Sustainable Development

On June 13, 2018, the International Institute for Sustainable Development (IISD) hosted an interactive expert meeting in Ottawa, Canada, on Developing a Progressive Agenda for Reform of International Investment Law: Canadian Perspectives. The meeting was attended by 27 experts representing Canadian government agencies, academia and civil society organizations (CSOs), with expertise in the fields of diplomacy, economics and law, and covering issues such as trade, investment, environment, labour, human rights and gender.

The current state of flux in international investment law and policy making offers opportunities to rethink its objectives and potential. Since at least 2005, international policy making has shifted from seeing investment as purely a liberalization and protection issue to highlighting the necessary relationship between investment and sustainable development. The 2030 sustainable development agenda shows us the direction. From a practical perspective, to respond to the urgency of the Sustainable Development Goals (SDGs) agreed to in 2015, international investment law and policy needs to be redesigned to support investment for sustainable development.

Amid times of uncertainty marked by a wave of protectionism and, concurrently, the conclusion of megaregional trade agreements such as the Canada–European Union Comprehensive Trade and Economic Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Government of Canada is seeking to identify elements to build a consensus for a progressive trade and investment agenda.

Taking advantage of this remarkable opportunity to refocus international investment policy, discussions at the expert meeting focused on how developments at the global level and the search for a progressive Canadian position can be mutually informing and reinforcing.

The meeting brought back to Canada a debate spearheaded by IISD in a series of reform-oriented expert meetings held in October 2014, May 2016, April 2017 and January 2018.[1] The experts gathered at these meetings helped develop new thinking on investment for sustainable development and what it needs to mean in practice. Building on the results of this process, the meeting in Ottawa was an opportunity for different Canadian stakeholders to voice their ideas, priorities and concerns, assessing and articulating Canadian perspectives on this critical progressive agenda for investment law and policy.

The meeting began with a context-setting introduction about the evolution of international investment law, focusing on the shift from traditional investment protection treaties to agreements aimed at fostering investment for sustainable development. In the following sessions, several Canadian stakeholder groups—including the Canadian government, development and environmental CSOs, academia and labour unions—presented their perspectives, followed by commentary and discussion among participating experts.

A discussion followed on how substantive issues relate to procedural issues, including formal dispute settlement mechanisms, fact finding and accountability mechanisms. This session also included a discussion on how and where the issues discussed relate back to deliberations in multilateral forums such as the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO) and elsewhere.

Finally, a facilitated discussion aimed at identifying areas of convergence among the Canadian perspectives presented throughout the day and potential synergies among various stakeholders. Experts discussed how to build on the upcoming revision of Canada's model Foreign Investment Promotion and Protection Agreement (FIPA) as an opportunity for Canada to advance a progressive agenda for reform of international investment law.

The meeting took place under the Chatham House Rule. This report presents some of the main points that emerged from the discussions.

[1] http://www.iisd.org/project/investment-related-dispute-settlement-expert-meetings

2.0 The Evolution of International Investment Policy: From investor protection to investment for sustainable development

2.1 Summary of Expert's Presentation

The first presentation provided an overview of the evolution of international investment law and policy and looked into recent approaches designed to move away from the narrow lens of investment protection toward a model that supports investment for sustainable development.

International investment law goes back to the late 1800s, but it was in 1959 that the first bilateral investment treaty (BIT) was concluded between Germany and Pakistan. Leading up to that first BIT, in April 1958 groups of European business people and lawyers, under the leadership of Hermann Abs, Chairperson of the Deutsche Bank in Germany, and Lord Shawcross, former Attorney-General of the United Kingdom, developed a draft convention on foreign investment.[2] They held a conference to outline its rationale, centred on a singular purpose—protecting the investments of Western investors abroad:

> Since it is now widely recognized that major steps must be taken to buttress the economic position of the free-world nations, both as a measure against Soviet moves and as a means of resolving some of the demands being made by peoples of the undeveloped nations of the world, the *notion of greater protection under international law for private investment takes on added importance* [emphasis added].

In the 1990s, investment law and policy making began to refocus on investment liberalization, reflecting trends on services liberalization at the WTO and the Washington Consensus.[3] Clauses on pre-establishment rights, investment liberalization and prohibition of performance requirements started to appear in investment treaties and chapters. With and systematically after the investment chapter of the 1994 North-American Free Trade Agreement (NAFTA), the liberalization agenda was significantly expanded.

As a result of the wave of investment liberalization through treaties, investment law became a process to develop what could be called the "new international law of neocolonialism," as developed country investors were granted exclusive rights to participate in developing country economies. International arbitration was an important part of that model: under investor–state dispute settlement (ISDS) mechanisms, three individuals from a removed context would arbitrate the treaty-based rights between a foreign investor and a host government.

Since the 1990s, there has been a significant growth in the number of investment treaties and chapters, now at over 3,300, and in the number of treaty-based investment arbitrations, now at over 800 known cases (most contract-based cases remaining secret). Investor–state arbitration has become the most used international dispute settlement mechanism ever created, with double the number of cases before the WTO Dispute Settlement Body. While WTO proceedings may trigger processes to review domestic laws, investment arbitration tribunals may grant monetary damages against states, and awards in the order of billions of U.S. dollars are increasingly common.

Although the rationale was that investment treaties served primarily to protect investments abroad, the capital-importing states hoped that investment treaties would lead to greater flows of investment into their countries. However, empirical studies, including most recently a study by the Organisation for Economic Co-operation and Development (OECD), do not support that there is a significant correlation between investment treaties and investment flows.

[2] Shawcross, H. & Abs, H. (1960). The Proposed Convention to Protect Private Foreign Investments: A roundtable. *Journal of Public Law, 115*, 155.

[3] "Washington Consensus" is a term coined by economist John Williamson in 1989 to summarize 10 policy recommendations by Washington-based institutions such as the International Monetary Fund (IMF) and the World Bank as necessary for countries to recover from economic and financial crises: 1) Fiscal discipline, 2) Public expenditure priorities, 3) Tax reform, 4) Financial liberalization, 5) Single, competitive exchange rate, 6) Trade liberalization, 7) Elimination of barriers to foreign direct investment (FDI), 8) Privatization of state-owned enterprises, 9) Deregulation of market entry and competition, and 10) Secure property rights. The phrase is often used in a broader sense than intended by Williamson, referring to a general orientation toward a marked-based economy or neoliberalism. See Williamson, J. (Ed.). (1990). *Latin American adjustment: How much has happened*. Washington, D.C.: Institute for International Economics.

With these new studies and with the rise of ISDS cases and growing perception and concern about their impacts on government budgets and on states' right to regulate in the public interest, various stakeholders have started to question the international investment regime. In light of these recent developments, since the mid-2000s, governments, international organizations, academics and civil society have been re-examining the relationship between investment and sustainable development, questioning the rationales and approaches of traditional investment treaties and developing alternative approaches. Examples include:

- 2005: IISD Model International Agreement on Investment for Sustainable Development
- 2012: Southern African Development Community (SADC) Model BIT Template
- 2012: Investment Policy Framework for Sustainable Development (IPFSD) of the UNCTAD (updated in 2015)
- 2012: Commonwealth: Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries
- 2016: Investment Court System (ICS) in the Canada–EU CETA
- 2017: Draft Pan-African Investment Code

While acknowledging that foreign investment is needed for sustainable development, other questions now arise: What is and what should be the goal of investment treaties? Should they be geared toward liberalizing investment, protecting assets abroad, maximizing investors' profits or ensuring broader socioeconomic benefits of foreign investments? What should be dealt with in treaties and what should be left to domestic law? These questions must be addressed, going beyond a mere tinkering with the current model of investment protection and moving toward a transformation of international investment law at a more fundamental level.

2.2 Summary of Discussions

Participants began discussions with an important case in the Canadian context: the *Clayton/Bilcon of Delaware v. Government of Canada* case under NAFTA.[4] In that case, the tribunal criticized a joint federal and provincial environmental impact assessment (EIA) process and concluded that Canada had breached its obligations because the Joint Review Panel (JRP) had not applied the environmental assessment standards that were, in the tribunal's view, required by Canadian law. Some participants argued that the same scenario and outcome would be possible under the fair and equitable treatment (FET) language in CETA, demonstrating in their view that tinkering with investor rights will not suffice: although intentionally drafted to be more restrictive, it was said that the CETA would still lead to environmentally hostile decisions such as the one rendered by the *Clayton/Bilcon* tribunal.

Participants offered different views regarding the rationales and motivations for negotiating investment treaties, and in particular for including an investment chapter in CETA. For some, the investment chapter in CETA was not negotiated to attract foreign investment, but to set a baseline for investment protection and to support the notion of an investment court. Others were concerned that leaving an investment chapter out in CETA could lead to a knock-on effect—Canada and the European Union would have difficulty negotiating investment chapters or treaties with other countries if they did not have an investment chapter between themselves in CETA. For those, the investment court issue came later, as a response to public criticism of CETA. Others recalled that, while Canada was more flexible in negotiating the investment chapter, the European Union was more insistent on keeping its proposed language.

Some said that it would be inappropriate to impose investment rules on developing countries only to then rely exclusively on domestic law and courts in agreements between developed countries, as between Canada and the European Union. These participants highlighted that expropriation and nationality-based discrimination can happen in both developing and developed countries, and argued that, if international investment rules serve a purpose, Canada should live by them with all of its partners.

Several participants agreed with the presenter that there is a near-zero correlation between investment treaties and the promotion of investment flows. Others stated that many countries regularly approach Canada with offers to conclude a FIPA, supposedly based on their assessment that a FIPA would attract Canadian investment. In addition, it was pointed out that it is difficult to disaggregate

[4] See case summary here: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng

the impact of a FIPA on investment flows, since proposals to negotiate FIPAs are often accompanied by a suite of domestic measures aimed at attracting FIPAs. Some participants underscored the need to attract investment and, given the ineffectiveness of treaties in this regard, the need to consider other types of instruments that may be more effective. Others said that investor protection has an effect on the cost of capital. Some expressed concern that the Government of Canada continues to advance attraction of investment as a political justification of investment treaties and chapters, including in the context of CETA. A number of participants emphasized the need to seek balance between investors' rights and obligations. Other participants said that governments should not overprotect companies abroad at the expense of host governments' policy space to promote sustainable development and that policy space should be prioritized over investors' rights.

3.0 A Progressive Agenda on Investment

3.1 Government Perspectives

3.1.1 Summary of Expert's Presentation

The second presentation focused on the perspectives of the Government of Canada with respect to a progressive trade agenda, including investment issues.

The government noted its dedication to a progressive trade and investment agenda. It announced the government's upcoming consultations on a revised model FIPA and explained that part of that mission was to relate investment issues back to people and to show how investment issues matter in people's lives.

Views on the investment regime can be grouped in five camps: (1) those who think the regime is fine as it is; (2) those who see moderate changes, tweaks or tinkering as useful; (3) those who see a need for deeper reform of the investment regime; (4) those who reject the regime completely; and (5) those who are confused as to the best way forward. The Government of Canada wishes to hold a genuine consultation and hear from all five groups.

The Government of Canada has a firm commitment to a progressive trade agenda, which stands for inclusive growth for under-represented groups (including women and Indigenous Peoples), equal opportunities and provisions to protect public interest in free trade agreements (FTAs). This agenda is reflected in Canadian FTAs in the following topics (covered as specific chapters as well as provisions in other chapters—for example, in ISDS, e-commerce and procurement chapters):

- **Environment and Labour**: The Government of Canada intends to negotiate robust chapters in these areas. The environment and labour chapters in the CPTPP are the strongest ever and subject to dispute settlement for the first time.
- **Gender**: Dedicated chapters on trade and gender were included in the recently modernized Canada–Chile and Canada–Israel FTAs.
- **Indigenous Peoples**: A chapter was drafted in the context of NAFTA renegotiations, resulting in a successful process from everyone's side.
- **Small and medium-sized enterprises (SMEs)**: The Government of Canada is committed to assisting SMEs; there is a trade promotion side to this.
- **Public interest**: While there is no specific public interest chapter, this is a very important cross-cutting topic. Examples include provisions on transparency, privacy, consumer rights, product labelling and the right to regulate, and reservations for education, health and other social services.

It was also indicated that the impact assessment provision agreed to in the context of the negotiations with the Southern Common Market (MERCOSUR) will cover not only environment but also gender and Indigenous Peoples.

The Government of Canada will hold public consultations to discuss all of these areas in the FIPA context. Responsible business conduct (RBC) continues to be included in investment treaty negotiations, as has been the practice in Canadian FIPA negotiations since 2013.

Finally, Global Affairs Canada has established a multistakeholder Advisory Body on RBC abroad to promote RBC by Canada and Canadian companies and help shape the operating procedures of the Canadian Ombudsperson for Responsible Enterprises.

3.1.2 Summary of Discussions

Participants agreed that the consultation to be held by the Government of Canada on the FIPA model is very timely and welcome. In this regard, a number of participants noted the global reconsideration of the costs and benefits of investment treaties, the fact that Canada has not held a consultation on investment policy in a long time and the need to not shy away from taking the politically difficult decision to invite Canadians to express their views on trade and investment issues. Several participants noted that they were also encouraged to learn that the government will take a very broad approach to hear a broad variety of views.

Some participants highlighted the need to break the path dependence in treaty making—that is, the tendency to use previously negotiated language as a starting point and merely tweak it—and to have very broad conversations about investment treaty making generally.

Some participants also highlighted what they saw as the need to rethink Canada's approach to treaty making. They said that, while typical FIPA negotiations involve an attempt to get counterparts to sign onto the Canadian model, there has not been much of an attempt to adapt the provisions to each context. Some participants cautioned against this one-size-fits-all approach, which would not be conducive to the promotion of investment for sustainable development, and called for more time and effort to be put into negotiations, allowing more opportunities for trade-offs and customization. The Brazilian approach to negotiating treaties focused on investment facilitation exemplifies that the context of the partner country, including its different needs and capacities, must be taken into account.

Some participants suggested considering the desirability of a permanent or semi-permanent institution for consultation for stakeholders to discuss various issues, along the lines of the one proposed in the SADC model. This could be reflected in an advisory body composed of government officials and representatives of civil society and industry. Others recalled that Canada had an ongoing multistakeholder consultation process on investment policy until 2004, with meetings three times a year, and suggested that this could be reactivated. A number of participants recognized the long-term systemic value of a permanent consultative body.

Some participants highlighted that it is worth embedding Canada's higher values in the model treaty that Canada puts on the negotiating table. They said that new progressive elements should be incorporated into the model, so that Canadian negotiators can present language on the desired treaty standards.

It was also suggested that Canada make a genuine contribution by undertaking a study of costs and benefits of signing on to investment treaties, including the views of Canadian companies and an analysis of cases initiated by Canadian companies as well as those brought against the Government of Canada, to allow discussions based on evidence rather than anecdotes and rhetoric. Other participants added that it should be a study not only of costs and benefits to Canada and its investors, but to its treaty partners as well.

It was underscored that the Government of Canada is working with different institutions—for example, the World Association of Investment Promotion Agencies (WAIPA)—to ensure responsible investment through facilitative and cooperative approaches, along the lines of the Brazilian model, and that there are solutions and approaches beyond FIPAs and investment chapters.

Finally, several participants proposed questions for reflection: Is Canada advancing standards with the right scope and, if not, what should be their scope? What should be in Canada's model to realize the shift away from investment protection toward treaties that fit into a broader paradigm of sustainable development? What will Canada be able to claim as its contribution to the SDGs in the investment field? Is Canada confident that the current legal regimes and frameworks will contribute to a transition to sustainable investment? If not, what instruments would be appropriate, and what is Canada's vision?

3.2 Social and Economic Development Issues

3.2.1 Summary of Expert's Presentation

The third presentation focused on perspectives of civil society representatives working with socioeconomic development concerning the impacts of investment treaties and chapters on economic and social issues, including gender.

Investment treaties are perceived to affect each and every one of the SDGs. In many developing countries, they are seen as instruments of power and

privilege in at least three ways. First, they form part of a global financial and legal infrastructure that reinforces inequalities, without a gender, democratic or sustainability lens. Second, they reinforce power imbalances on a nation-to-nation basis. For example, they reinforce developing countries' vulnerability to Canadian diplomatic and corporate power. Third, they both reinforce and enforce the negative effects of these power inequalities within the countries. For example, Indigenous Peoples, low-income communities, women and other marginalized people are extremely vulnerable to harms that affect people generally in developing countries.

Land acquisition by foreign investors—often protected by investment treaties—illustrates how people are affected by investment treaties. As has been reported by the UN Special Rapporteur on the Rights of Indigenous Peoples, land grabs are causing serious violations of the rights of Indigenous Peoples and rural populations. The case of a land grab in Guinea-Bissau by a Spanish investor was mentioned as an example of how women are differentially affected. All the peasants forced off their land suffered and went hungry, but women were evicted without compensation, lost their economic status as they became less able to take care of their families, and with displacement became more vulnerable to sexual abuse and rape. In cases such as this, investor protection and ISDS clauses create a policy chill for governments pressured to respond to citizen outrage.

Another example discussed were cases initiated by Canadian mining companies against Colombia, regarding the state's decision to disallow mining activity in wetlands, and the creation of a national park in a biodiverse area, home to 19 indigenous communities. In one case, investors are claiming USD 16.5 billion in compensation for the alleged expropriation of their interests in a mining concession—a sum that corresponds to over 20 per cent of Colombia's 2017 national budget, more than its average annual investment in social spending.

According to UNCTAD, the number of effective treaty terminations now surpasses the number of new treaties negotiated. India and several other countries have revised their model BITs. Several of Canada's counterparts are questioning the usefulness of investment treaties. ISDS, based on the premise that domestic courts do not work appropriately to safeguard foreign investors' rights, provides them with extraordinary procedural rights. This leads to discrimination against domestic investors and national citizens, who see foreign corporations enjoy complete impunity, able to disregard national courts, governments, even the constitution. ISDS thereby can throw national legal regimes and democratic process into disrepute, harming their development as a consequence.

There are other ways to address Canadian investors' concerns without encroaching on the policy space of other countries and without giving greater rights to foreign investors than those accorded to domestic companies and individuals. Trade and investment treaties must be consistent with and not undermine human rights, environment, labour, Indigenous and gender rights. Investor–state dispute mechanisms should be abolished. To the extent that international investment agreements (IIAs) establish any investor rights, they should be balanced with corresponding obligations and include third-party complaint mechanisms to address government and citizen complaints.

3.2.2 Summary of Discussions

Several participants echoed the idea that, while investment is needed to make the transition to sustainable development, there is a need to change power dynamics to achieve sustainable development. In that respect, these participants agreed that, to the extent investment treaties entrench or preserve power inequalities, they may run counter to the SDGs.

Participants generally agreed about the importance of considering a whole range of means and instruments, not only investment treaties. Looking into other options, several participants identified the option to rely on risk insurance to Canadian investors abroad, for example, through Export Development Canada (EDC) and the World Bank Group's Multilateral Investment Guarantee Agency (MIGA). This would avoid forcing developing countries to absorb all of the risks of the investment environment. Others reasoned that, because political risk insurance does not have the deterrence effect to chill bad governance or regulation, complementary instruments would still be required.

Some participants stated that insurance may cover some, but not all, risks and that Canada could work on improving governance in host countries to help minimize other such risks, though it was noted that this might be challenging and bring its own conflicts of interest.

Others indicated their concern that investment treaties and chapters give Canadian investors the ability to lobby against changes in the laws of the host countries and to challenge such changes.

Some participants expressed their view that, if investment treaties are removed from the landscape, these issues would be pushed to the domain of private law (investor–state contracts), in which there is very limited transparency, leading to an even higher number of unknown arbitrations. In their view, it would be difficult to reassert the role of states, safeguard their policy space and ensure meaningful dispute settlement processes in the absence of treaties, because treaties would also serve to bring the power asymmetries to light and help mitigate them.

In response, some participants highlighted the power differentials between treaty and contract negotiations. When a developing country negotiates a contract with a multinational company, however big and strong the company may be, the country is still dealing with the company only. On the other hand, when negotiating a treaty with the home state of the company, the country must consider many other aspects of its relationship with the capital-exporting state (political, aid, etc.). Accordingly, some participants argued that the juxtaposition of treaties and contracts would make the foreign investors' position even stronger against host country governments. Others recalled the problems resulting from (the threat of) multiple investor–state proceedings (under domestic courts, contract-based arbitration and treaty-based arbitration).

It was suggested that Canada should focus more on a foreign economic development strategy that supports disempowered individuals and groups through development assistance and capacity building, stressing that current FIPAs are inflexible instruments that are not the appropriate vehicle to right socioeconomic wrongs. Other participants, however, said that FIPAs currently both create and reinforce socioeconomic wrongs.

Some participants highlighted the need to develop tools for assessing the environmental, labour, human rights and gender impacts of foreign investment, from a bottom-up approach. They also indicated their concern with the fact that gender chapters and provisions in Canadian treaties, still in their infancy, tend to equate "gender issues" with "women entrepreneurs." They cautioned against such a narrow view of gender issues, as it leads not only to missed opportunities to empower women—for example, through enhanced childcare, health and education—but also to ignoring the extreme harms to women caused by IIAs.

3.3 Labour Issues

3.3.1 Summary of Expert's Presentation

The fourth presentation discussed the perspective of labour unions with respect to the issues resulting from investment treaties and Canada's progressive agenda on investment.

In technical discussions about investment treaties, many people simply look at the text and conclude that the treaties do not include any language that they would not support. However, these treaties have to be taken in the larger historical and power context of neocolonialism. The colonial trade patterns with developing countries that existed in the past and that Canada continues to enforce through investment treaties must not be ignored. Ensuring private profits in resource-rich developing countries still consists in colonialism—the only change is that it is now carried out by multinationals as well as states.

Investment treaties are about enforcing property rights—but how far should a state go to protect them? For example, if workers in Mexico unionize and strike against the interests of a Canadian company investing in Mexico, the government could feel pressed to employ the police force to prevent being sued under NAFTA—an action that contradicts the workers' rights to unionize and strike. By granting treaty rights to Canadian companies, the Government of Canada is picking sides against workers and Indigenous Peoples in developing countries that do not have the appropriate governance mechanisms to protect environmental, labour and human rights.

Any consultation undertaken by the Government of Canada with a view to formulating a progressive agenda on investment must not ignore the role played by these supposedly neutral investment treaties in these power dynamics. Rather, it must be based on the understanding that the government's protection of Canadian investors' right to profit when operating abroad, at the expense of environmental, labour and human rights in the host state, is in contention.

3.3.2 Summary of Discussions

It was said that resources in developing countries do not have intrinsic value—only when extracted and marketed can such resources generate revenues that can be used for investing in the social infrastructure needed. In this context, it was asked what advice should be given to developing countries with resources worth trillions of U.S. dollars.

Several participants stated that, when Canada signs investment treaties, it reinforces the paradigm that environmental, labour and human rights standards must be kept low. These participants also stressed that Canada needs to change its policy, fostering a discussion at the global level to change this paradigm and give priority to environmental, labour and human rights conventions.

Some participants acknowledged that social justice issues often arise from bad and unfair decisions taken by governments—of developing and developed countries alike—against the state's population and against foreign investors in its territory. Views were expressed that FIPAs and ISDS mechanisms are designed to prevent such situations, depoliticizing disputes and encouraging host governments to take better decisions and raise investors' level of accountability—for example, requiring them to prove that they pay fair wages. Accordingly, some participants suggested that, while the internationalization of the legal order may be a solution, it must be accompanied by checks on investors to ensure they invest responsibly.

Others, however, disagreed with such alleged advantages of FIPAs and ISDS, referring to negotiated settlements such in as the *AbitibiBowater* case,[5] in which they said that the Canadian government paid the investor large sums of money to avoid arbitration. Concerns were also raised regarding the unintended negative consequences of ISDS mechanisms for legal systems. Recalling that environmental, labour and human rights language is often phrased in treaties as best-efforts or weak obligations ("should") and investor protections are strong and binding ("shall"), some participants supported seeking balance and changing the priority from protecting investments to protecting people, without excessively protecting investors at the expense of environmental, labour and human rights.

Also mentioned was the potential contribution of a progressive agenda in creating beneficial impacts for SMEs, Indigenous Peoples and women, creating conditions that facilitate investment opportunities for Canadians and empower Canadian investors abroad.

Some participants refused to accept the presumption that investment treaties are neutral, stressing that these treaties are based on a particular ideology. By promoting this particular ideology through its investment treaties, Canada is imposing its values abroad, particularly in the developing world.

Participants acknowledged that investment-related issues cannot all be resolved by investment treaties alone, and that they consist of complex problems that relate to the international legal system as a whole and its interaction with domestic law. At the same time, they emphasized that the new Canadian model should deal with the problems identified in existing treaties.

In this context, they pointed to the need to rethink investment treaties as part of an international law framework designed to protect economic activity to the detriment of labour, environmental and human rights, among other interests.

Beyond adding chapters on labour and other areas, some participants argued that the treaty needs to be looked at as a whole: How do chapters and provisions interact? How may one provision override another? Does the preamble give precedence to non-investment provisions such as labour? What does the reference to labour rights in the preamble accomplish in practice?

In addition, some participants argued that additional provisions on labour—such as clauses prohibiting derogation from labour laws, recognizing states' commitments to upholding and raising international labour standards, and providing for state–state cooperation on labour issues—despite their significance, have done little to prevent the abuse of the system by investors and to protect workers' rights.

As alternatives, some participants pointed to including stronger clauses on labour issues, such as the ones used in EU treaties, mandating parties to cooperate in the enforcement of labour standards. Rather than voluntary corporate social responsibility (CSR) clauses typically included in Canadian treaties, some participants considered

[5] See case summary here: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/AbitibiBowater.aspx?lang=eng

imposing enforceable obligations on foreign investors and investments to respect core labour standards. Some also considered creating civil liability or accountability mechanisms that would allow individuals and host states to challenge investors and their investments for non-compliance, thus enhancing access to justice. Other ideas included carving out bona fide laws that increase protection of labour rights from challenge in ISDS proceedings.

3.4 Environmental Issues

3.4.1 Summary of Expert's Presentation

In the fifth presentation, the perspective of environmental organizations was presented regarding Canadian investment treaties and progressive agenda on investment, based on a critique of the outcome of the *Clayton/Bilcon v. Canada* investment arbitration case. The arbitral tribunal in *Clayton/Bilcon* found that an EIA undertaken by a JRP established by the Province of Nova Scotia and the Government of Canada breached the minimum standard of treatment and national treatment provisions under the investment chapter of NAFTA.[6]

The critique of the case started from the final part of paragraph 724 of the *Clayton/Bilcon* award:[7]

> The "community core values" approach adopted by the JRP was not a "rational government policy"; it was at odds with the law and policy of the [Canadian Environmental Assessment Act]. The approach of the JRP was not consistent with the investment liberalizing objectives of NAFTA; indeed the Tribunal has found it to be incompatible with Article 1105.

First, the tribunal interpreted NAFTA's objectives very narrowly, focusing solely on its "investment liberalizing objectives" while disregarding other public interests reflected in the treaty. Second, there was no Canadian court case that affirmed that the JRP's approach was at odds with Canadian law: the three arbitrators in the *Clayton/Bilcon* tribunal made that determination without any prior knowledge of Canadian law, in a matter as fundamental as EIAs. Third, the tribunal reviewed a series of reasons why *Clayton/Bilcon* had a reasonable expectation they would get the permit, including billboards and pamphlets advertising that Nova Scotia was open to business. The tribunal effectively admitted investment promotion activities into evidence and allowed the foreign investor to turn them into a "legitimate expectation" that the investor's EIA would be approved.

The *Clayton/Bilcon* award thus fundamentally rewrote Canadian EIA law. EIAs are legally independent, in that no Canadian government official has the right or discretion to dictate the result of an EIA process. However, paying no deference to the JRP's assessment, the tribunal stripped away that independence and put together a notion of dependency.

While some argue that the *Clayton/Bilcon* decision is an isolated case, in reality the same rationale is being replicated in cases against other countries and is being consolidated into how investment treaties are being applied.

Addressing environmental issues in investment treaties must go beyond providing that measures to limit pollution will not be considered a treaty breach. Treaties must also look at how environmental issues are addressed. The relationship between ISDS tribunals and independent statutory bodies under domestic law must be clarified.

In a claim for judicial review of the *Clayton/Bilcon* in Canadian courts, a federal court judge accepted that the award "raises significant policy concerns," including its effects on states' ability to regulate environmental matters and the potential "chill" in the EIA process. Even so, the judge concluded that nothing could be done about it in view of the constraints imposed by Canada's arbitration law on the ability of Canadian courts to review arbitration awards. The *Clayton/Bilcon* case highlights the need to revise Canadian arbitration laws, reassess how they are implemented and clarify the relationship between international and domestic law.

3.4.2 Summary of Discussions

Some participants suggested that, to understand the environmental issues raised by the *Clayton/Bilcon* case and advance with reform of investment law, one must take cognizance of where neoliberalism is today and of its failure, as well as of the strengthening of corporate control in three ways: the conclusion of FTAs and BITs; processes such as the

[6] https://www.iisd.org/itn/2015/05/21/uncitral-tribunal-finds-canadas-environmental-assessment-breached-international-minimum-standard-of-treatment-and-national-treatment-standard-clayton-bilcon

[7] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada. Award on Jurisdiction and Liability. PCA Case No. 2009-04. March 17, 2005. Retrieved from https://www.pcacases.com/web/sendAttach/1287

World Economic Forum in Davos; and the greater involvement of transnationals in policy-making processes, including in the United Nations. At the same time, some recalled that evidence is emerging of possible economic and ecological breakdowns, inviting the question of whether growth should be encouraged if it is causing dramatic environmental damage. Others recalled that the low-carbon transition required by climate change also forms part of broader perspectives that must inform investment law reform processes.

It was also mentioned that the *Clayton/Bilcon* case highlights two problems. First, the problem with substantive standards: Is their phrasing and interpretation satisfactory? Is investment protection the appropriate interpretive keystone for such standards? The second problem concerns whether the procedural aspects of the dispute settlement mechanisms used to interpret them are satisfactory.

Certain participants indicated Canadian policy needs to be considered as a whole, and that Canadian development assistance to developing countries, including through aid and development programs, helps them achieve sustainable development. They also noted that the Government of Canada provides guidance on CSR to Canadian companies operating abroad (particularly in the mining sector) and facilitates dialogue with companies to clarify the host government's intention to raise revenues and protect human rights.

In this context, some participants pointed out that investment treaties are useful in that they help the Government of Canada get the attention of foreign governments and help them avoid claims by reaching a consensus and come to consensual solution with the investor. In their view, investment arbitrations under FIPAs were not that frequent. It was also said that these treaties could create or reinforce power imbalances and lead the host government to negotiate the rights of its people with a foreign investor. Other participants recalled that Canadian companies are using ISDS mechanisms in FIPAs in 40 known claims against Latin American states. Several of these cases involve challenges to EIAs or other environmental measures, such as *PacRim v. El Salvador*[8] and *EcoOro v. Colombia*.[9]

Referring to the *PacRim* case, some participants mentioned that, when purchasing claimant Pacific Rim, Oceana Gold was aware that the company's only asset was its claim against El Salvador. According to these participants, the fact that ISDS claims have become assets that may be purchased illustrates that the ISDS regime is being abused.

In response to these discussions, it was noted that certain institutional provisions in investment treaties and chapters could help mitigate adverse effects of foreign investment, such as the Committee on Trade and Environment in the CETA, the Civil Society Forum established under the agreement and the stakeholder inputs allowed in the dispute settlement mechanism. It was suggested that perverse outcomes, such as the undermining of an EIA by an ISDS tribunal, could be remediated by broader treaty processes.

Some participants also suggested that treaties should go beyond traditional support for mining companies and focus on opportunities for clean technologies and green environmental services. In this context, one participant noted that, at present, some Canadian Trade Commissioners are increasingly focusing on promoting such technologies and services, which may ultimately lead to new Canadian investments abroad. Finally, some participants highlighted the importance of including provisions in treaties to ensure that nothing in their implementation prevents states from complying with international environmental commitments under treaties such as the Paris Agreement and multilateral environmental agreements.

3.5 Investment-Related Dispute Settlement: Joining the substance and process of a progressive agenda

3.5.1 Summary of Expert's Presentation

The presentation looked at investment-related dispute settlement and its relationship to the substantive obligations in the context of a reformed, progressive agenda on investment.

Even if a significantly better balance can still be achieved between rights and obligations in investment treaties, an impartial process to resolve disputes that respects the rule of law will still be

[8] See case summary here: https://www.iisd.org/itn/2017/03/13/all-claims-dismissed-oceanagold-to-pay-usd-8-million-in-costs-pac-rim-cayman-llc-v-el-salvador-icsid-case-no-arb-09-12/

[9] See https://www.iisd.org/itn/2016/05/16/three-mining-disputes-the-first-investment-disputes-against-colombia-come-to-light/. Case details and public documents available here: https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/41

necessary. At the same time, the flaws of ISDS must be recognized, and mechanisms must be considered to reduce its high costs, avoid frivolous claims and ensure that governments may effectively recover costs awards against investors.

In any dispute settlement mechanism, there will be winners and losers. This is true in Canadian domestic courts, where the Government of Canada often loses cases. However, even if the government does not agree with the decision, this does not lead to a crisis of legitimacy for the system; rather, this is seen as enhancing the legitimacy of the system. Whether ISDS is fair and legitimate must be answered with reference not only to investors, but to the ultimate stakeholder—the public. If Canadians do not find ISDS fair and legitimate, the regime must be reworked.

Dispute settlement in Canada's investment treaties evolved significantly from its early treaties to the 1994 NAFTA, which included an entire section on procedure. In the 2000s, a more detailed model was introduced, including transparency provisions that were advanced at the time. Canada has also been an international leader in considering reform of ISDS over the past couple of decades.

For example: already in 2008 Canada was heavily involved in the UNCITRAL transparency process, promoting ideas that were not very widespread initially, but which ultimately led to the adoption of the UNCITRAL Transparency Rules and the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (known as the Mauritius Convention).

Canada's modern treaties include advanced transparency provisions, including requirements for other states to notify the Government of Canada of disputes and allowing Canada to be involved in treaty interpretation. They also address concerns about arbitrators' expertise and bias and about the correctness of decisions. Despite these developments, dispute settlement mechanisms in Canadian investment treaties and the decisions taken under such mechanisms can be further improved.

In current Canadian treaty practice, two dispute settlement options are being considered and negotiated. One of them is more like traditional ISDS, such as included in the CPTPP. The other is the permanent investment tribunal system included in the CETA, providing for a standing first-instance tribunal and an appeals mechanism. It is now important to discuss whether one approach is better than the other and whether there may be an altogether different alternative that could be better.

In the summer of 2017, UNCITRAL launched a process to consider and discuss possible reform to the current ISDS mechanisms, and again the Government of Canada is heavily involved. Although it is a UN body consisting of UN members only, UNCITRAL is open to CSOs with observer status, not only as listeners but also to express their views. UNCITRAL mandated its Working Group III to identify concerns regarding ISDS, consider whether reform is desirable and, if so, develop recommendations. States have already identified several concerns with the current ISDS mechanism, and next discussions will focus on whether UNCITRAL is the appropriate forum to address them. Any mechanisms developed in the UNCITRAL context must be flexible and adaptable, serving the interests of various countries and stakeholders.

3.5.2 Summary of Discussions

Constitutional Law Arguments

Some participants commented that, while investment arbitrators were originally seen as omnipotent judges with an authority as final as the supreme court of the nation, this view is now affected by a public law critique of investment arbitration, indicating that arbitrators lack tenure, independence and impartiality. This critique prompted some of the ongoing discussions about ISDS reform at UNCITRAL and about the creation of a multilateral investment tribunal, but there is a concern that these initiatives will not address the problems that prompted them, as the regime is designed to maximize arbitrators' ability to interfere with domestic policy space. These participants saw an irony revealed in the *Clayton/Bilcon* case: while investment tribunals exhibit no deference whatsoever for domestic authorities, domestic courts yield to arbitrators and their expertise.

From a Canadian constitutional law perspective, it was noted that there was no surprise that Canadian courts are not interested in addressing the relationship between international investment arbitration and domestic courts. The Canadian Supreme Court seemed reluctant to address challenges to investment treaties in chapters and ISDS mechanisms, based on an anxiety about separation of powers—understanding that these

issues belong to Canada's foreign policy sphere, the judiciary does not want to impede the executive's powers in this domain.

It was also said that, in other countries, the conflict between international investment law and domestic constitutional law is increasingly more in focus. For example, it was said that the Colombian Constitution has been considered one of the most progressive in Latin America, and the Colombian Constitutional Court has been interpreting it in the interest of Colombian Indigenous Peoples and the environment. However, in recent disputes against Colombia—including those initiated by Canadian mining companies—investors are challenging decisions taken by the Government of Colombia based on the Colombian Constitutional Court's interpretation of its constitution.

Civil Society Critique

Some participants indicated that there seem to be parallel conversations going on in different universes. While in academic circles and government consultation bodies ISDS mechanisms are regarded as normal, civil society members and the general public do not understand how anyone could possibly justify them. These participants said that, for most citizens who understand how ISDS works, it constitutes an affront to democracy, and it is shocking that a parallel justice system exists to which only private actors have access. They stressed that, despite differences in perspectives of different institutions and organizations in different countries, one point of convergence of civil society, at least in EU member states and in the United States, is that ISDS—the very idea that a foreign investor might have an exclusive forum to sue the host government—is fundamentally flawed. In some participants' views, it is not possible to describe CETA or CPTPP as "progressive" as long as they include ISDS, and the mechanism should be dropped from investment treaties and chapters.

Alternatives to Traditional ISDS Mechanisms

Challenged to seize the opportunity to re-imagine the ISDS regime, some participants suggested focusing on domestic court systems. They indicated that Canadian courts are regarded as fair and reliable, and that there is nothing so fundamentally wrong about the Canadian judiciary that would justify the creation of parallel private systems accessible by foreign investors only.

Several participants stressed the need to think openly and creatively about alternatives to the ISDS mechanism, which is in peril, and pointed to options including political risk insurance, domestic mechanisms that foster dialogue and amicable resolution of disputes (such as in treaties concluded by Brazil) and a divestment fund to facilitate the exit of investors.

While some participants did not see the permanent investment tribunal system approach as a true alternative to ISDS, others elaborated on the obstacles in moving forward with the permanent investment tribunal system approach. Some indicated that the multiplicity of appellate tribunals interpreting various agreements—such as the permanent investment tribunal system included in CETA, as well as in the treaties between the European Union, on one side, and Mexico, Myanmar and Singapore on the other—could ingrain rather than resolve the existing issue of lack of coherence. The cost of having multiple permanent investment tribunal systems was also raised as a problem, as well as practical difficulties such as finding panellists.

It was also said that there is agreement among international law experts on the need to provide access to justice for individuals and communities who are victims of investment-related activities through inclusive and transparent mechanisms, such as fact finding, multiparty mediation and accountability mechanisms. For example: when a Canadian company seeks the Government of Canada's support in resolving a dispute in a host state, the home state could play the role of bringing in other stakeholders that should be involved in the process, to avoid the escalation of the dispute. Participants asked several questions for reflection in this context: If such mechanisms are provided to enhance access to justice, should ISDS be retained? If so, should ISDS be subjected to the exhaustion of local remedies? Could it be made more inclusive and transparent?

To Broaden or to Narrow the Scope of ISDS?

Some participants suggested that, rather than focusing FIPAs on investment protection, they should be instruments to facilitate and liberalize sustainability–friendly investment and promote RBC. However, other participants would be more inclined to narrow rather than broaden the scope of investment treaties: given their view that the regime is deeply flawed, it would be better to address CSR,

environmental and other public interest concerns elsewhere.

Certain participants were of the view that, if the idea is to broaden the scope of investment treaties, one of the driving forces would be the effectiveness of their enforcement mechanism and the possibility to award monetary damages. They argued that these elements made the ISDS regime the most widely used international dispute settlement mechanism and that they are not available in international law regimes perceived as less effective, such as those under human rights bodies. Other participants, however, recalled that compliance with WTO decisions is very high, even in the absence of monetary awards.

State–State Dispute Settlement

Several participants also suggested looking into the option of settling investment disputes in state–state proceedings. Consider the example of Canada: even though treaties provide for ISDS, the Government of Canada is still involved in preventing and resolving disputes involving Canadian companies—and the same is likely true for other home states. In addition, these participants recalled that state–state dispute settlement at the WTO has also suffered attacks as to its fairness and legitimacy, but never to the extent of the attacks to ISDS.

Therefore, these participants argued that state–state mechanisms for the settlement of investment disputes could be an option, either as a substitute for ISDS or as an alternative suited for certain types of disputes that may be more adequately resolved in state–state proceedings. Other participants added that, for example, disputes arising from systemic issues affecting an entire industry or aggregating claims of various firms could lend themselves well to state–state resolution.

Others cautioned that state–state mechanisms outside the WTO have largely been unsuccessful and that state–state dispute resolution would have to be substantially reimagined if it is to be a useful alternative to ISDS mechanisms or permanent investment tribunal systems—for example, through screening processes to select claims based on their significance, among other criteria.

However, it was also indicated that firm-level disputes such as expropriation, which may involve issues in the behaviour of both the company and the host state, should be addressed differently, to avoid putting governments in the position of judging which companies deserve diplomatic espousal and which do not.

Transparency About the Activity of Canadian Diplomatic Representations

Some participants expressed the view that there is a tendency to say that, if transparency can be increased, ISDS is a positive mechanism, in that stakeholders can be reassured that at least disputes are not being settled away from public scrutiny. At the same time, it was pointed out that, even though BIT claims are not as frequent against African countries, this does not necessarily mean that Canadian companies are refraining from using them as a "stick" as they negotiate with their host countries in back rooms. Given that Canadian diplomatic representations have been assisting Canadian investors abroad in amicably resolving disputes with host states, several participants called for transparency about the activities of Canadian embassies and high commissions on behalf of the commercial interests of Canadian companies abroad.

A view was also expressed that changing the model FIPA would not change the foreign service culture of rewarding certain behaviours and companies abroad. Some participants suggested that the Government of Canada ensures that Indigenous Peoples organizations, women's groups and other local leaders should be present in meetings geared toward amicable resolution of Canadian investors' issues abroad. They highlighted that there is a need to bring out in the open what their practices are, to show capital-importing partners that there is a marked change from preceding governments to Canada's current progressive agenda on trade and investment.

4.0 Toward a Common Understanding of a Canadian View of a Progressive Agenda on Investment

The expert meeting was not designed or intended to produce a consensus report on all the concerns about ISDS or pathways for reform. Rather, it sought to provide an understanding of the scope of issues that many Canadian academics and civil society experts believe should be included for

discussion in the upcoming consultations on a revised model FIPA, the rationale for these concerns and ways to address them. It was an opportunity for a range of government officials to engage with other stakeholders on these issues.

In the final session, participants discussed the main points that emerged from the contributions of the various stakeholders throughout the meeting.

- At the basis of any consultation on investment there should be a cost-benefit analysis of investment treaties, taking into account the views and interests of the Canadian government, citizens and investors as well as the need to achieve the SDGs—in Canada and in its partner countries. Both proponents and critics of investment treaties should be invited to weigh in on this analysis.
- Academics and civil society experts applauded the Government of Canada's plan to hold broad and inclusive consultations on a progressive agenda for reform of investment law, also including stakeholders not represented in this expert meeting (such as Indigenous Peoples and the business community). They agreed that the initial process should be followed by an ongoing consultation.
- Broad impact assessments should be conducted prior to the negotiation of any investment treaty, covering the environmental (including climate change), social (including gender) and human rights risks of such treaties in Canada and abroad, with impact mitigation measures included in the treaties and enforced with the assistance of periodic reassessment.
- The existence of a path dependence in investment treaty negotiations (with respect to the model FIPA and to the text of investment treaties and chapters concluded by Canada in the past) hinders progress toward a progressive agenda for reform of investment law.
- The primary question in the consultation should be to identify the scope of investment treaties: should they stay focused on the singular objective of protecting investments, or should their focus be shifted to the promotion of investment geared toward sustainable development?
- To shift the focus of treaties toward sustainable development, tinkering with existing language or slightly reformulating the existing model FIPA will not suffice—a progressive agenda on investment goes beyond IIA and ISDS reform. There is a critical need to re-examine the scope and language of provisions and discuss them at both the policy and technical levels. Among the key questions to be asked are:
    - What are the goals and legitimate scope of investment protection obligations? To what extent do they harm or risk harming governments and other stakeholders?
    - Is investment liberalization a core requirement? Should the Government of Canada prohibit foreign governments from adopting performance requirements, or should it rather encourage Canadian investors to comply with such requirements?
    - How should investment treaties deal with taxation issues?
    - Should the right to regulate be formulated as an affirmative provision or as an exceptions article (such as in Article XX of the General Agreement on Tariffs and Trade [GATT][10])?
    - How should investment chapters relate to other chapters in FTAs (such as chapters on labour, environment and gender)?
    - How should major gaps in current investment treaties—such as protections to investors in land grabs—be addressed in a reformed policy or model treaty?
    - What is the role of interpretative notes and clarifications by the state parties?
- Investor behaviour needs to be appropriately regulated, though discussion is still needed to assess to what extent investment treaties are the appropriate instrument to impose such investor obligations. The consultation should draw from recent innovative approaches, such as those developed in Africa, to help determine the ideal scope of such obligations, covering, among other elements: international standards on due diligence of investors prior to making the

[10] https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX

investment; environmental, social and human rights impact assessments; corruption; fraud; compliance with domestic laws of the home and host states; domestic and international labour standards; and obligations on human rights, taxation and environment.

- Governments should be able to implement their obligations under other international agreements without being challenged by investors under investment treaties. In particular, it would be important to provide a safe harbour to measures adopted by countries to achieve climate change mitigation and adaptation goals.
- On dispute settlement, all options must be on the table, from eliminating ISDS, to providing for state–state dispute settlement in certain or all cases, to expanding access to justice to a broader range of investment-related stakeholders. The current political climate in the United States—traditionally a staunch supporter of ISDS, but no longer a key driver of this model—creates an opportunity for fresh thinking about the kind of dispute settlement model Canada wants.
- Should ISDS be maintained, several improvements should be considered, including limiting it to certain substantive standards and reforming its procedural aspects (for example, to prevent conflicts of interest and "double hatting," require exhaustion of local remedies or provide for screening mechanisms). Even if maintained between developing and developed countries, eliminating it between developed country states should be considered as an option, as part of the reform process.
- Beyond the role of investment treaties, alternative or complementary approaches could be considered for protecting investors abroad, such as political risk insurance and investor–state contracts (with ISDS clauses), each with its advantages and disadvantages.
- Reform options should be considered in a context of potential complementarity, acknowledging that an appropriate mix of legal instruments or dispute settlement mechanisms could be better than finding replacements for existing instruments or mechanisms.
- Gender issues in investment treaties and chapters need to be thought through carefully, ensuring that broader power relationships are addressed, beyond matters of women entrepreneurship.

5.0 Conclusion and Ways Forward

Participants agreed that the debates throughout the meeting were challenging, enriching and fruitful, providing the Government of Canada with enlightening and useful input as it prepares an online consultation process on a revision of the Canadian model FIPA in light of Canada's progressive trade and investment agenda.

In particular, discussions were useful for helping the Government of Canada get the consultation questions right, in that they should design the process in a manner that it is useful for the government without unduly narrowing the opportunities for stakeholders to contribute. In addition, several of the issues raised during the meeting will be addressed in background papers to the specific questions to be posed in the consultation.

As a first step, the platform for the online consultation will be launched in July 2018 and remain open until at least September 2018 to give stakeholders ample time to provide input.

The online process will later be expanded to more general round tables, to be as public and participatory as possible. The timeline for in-person round tables and events has not yet been defined.

Overall, the consultation process will enable meaningful participation of all stakeholders, across various levels of understanding about FIPAs—what they are, what they do, how they touch on issues about which people care or should care.

Academics and civil society experts will continue to engage with the Government of Canada throughout this process. IISD, in particular, is committed to following the consultation process closely and to organizing other expert meetings, to continue the discussions begun here or focus on specific issues identified in greater depth, including through more technical research and discussion.

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