Open-ended intergovernmental working group for the elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to human rights, Resolution A/HRC/RES/26/9

Geneva, Palais des Nations, Room XX

Second session, 24-28 October 2016

IISD Statement for Panel III, Sub-theme 1

26 Oct 2016

I would like to thank the distinguished panellists for their excellent and stimulating discussion this morning, especially for the successful examples they pointed out in using international instruments to address obligations and responsibilities of private actors.

I would also like to take this opportunity to address some of the comments made by one of the panellists yesterday, Mr. Meyerstein from the US Council for International Business. For the past two decades, my institution has also closely followed the debate on ISDS and more broadly the reform of the investment regime, and I would like to share some of our observations.

Mr. Meyerstein put forward some numbers yesterday that reflected a particular US business view of the statistics. We understand that statistics get interpreted differently by different people for different purpose. For example, if we are to look at the "big data story," as Mr. Meyerstein called it. We will see that according to UNCTAD’s data, as of the end of 2015, there were a total of 696 publicly known treaty-based ISDS cases, out of which 444 were concluded. When we look at those cases and focus on decisions on the merits, we will see that Investors prevailed 60% of the time, and States only prevailed 40% - and this is not counting the number of cases settled without an award being rendered. If we also consider the jurisdictional phase, then States only prevailed 30% of the time in challenging jurisdiction at a tribunal.

In terms of damages claimed and awarded. Again, we look at UNCTAD data, as of the end of 2013, the average amount claimed by investors was $492 million, the average amount awarded was $81.4 million per claim. This data set does not even include another 14 cases initiated since 2014 where investors claimed for damages of $1 billion of more, nor does this include another 6 cases where the awards rendered exceeded $1 billion each, including the $50 billion award against Russia This is hardly "a few cents on the dollar" as Mr. Meyerstein put it.

Mr. Meyerstein also claimed "no laws are ever rewritten": From UNCTAD's data, we know as of the end of 2015, 26% of all 444 concluded ISDS cases were settled. We do not know the details of all those settlement agreements as they are among the best guarded secrets in this non-transparent industry. But we do know that as part of a settlement, Canada withdrew one law banning a product that was banned in most of the US after the US manufacturer initiated an ISDS arbitration, and did not renew a second law to avoid higher damages after another decision. Germany withdrew its measures against Vattenfall after an arbitration was initiated against it. Indonesia settled with investors who filed ISDS claims and provided special exemptions to those investors from the application of the law being challenged.

Mr. Meyerstein's data told him that the vast majority of ISDS claims were brought as a last resort. Our data tells us that the threat of ISDS is regularly used against governments even before a measure is adopted in order to fend of that measure or get a weaker one. We saw this used to fend off tobacco control measures most effectively over the past five years.

We respect Mr. Meyerstein’s right to use statistics as fit his objectives, but would also like to share our observations on this issue so that Mr. Meyerstein's use of his statistics will not be understood as reflecting the view of the meeting as to their correctness, simply as his opinion of what certain statistics reflect. We welcome any future open discussions on reform of dispute settlement mechanisms and other aspects of investment treaty reform.

Thank you!