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Global South vs Global North: Viability of ISDS

MODERATOR

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SPEAKERS

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NEETI SACHDEVA: My apologies. We do not have a break for you right now. We start into the next session immediately as Naresh said, a light session, before we give you a light lunch. If I could invite my panellists, please. Sapna, Gagan, Patrick. Yes, they all are here. Good. We were to have John join us. But because of this visa issues, we do not have John with us. Once again, good morning, everyone. I'm delighted to be moderating this session on "Global South versus Global North: Viability of ISDS". I have a relatively easy job to ask questions, to get the credit for the questions and no blame for the answers. I'm joined today by a stereo cast of speakers. Gagan, may we ask you to move here? It just looks bad to have a seat empty. I'm sorry, but... Yes, thanks Sapna for that as well. We were to have John join us, like I said, but unfortunately, these visas issues, we couldn't have him. So, they will be now doing John's questions as well which I didn't tell them earlier.

Anyway, let me begin by introducing Patrick Taylor on my left. Patrick is a Partner at the London office of Debevoise & Plimpton, Co-Chair of their Africa practice and one of the go-to experts in Investment Treaty Arbitration, especially for energy transactions, telecom, upstream, oil and gas. Patrick is also the MCIA Counsel member.

Then we have Sapna Jhangiani, KC, Blackstone Chambers, based in Singapore. She is truly a trailblazer. The first female lawyer from Singapore to be appointed silk in England. Experienced across courts and Tribunals globally. Sapna is someone who makes the client's complex cases understandable and persuasive. Welcome, Sapna.

Last, but definitely not the least, we have Gagan, a Chartered Accountant, Risk and Regulatory leader. Pioneer in forensic services in India with over two decades of work in forensic engagements, ethical violations, fraud and compliance. He brings a sharp perspective on how regulation, risk and investor state disputes intersect in practice. Apologies, Gagan, that I introduced you to last. As always, experts come in the last in India. A big grudge. Too late. Right? But I will bring in you for the questions the first. I promise, okay

Before we dive into this question itself, I thought, let's just discuss and understand the scope of what's this Global North and Global South. It's not a geography lesson. It's definitely not a compass exercise. It's not also about which part of the equator you took a holiday, the last vacation. The Global North is basically a club of rich, industrialized, capital exporting countries. The usual suspects being like US, Europe, Japan. The VIP lounge of the investment and the world economics. The Global South is the rest of us, developing and emerging economies, often on the receiving end of those investments, very often on the receiving end of ISDS claims as well. North sends the money, the lawyers, South sends the defences, the counter agreements and sometimes the tiers. And occasionally it wonders if the rules were written at a dinner party where we weren't invited at all. But that's the twist. Now, with countries like India, Brazil, China being capital exporting, the party seems to be giving an interesting twist are the tables turning, and that's what we are here to discuss with our panels that how things have planned out and what we really see in the future.

So, Gagan, let me begin by you after decades of use, you think is ISDS still a credible system or we are discussing it because we need to have a topic for the conference?

GAGANPREET PURI: Okay, I think, as always with experts, we put the evidence first. The evidence is John couldn't get a visa so I think there's no better example of Global North and Global South and the divide that still exists. We still need visas to travel halfway to the world and half of the world still needs visas to come to the South. So I guess that's where we are. Look, I think when one talks about credibility, credibility is something that's built over a period of time, and I'm going to take credibility with a bit of cynicism right now. And again, speaking from the non-legal world, and especially what we see happening, I think there are two or three very clear outliers from my perspective. The first is, I think there is no doubt. And I think there's enough empirical evidence in everything that we see across the world that there's a resurgence of nationalism, protectionism whether you talk about North or South. So, in certain ways the core of business, of what the business world was, I think, has been shaken over the last few years and this shakeup will continue over a period of time. So, is the system credible? Yes. But is the system undergoing transformation? Obviously yes. And I think what really one needs to see is where will this transformation go? And what really with this transformation entail over the next few years. The second part, and I think this is again something where it's completely evidence packed. Look at the way regulation has changed, both in the Global North and the Global South. And look at the uncertainty around regulation changes in the North and in the South. Compare that with the overall scheme of how treaties have worked, I don't think they have caught up pace with the way regulation has changed. I think that's a big divide, that's a larger divide than the Global North and the Global South divide is the sheer changing pace between what we've written in the sort of law that governs the treaties as it is and in terms of how it's implemented.

And lastly, and most centrally, I think when one talks about Global South and firstly, there's no doubt in my mind when one looks at the history of Treaty Arbitration it's been one way, right? The other way has not, and we can talk about that later. But the other way is not really moved as much, but it is going to move, but because it's been one way. The whole thing of populism versus commerciality. I think that has been a very major play in terms of enhancing the credibility of something that was basically set in to provide commercial protection. So for a very simple fact, and I've spoken because we end up working a lot with the governments on this side and kind of moving there. The thing always is that the question that's asked is that if we settle, is it, how is it going to be viewed from the political domain? If we settle, how is it going to be viewed? So it's totally different lens that's put onto some of that. So to me, I am a bit cynical, and excuse my cynicism for that, but coming from a world completely of commerciality and not of law. I think at the end of the day, if we are unable to make commercial sense of what's happening, the credibility obviously gets tampered. But having said that, on the flip side, there is a lot of credibility that's been put in institutionally from the government side, from the overall the global political ecosystem side. So, I would still say there is credibility, but if interventions don't come right now to bridge the divide, this credibility is going to dampen. And go down over a period of time.

NEETI SACHDEVA: Thank you, Gagan. Let me bring you in, Sapna here, and we've seen that a lot of developments are happening in the ISDS world. There are reforms currently with UNCITRAL Working Group III working on it. Do you think that will make ISDS more viable, or do you think it's just going to complicate the world a bit more?

SAPNA JHANGIANI: Thank you, Neeti. I don't know if my microphone is on or if I've...

NEETI SACHDEVA: Sorry, Sapna. I should have said one thing before I got you in there. Yes that's my mistake. I must tell it, and because it's getting transcribed specifically for that, that the views expressed here are very personal and not of the organizations and institutions that they represent my speakers, so they should not be quoted anywhere out of the context. Over to you, Sapna.

SAPNA JHANGIANI: Thank you so much Neeti. I think my microphone is now on. Happy to start talking about reforms, but I want to pick up on this topic of credibility and I want to give an answer by starting with a question to the audience. Who in the audience has seen or read about the Alexander lecture in 2023 by Toby Landau? Can I have a show of hands? Okay, a few of you. I think it's really important when we talk about the credibility of ISDS because I think it's a really seminal piece of thought leadership on the topics. If you don't mind, I'll just spend a couple of minutes for the benefit of those who haven't seen the lecture or read a transcript of it. So ultimately, in that lecture, Toby Landau is suggesting that the whole process that we have of investigation Arbitration is wrong, and the problems that we have with the process undermine its legitimacy, and ultimately its credibility. And he traces back the introduction of ISDS to one of the architects of ICSID, a man called Aaron Broch. And the whole idea was to take the politics out of Investor State Dispute Resolution. So, you go away from state to state resolution of disputes and diplomatic protection to investors, which existed before we had the current regime of Investor State Arbitration. And instead you move the

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dispute into the arena of deciding the disputes based on objective legal rules. And what Toby argues is that many of the subjects that we have in Investor State Arbitrations nowadays. So, climate change, nuclear power, war, they're inherently political issues and you touched on politics, Gagan in your answer, we are reaching the stage now where the subject matter is so wide that deciding these issues through an adversarial process without taking into account the wider political context is beginning to undermine the legitimacy of the system. And what you need to have is all stakeholders heard so that they could be involved in the dispute resolution process. He thinks that we need to do that. We need to change the whole system, start from scratch and make sure it's much more inclusive of stakeholders, and ultimately that's what we don't have with the current adversarial system. So, from Toby's point of view, and I'm just the messenger here, the reforms in working group three, what they're doing is they're looking at increasing the transparency of the system consistency, length of time, costs, which are all great but he's saying these aren't going to solve the crisis of legitimacy that we have. We actually have to change the whole system. So, what are the reforms that we're talking about? Well, we've had a code of conduct for Arbitrators. We've had a set of Mediation Rules, there's a discussion about setting up an Advisory Centre, which I think is going to happen. I think they're at the stage now of deciding how that's all going to work. And then there are discussions also for a multilateral investment court. They've worked really hard and I don't want to undermine their efforts. It's really hard to build consensus amongst states, so it's a slow process. I think it's amazing what they've achieved so far but there is still this argument in the background that what is needed is not this surface level we form, but a fundamental we think of the whole system.

NEETI SACHDEVA: Thank you, Sapna. That's quite interesting. Yes, I agree that the way things are positioned. I think when we talk about ISDS and I look at the history of it, it was always linked to more investments. The question, of course, for you, Patrick, I bring in you here is to say that do you genuinely think that ISDS promotes investment? Or is it a link which has been overstated?

PATRICK TAYLOR: Thanks very much, Neeti. John's gone to great lengths to avoid being here to deal with these difficult questions, blaming visa issues. I've not been so lucky. So, I'm going to be on the spot here for some of this. I'm going to suggest a slightly different lens on what Sapna just said, which is this also comes down to commercial competitiveness. We see states use their tax regimes in order to give themselves a commercial advantage for attracting capital. And in some sense, the ISDS and levels of protection that you see in Bilateral Investment Treaties, Multilateral Investment Treaties are means for a state to make itself more competitive, to attract capital and capital exporting states and companies that have got capital to place ultimately have a choice about where they take that capital. And I think that's the other end of the scale, the other side of the lens. And understanding therefore, whether there is genuinely a link between more open, more comprehensive protections and ISDS and the flows of capital, I think will give us some insights as to how much the system is likely to change or whether what we're going to see is people keep on coming back to ISDS in its sort of original form whenever they are desperate for more capital. It's also, I think, interesting to think about how this playing, is playing out at the moment, and we see it playing out at the moment in the domestic context. Governments in places like the UK over the last several years have railed against the judiciary for restricting what they believed was the mandate they had from the people to implement rules as they wanted to implement them. When Judges turn around and say, sorry, you can't do that, it's illegal. They attack the judiciary, and they look for ways to make it less independent. And in some ways those attacks show that the judiciary is doing its job. You can't get the benefits of a system without also taking on the consequences. And one of the consequences of the system has always been that you give up some sovereignty. And finding that balance and where governments focus that balance changes depending on how often they're being sued. So, over the course of the longer history, we saw that more Global South jurisdictions were being sued when investors weren't happy. And then, more recently as that has started to change and the tables have started to turn, lo and behold, we have many European states complaining about the same thing. Spain is being one of the most sued, if not the most sued state over the last ten years, and the EU has come in to try and change fundamentally the process of Bilateral Investment Treaty and Multilateral Investment Treaty protection in the EU. I think it is sort of reaction to ultimately, in some ways, a system that was working.

SAPNA JHANGIANI: I should just clarify, just for Toby's benefit, and I encourage all of you to actually watch the full lecture, read the transcript, and not rely on my précis. I don't think he was saying we shouldn't have Treaty protection, but just that the way that those disputes were adjudicated should be more inquisitorial than adversarial. But I think there wasn't a suggestion that we move away from international obligations or specific Treaty protection for investors. I just want to clarify that more for the benefit of Toby.

PATRICK TAYLOR: Thank you. So, one of the important aspects then, is testing the link between investment flows and effective investor state dispute settlement mechanisms. There's no real consensus. There have been a number of studies, but the results seem to vary depending on whether the authors of those studies have controlled for the strength of the ISDS provisions that they're looking at, or if they've correlated the results with the institutional quality of the host country. I'm going to venture, though, that there is indeed a positive link between ISDS and FDI. In a 2022 study in a working paper for the US International Trade Commission the authors looked at investment stock, which they described as the total level of investment in a year in 151 host countries in the period from 1980 to 2012. And the study found that there is indeed a positive correlation between the availability of strong ISDS mechanisms and FDI. So, according to that study, ISDS mechanisms that guarantee investors the right to pursue binding Arbitration do result in increased FDI. And you see on this slide, that's the left-hand column, which shows that, over the red bar shows that what the investment levels are compared to year zero at the end of year one following the introduction of an IIA with a strong ISDS provision and then the yellow column shows the effect after five years.

For treaties with limited scope of ISDS, the results vary, and it's actually very hard to draw any firm conclusions, but one of the most surprising things in the study is what you see on the right-hand side. Which is that there appears to be evidence that countries that adopted International Investment Agreements that did not offer any ISDS. Actually, saw decreases in FDI in the years following the ratification of such agreements. I wasn't able to test the underlying data or assumptions behind that conclusion, but if that's accurate, then that's a very strong indicator that investors consider a state's attitude to ISDS as very important to their decisions on whether or not to make an investment in that jurisdiction. And so states attitudes to ISDS, I think are also instructive. And what we see playing out in real time is that states that are looking to attract foreign direct investment do still think of ISDS as one of the means that they can do that. Argentina pretty well publicized economy with problems that is looking now desperately to attract foreign direct investment, past the incentive regime for large investments last year, the RIGI. And the RIGI targets investments in key sectors, and you have to qualify for it. And one of the ways you qualify for it is by registering as a foreign investor and committing more than $200 million to an investment in those particular sectors. The benefits of that gives you access to aren't just ISDS and that's important, it includes tax and customs reductions or exemptions, guarantees of regulatory and tax stability for 30 years and also then the benefits of being able to take a dispute to Arbitration under the PCA, ICC, or ICSID Rules. It will be interesting to see whether or not RIGI actually has the effect that it was hoping to have and succeeds in attracting additional investments. But if the studies to be believed, then it should. And I think that brings me to my concluding point here, which is for as long as states think that ISDS will help attract investment. And as long as investors think that ISDS in its original form, is the best means of protecting investments, then, for competitive reasons, I think states will keep on coming back to using it, and we won't see a complete overhaul of the system in all states for all time.

SAPNA JHANGIANI: Can I add on?

NEETI SACHDEVA: Yes, Sapna, please, go on.

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SAPNA JHANGIANI: Just to bring some conflict into the panel. I don't actually disagree with...

NEETI SACHDEVA: Why don't I ask a question before you get in? It's very interesting that Patrick talks about all the statistics and talks about that there seems to be a positive correlation between investments and ISDS. As many of you in the room would know, that India never ratified ICSID. We, of course, also had all our BITs cancelled. We have a model BIT, which was not subscribed to a lot of the countries. Of course, India is negotiating it individually, but I don't think investments have really stopped in India, even despite us taking that stand. So do you see that what Patrick has said in and do you see a conflict therein, or you think it's very country specific because it's a growing economy, it wouldn't really make a difference whether we subscribe it or not? Or do you think our judiciary upholds the principles so strongly that it doesn't really matter that payer ratified ICSID or any other multilateral treaty, it would not make a difference. Sapna, would you want to probably comment on that?

SAPNA JHANGIANI: I think investors want attractive rewards, and reward comes with some risk, and I think they build in the risk. When I was at a law firm, it was a leading insurance law firm, and a large part of the practice was political risk insurance. That is a type of insurance product that is taken out specifically to provide for these types of sovereign risk for investors investing in what might be regarded as more risky countries. I just want to bring up the example of Brazil. Now, Brazil is in the list of countries with the highest foreign direct investment. It's number five on that list. It doesn't have any investor state dispute resolution mechanisms in any of its treaties. It regards them as unconstitutional, and it's not a member of ICSID. But I do think it's important to bear in mind that Brazil does include in its agreement certain types of risk mitigation, so it is looking at how to give some comfort to investors to attract them to the country, and so, I'm sure investors want the rewards, but they want to manage the risks and I'm sure is ISDS can definitely help. That's one option. What Brazil uses is something called a cooperation and facilitation Investment Agreement, which looks at dispute prevention and state to state Arbitration rather than Investor State Arbitration. And it really looks at trying to stop disputes before they escalate which is perhaps something to be thought about generally in this whole field. So, I think it is, I can absolutely see how there would be a link between good dispute resolution mechanisms for investors and investment. It doesn't seem to have hindered investment into India, but it is... I think it's the fastest growing economy in the world. And so it's just when you're an investor and you're doing that risk reward analysis. The reward seems to be very, very attractive. But I do think investors do look for some comfort, whether it's insurance, whether it's the Brazil type of agreement called an CFIA. I think countries do need to think about these things.

PATRICK TAYLOR: And we've probably all had experience of investors who, when you tell them they might have a claim under an investment treaty, go, oh, really?'

SURESH DIVYANATHAN: Can I make a comment?

NEETI SACHDEVA: Yes, please. Let’s take a question. Yes, please.

SURESH DIVYANATHAN: I wonder if we are mistaking a coincidence for correlation. So, like you mentioned, the investors quite often don't even know that they have recalled ISDS. Could it be that these countries that adopt ISDS just adopt a whole bunch of other policies which are very investor-friendly, anyway and ISDS are just one of them. And so people naturally invest in those countries for those reasons and really not because of ISDS?

PATRICK TAYLOR: I think that must be true in certain instances, and I think it's very hard to measure precisely because you can't tell exactly what's driven an investor's decision. Having said that for every investor that says, oh, really? There are plenty who say, I wouldn't have invested there. If I'd known that I was going to be treated in this way in relation to, for example, my ECT Rights. And with the changes to the ECT, we've got clients who are saying, we wouldn't have invested there had it not been for the ECT. And with what's happening to the ECT, we wouldn't have invested there either.

GAGANPREET PURI: I just want to add one point. I think there's also very interesting perspective on the other side that in a few investors who could have gone down the route, decided not to because of the perception that what going against a sovereign or a state means for them. So, we've had a few cases where we went down the road, the legal process was sorted out, the quantification has happened, and they decide not to do it. Because do we really want to risk the whole notion of being anti-establishment in a country where we have a significant investment or we expect to put a significant investment. So that's again, a softer issue that obviously needs to be put not just from a regulation perspective, but just from a Contract administration, from an entire investment administration perspective its important. So, regarding your point, it's one factor of the risk an investor looks at. Obviously, they're not guided by the fact that something's going to go wrong. And what's going to happen to me if something happens. It's one point, but it is a very pertinent point. Most discussions it does come up, especially when we are thinking about potential M&A into strategic markets. It is something that comes off the table more often than now.

NEETI SACHDEVA: Gagan, when you say that, and Patrick also said is that, that there is definitely a positive correlation and he also alluded to the fact that it's not only, you see the growing economies which have been sued. Now you see that even EU and the countries are seeing this. Then why do you think in your sense that is it always ISDS always remains a controversial question, more in the Global South than in the Global North?

GAGANPREET PURI: I think it's about different people and being in a different space in a different time. But to me, honestly, the gap is widening and it's actually going to start going the other way soon as the investment pattern shift. I think, firstly, the most common kind of thing, reason we come across is that, well, the economic expectations are very different. When you talk about a growth economy, the trajectory, the whole investment cycle in a growth economy, the whole investor expectation in a growth economy is a very different from what it is in the Global North. It is. You make a risky investment, you expect a risky return. There's an investment return trade off that always comes in, and it is, frankly, you are dealing with that. Now, when I look at it from a country's perspective in the Global South, they expect agility. They are at a stage now where their economies have started catching on with growing economies, grown economies and there was a lot of churn. I mean, there was in action for a number of years. Suddenly you see taxation rules in most countries changing. Suddenly you see investment climate in most countries changing, foreign direct investment rules changing, so there's a lot of change and governments there expect agility and going back and renegotiating a treaty is going to take forever. And by the time you renegotiated, the economic point of that country has changed again, and the expectation has changed again. So for me, that's probably one of the main reasons why that's there.

The second part is public policy. And I think, as we've also seen the expectation of the Global South always has been. For us, it is now a matter of public policy. For example, when they signed a Treaty Arbitration, they did not envisage that there would be a huge taxation loss because a transaction happened outside the country where you could actually go and now put a thing and say, well, I'm going to claim, it's within my sovereign right to tax this transaction, but I didn't think of it when I was kind of defining my treaty or I was signing to that treaty. Why? Because my economic goal point has changed. So, public policy again has a very major bearing. Public policy is more developed in the Global North. It is still developing, I would say, in the rest of the world, and things, even like environmental, social, governance. And all the goal points have changed so much in the Global South in the last two, three years. It's hard to catch up and really say that and how that coverage will happen.

And lastly, and most importantly, I feel at least in the Global South, there is a constant feeling of fairness in the process. If it is our economic disadvantage, why is it not being viewed as being fair to us? Because we are also at a loss. In most cases over here, where we also actually may have suffered an economic consequence or damage, which has far bigger ramifications than if we were to give in on let's say a single point. So to me, it's a combination of these three, at least from an economic policy perspective. And I think if at all, this has to be successful, and I hope it's a good medium, it should be successful. The catch up that one needs to do from a policy ramification perspective, a policy definition perspective, there is a lot of ground to cover. I think what we are trying to do is solve for today. But with the changes that are happening to actually solve for two decades from now and start putting good structures in place today from a policy perspective, that will help kind of guide this process in the future.

NEETI SACHDEVA: But Gagan, don't you think that now with Global South being outward investor, some of the complaints that they've always harboured and spoken about it. And have this sort of a divide, it's not going to stand the ground anymore because now they are investing, they are exporting Investment. And how are they going to really defend the fact that what they were complaining about, today, really, is what they need? So where do you see that happening in the future?

GAGANPREET PURI: Yeah. As balance of trade, I wouldn't say equalizes shifts.

NEETI SACHDEVA: Yes.

GAGANPREET PURI: It's probably a ride over to say, as balance of trade shifts. There is no doubt in my mind that some attitudes will change or have to change, and that protection would need to be given. The problem that the Global South is going to face is getting a sheer volume of voice to put sort of pressure back in the governmental systems to kind of say that there is our perspective that needs to be protected when we are going to other jurisdictions. And at that moment, as we speak today, that voice is very disaggregated. It is disaggregated within countries and within the different strata of economics within every country itself, it's disaggregated within Global South, and unless we see a shift in that happening, that collective voice coming in and started putting some reason back, it’s going to be a challenge. And I personally think that is probably we are, like, half a decade away from some of those voices to start becoming meaningful. I mean, there's murmurs today, but it needs to be made into a more sort of a collective power that needs to come into dry policy.

NEETI SACHDEVA: So you think that we can still continue to discuss this topic for the next ten years as well?

GAGANPREET PURI: 20.

NEETI SACHDEVA: And the cons... 20. Okay, good. So we are sort sorted in there, yeah. Sapna, we are hearing it now about that the EU has a proposed multilateral investment court.

That seems to be very interesting development, of course. Do you still think that it's a very Global North stance just under a new label?

SAPNA JHANGIANI: Just to pick up on a couple of points you mentioned earlier. I mean, I think one of the things you asked about this. So called North South divide. Is it true economics? Is it perception? I think we've had some very high profile, very large awards against states which have been a large chunk of that country's GDP, and I think they have contributed greatly to this perception and this perceived lack of equilibrium in the way that states are being subjected to investigate claims. And just to pick up on your point about now that we're seeing more outward investment from the Global South, if we agree with that dichotomy, that's a whole other panel but I think if we think about those very large awards, the risks of inward investment and having ISDS protection can be very, very great. So, you may want as a state, you may want to protect your investors going out, but again, you're going to be managing your own risks. And it's quite interesting to look at the example of China which used to have a very limited policy on ISDS, either didn't have them at all in treaties or had them only addressing compensation. And we've seen a big liberalization of that policy, more ISDS, provisions in treaties. The first award, which we've all heard of when the UK-China Treaty with UK investor, I think in China. So I think that it does seem that that has been influenced by outward investment. But anyway, sorry, the question was the EU investment Court. Sorry, what was the question?

NEETI SACHDEVA: EU proposing a multilateral investment court?

SAPNA JHANGIANI: Yes.

NEETI SACHDEVA: Do you think it's going to make a change in system as it is now? Or is it just a new label for the same Global North predominance which we have seen?

SAPNA JHANGIANI: Well, it's definitely EU driven. I don't know whether you'd call it North driven in the context of what we're talking about. But if you think about that, what are the drivers for the EU looking at the multilateral Investment Court, I think they think it's really critical for what they see as promoting the rule of law and restoring confidence in International Investment Agreements. They want to enhance legitimacy, consistency, impartiality, all of these are very noble ideals and you might assume that the kind of ideals that would be shared by North and South alike. But as with everything, the devil's in the detail. And when we get into the detail, we start to think about issues such as, well, who are going to be the Judges on this permanent court. How can you ensure proper representation of all states involved? Who's going to pay for it? And ultimately, where we land up is the big question. Is there a risk that the Global South are going to be or feel excluded? And, of course, that risk is there. And I think that's perhaps an impediment to this project getting off the ground. But the only caveat I would add to all of that is that the EU has adopted Bilateral Investment Court systems in the recent agreements and it's negotiated. So, with countries like Canada, Vietnam and Singapore and they have provisions for a potential transfer to a Multilateral Investment Court down the line as and when that might take off. And so, just as a practical matter, one wonders, will this be a mechanism that just gains traction through the sheer power, the sheer negotiating power of the EU block as it continues to put in Bilateral Treaties, Bilateral Investment Court setups, which are *ad hoc* courts with representatives from each state and then representatives from another state, but you just wonder if this is going to grant action eventually when they have all of these Bilateral Agreements that there might be enough of a critical mass to say, okay, let's just opt in. So, I think it's very interesting. And I said this the other day, and someone said, this is never going to happen, but it's possible. It's at least possible. And again, we're talking about a long game here. So, yeah, potential development. Let's see. We should have bets later.

NEETI SACHDEVA: And we'll have to see how the Global South reacts to it. Right? I should take a pause here and I probably should have said this in the beginning, that when we had a preparatory call for this session, I think we spent about 45 minutes discussing what is this Global North and what is this Global South and for the longest time, Patrick thought I was the one who chose this topic, and I told him no, I was just told that I have to moderate a session on this topic. So we said that for the purpose of this session. At least we'll agree to what's Global South and what's Global North and it's investing, importing countries and investment exporting companies. So we are not getting into that controversy of how do we define this? I should have said this before, but anyways, I've clarified that. Patrick, let me bring in here that I know we started off by credibility, right, of ISDS system, if let’s one was to assume that ISDS does lose its legitimacy at some point in time. Do you think there are any possible alternative which would exist for resolving these investor state disputes without interrupting the economic flow much?

PATRICK TAYLOR: So, I think there are three obvious alternatives that are talked about. One is the Multilateral Investment court that Sapna just mentioned. The second which Sapna also mentioned earlier in the context of Brazil was State to State Dispute Settlement. And the third is commercial Arbitration under contracts. So on the multilateral Investment court and that idea, I just wanted to add a couple of observations because I think the conclusion of the points I'm about to make is your point is the devil's in the details. I think another way of saying the same thing is the proof is going to be in the pudding. We'll have to see actually how it works out. Also, to your point earlier about India, there are some places that are just so impossible to ignore from an investment perspective such as India, China, Europe. The people are going to invest anyway and they'll take whatever benefits they can get along the way, but whether anyone's actually going to bring a claim to the multilateral Investment court remains to be seen for the following reasons. One, Judges, they're going to be selected by the EU. There's going to be 21 of them, I think, is the proposal on terms that are renewable every six years because they're all going to be selected by states. Are they all going to be state leaning? If they're all state leaning, are you going to bring a claim to protect your rights, wondering whether you're going to get a fair shake?

NEETI SACHDEVA: And how many of them would be from the Global South and then from the Global North. Right. And a mix of it as well. So, yeah.

PATRICK TAYLOR: Correct. And I think if it's a six-year term that's obviously in some ways quite a lengthy term, but in other ways, if states don't like the decisions you've rendered. They just won't renew your term after six years so the Judges could be state leaning. Another risk that's been talked about is the ability of states to agree joint interpretations of the protections that are being applied during the pendency of a dispute so a state could just pull the rug from underneath an investor's feet. Midway through, with the investor having spent vast amounts of money already to get that far. Are you going to take that risk? If you're an SME and you need funding for that, is a fund they're going to take the risk that that might happen. And I think these sorts of issues and whether or not actually, ultimately, SMEs will think of this as an improvement on the original system, may mean that we never really get to find out much about the court, if it's just not used. I mean, you think about it in the context of advising a client, unless they are a very big client with lots and lots of funds and willing to take the risk. Who's going to actually agree to be the first case and spend millions and millions of euros or dollars or pounds?

So, the second alternative is State to State Dispute Settlements. The Treaty makers being in the driver's seat on those disputes. SSDS can reduce concerns about Arbitrators in private disputes curtailing state sovereignty or imposing large damages awards on emerging markets. SSDS can also improve the consistency of the interpretation or approach to certain policy measures across cases. But there are significant disadvantages. I mean, in many ways they're obvious. Whether a case proceeds is likely to hinge on geopolitics, trade linkages, or the investor's ability to influence its home government. There are some governments not naming any, such as the US, that seem to make up policy on a daily basis coming out of that White House. Are they going to support your claim, are they not? Probably, depends whether you bought any crypto recently? It's exactly what ISDS was designed to avoid, which was to give the investors the ability to control the process.

Related to that point, SSDS claims will be filtered through that diplomatic and policy lens rather than just the merits of the claim. And that means that valid claims might never be brought. And even where they are, will the remedies ultimately be effective and worth the effort. The outcomes of SSDS often rely on diplomatic compliance rather than award enforcement architecture, such as what we have for Investment Treaty Disputes. And that means that you might end up with an award that simply has no practical effect. And so that leaves the third alternative, which I think of the three is the one likely to fill any gap in the interim, which is commercial Arbitration. Now having Investor State relationships governed by contracts instead of treaties does seem like a viable alternative. The state is able to limit its consent to Arbitration to clearly define relationships. It can tailor the exact protections that it wants to give to that particular investor for that particular investment, and it means that a lot of the benefits of Arbitration are preserved. Now, question in the EU context, how long private commercial Arbitration against states is going to be outside the purview of what the EU wants to change? But there are also some clear disadvantages.

First of all, for the award to be enforceable against the state, the state has to waive its immunity from enforcement, and that's going to need to take a fundamental change in the way states view this because at the moment, for any of us negotiating those kinds of arrangements states very, very rarely accept to give up that immunity.

The second is that a contract will only cover an investment where there is a reason to have a contract with the states, and there are many investments that do not have a direct public sector link, but that can be impacted by state actions such as retrospective tax applications, or that may want protection from things such as rogue decisions of domestic courts, but denial of justice is not something that you would obviously find included in a contract with the state. And then there's the question of fragmentation.

One of the criticisms of ISDS is that it doesn't necessarily lead to a consistent body of case law, but I think if you have a system that depends on hundreds or thousands of individual contracts with individual investors, you'll get even less of that. So, while there are alternatives to ISDS, I think what we're likely to see investors push for, at least in the interim, is improvements of the current system of ISDS rather than wholesale changes. And again, it will come back to whether or not states will keep on thinking there's an advantage to me offering this, and so a state somewhere will come back to it.

NEETI SACHDEVA: Great. Gagan, do you want to bring in your experts and say, forget everything, just get us in, we will solve everything? You know what I am talking about.

GAGANPREET PURI: Actually, I think Patrick covered it really well. From the middle part, which is the legal side, I think on institutional side. My two cents on this is, first, you got to look at before that. And unless we start writing better contracts and not getting into a situation where we end up... And not just writing better contracts, but predicting what sort of issues can happen when you especially work in developing geographies. I think it's very important to put that in place. So, there's been a formula driven, everything, we've seen all that happening, but of course I still feel that still, that has again not kept pace with the way the world has changed. So that's definitely one. And then on the last side, that you've got to limit your damage, so please carry political insurance. It's as simple as that. Make sure that you are hedging your risks, your risk properly. And really speaking to management of corporates all over the world, I think people don't think about that. I mean, it's not something you contemplate. So, figure that cost into your cost of doing business and try to steer away from protracted litigation. Because, frankly, on this one, the damage to a reputation and pretty much you risk the risk of isolation in a country if you take someone to court on this something like this. So there's a lot of ramifications down the line if an incident was to happen here.

NEETI SACHDEVA: On a lighter note, I always say that Arbitration lawyers come together and talk about the problems in the Arbitration. But when the real people who have to make that change is the corporate lawyers who never attend these Arbitration conferences. So, we will make that change at some point in time and not just the Arbitration lawyers talking to each other and saying this is what the contract lawyers need to do. Anyways.

SAPNA JHANGIANI: Can I say one thing?

NEETI SACHDEVA: Yes, Sapna. Please go ahead.

SAPNA JHANGIANI: Just on topic of filling the gap what could replace the current system? I don't think it's a full gap. But I think, as we all know, there is a huge emphasis now on trying to mediate investor state disputes, and I do think that to avoid shocking awards and some of the backlash that we have against the system, if we could find more peaceful resolution of disputes without them being fought to the bitter end, I do think that could be good for the system. And there's a huge focus on mediation, but I think one aspect of peaceful settlement of disputes that we just haven't focused on enough is conciliation and neutral evaluation, non-binding. I think one of the challenges is we've had conciliation in the ICSID Rules for decades but it's very rarely used. I think people didn't really understand what conciliation meant. I think they thought it was mediation. What is it? It is just, there are different meanings for that same word across different types of mechanisms. But I think because of one of the challenges to state settling is that someone wants a piece of paper to be accountable. I think we could see more use of neutral evaluation, non-binding, which is what I mean by conciliation to and use it as a creative tool. We could have experts involved. Someone said the other day that an investor state claim is like a telephone number because they tend to start off so big, that we could have experts involved and actually try and have a neutral evaluation, maybe with some thought as to what a realistic quantum could be. I think there's a lot more we could be doing, and we could be a lot more creative about this. And if we're not going to throw the baby out with the bath water, I think a fundamental rethink is going to be really difficult. It's so radical to get states to agree on non-radical things, can be really difficult.

NEETI SACHDEVA: Exactly.

SAPNA JHANGIANI: So, maybe we have to think about other creative ways to try and balance rights.

NEETI SACHDEVA: So, in the morning, we spoke about no war but Arbitration, and I would say no Arbitration, but maybe Mediation conciliation and neutral evaluation. Good. That's a good progress. We're doing it. I do have one last question for my panellists, but before I ask them, I feel that I still have ten minutes. I like to bring in the audience. It's a very light topic, so please ask light questions to my very heavyweight speakers who you don't get the opportunity to ask them without a bill. Right? So they're not going to invoice you for this. Yes, Lars.

LARS MARKERT: Just since Sapna very rightly brought up the topic of Investor State Mediation, I wanted to give a plug to the IPBA investment Arbitration Sub-committee, which has published the IPBA decision trees on Investor State Mediation. So if you go on the IPBA's homepage, you will find a set of decision trees, which can help investors and states to run through decision trees and say well, is now a good time for mediation. Are we in a phase of the proceedings which would make it difficult? So just wanted to point this out. I think this is a very good idea. Thank you.

NEETI SACHDEVA: Thank you, Lars. Yes, Sunita.

SUNITA: Thank you for this fascinating panel. So, Sapna spoke earlier about Toby Landau's Alexander lecture, and I understand that lecture was inspired by the documentary 'The Tribunal', which is based on the Copper Mesa and Ecuador dispute. That documentary interviews members of the Intag Valley that suffered Human Rights violations at the hands of Copper Mesa, which was a Canadian Mining company. And so central to the theme of that documentary was that Investor State Arbitration did not adequately address the Human Rights violations that they suffered. And so, my question sort of relates to legislation enacted by countries in this regard. So, several countries have enacted legislation imposing obligations relating to Human Rights on businesses incorporated in their countries. So, for example, France has enacted laws imposing a duty of vigilance on parent companies and Contractors, and the EU has recently adopted similar legislation in the form of its corporate sustainability due diligence directive. So, how effective are these types of legislation in addressing Human Rights abuses in the context of investor state disputes?

NEETI SACHDEVA: Should we just give it to John?

PATRICK TAYLOR: Excellent. I'm not sure this is going to answer your question. It'd be slightly provocative response, which is if those prove to be as effective as BIT as an ISDS in helping investors bring claims to allow the victims of Human Rights abuses to get significant damages from companies but propagate those abuses, I imagine that companies will start taking them extremely seriously. So again, it sort of shows that you can change behaviours and I guess companies would then complain about them as a result, but it seems to me a good thing to have Human Rights protections embodied in more easily enforceable statutes.

SAPNA JHANGIANI: Just a quick one to say, I'm not familiar with those pieces of legislation, but some of these new generation treaties. Like, for example, if we look at India's latest treaty, the India-UAE Treaty, investors have not just rights, but obligations. They have to comply with national laws. And I think there's specifically the ability for counter claims, if I'm not mistaken. So we are seeing, again trying to address this balance and making sure that there is responsible investment. And that can be built into these new generation treaties. And increasingly we're seeing that it is.

GAGANPREET PURI: I just want to add that it's not just responsible investment on its own today, but things like technology, social impact natural resources, which already is a very kind of a covered area. There's so much that's happening on technology that borderlines on psychological safety, that borderline is on impact on societal impact of technology. So this is going to be two way. It will have to change and evolve again. I don't think current legislation covers it, but if you take a bet into the next five years, we're just going to see more and more issues. ESG is going to be huge. US apart, I think we are already seeing impacts of that across most diligences that's been done, most acquisitions that been done. Setting up a ground zero of what reality is today, is a huge factor in investment decisions. And I think, to me, in the next couple of years if regulation doesn't keep it, contracts will. So, it's just going to happen. This is something that's rolling. It's rolling really, really faster.

NEETI SACHDEVA: Thank you. Any more questions for the panel? No? Okay, so I have a last question for all of you. The same question and I'll start with you, Sapna, ten years from now when we will celebrate for the 10th anniversary of the first ever IPBA Arbitration Day, do you think ISDS will be more inclusive and balanced or you think it's going to be in a deeper crisis?

SAPNA JHANGIANI: Quick. I did a straw poll recently of some senior people in this field and I said, do you think we'll have ISDS in its current form, maybe with a few tweaks in ten years' time and in 20 years' time? Ten years' time, everyone said yes. 20 years' time, the majority said no.

NEETI SACHDEVA: Okay.

SAPNA JHANGIANI: So, that's my answer.

NEETI SACHDEVA: The empirical data, yes.

GAGANPREET PURI: Basically, I'm going to use two words, cautious optimism. And for me, there's going to be a shift, we are definitely going to move from just pure commercial issues to tech, to ESG, to climate change, AI, technology transfer. These things are going to be huge in that and that mentorship needs to be happen. But my most important prediction, I think, which I feel is that instead of large multilaterals, we're going to have smaller groups of multilaterals. You're going to see multilaterals in three, two, three countries coming together. I think that is probably going to be at least the flavour of the next decade in terms of how things are going to go.

NEETI SACHDEVA: Patrick, the last word.

PATRICK TAYLOR: So, I think that ten years is not a long time in ISDS, so probably I agree with your straw poll. The straw poll. But I think the direction may well depend on the reaction of the Global North or originally capital exporting countries to being sued more often.

NEETI SACHDEVA: Yes.

PATRICK TAYLOR: And depending on what they do, in response to that as the capital flows change.

NEETI SACHDEVA: Very interesting. Please join me in thanking my all-wonderful panellists for making this an interesting discussion and thank you all for being here. We may continue this discussion of a North and a South, but we can't have a discussion anymore on this as we all need some food. The Indian food is served for you in the room across. You can all enjoy.

GAGANPREET PURI: Is it North Indian or South Indian? Just normally asking.

NEETI SACHDEVA: We'll keep a mix of it. And we will assemble here, probably in about an hour's time so that we can start on time, get you free on time to come to Delhi, for the Delhi leg of the Arbitration discussions continuing there. Thank you once again for being a wonderful audience.

~~~END OF SESSION 2~~~