



Fourth round of break-out sessions: Reform of investment dispute settlement International investment court¹

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1. The discussion mainly focused on the first question for consideration ("*Should an international court be created, which problems would it help to resolve?...*"), and the preliminary question of whether or not an investment court should be established. Overall, The experts were divided into two groups.

According to one group of experts investment arbitration worked well, and it could be improved in order to address well-founded, legitimate concerns. Among the advantages of the current system mentioned by some experts was the fact that the costs of the current system were mainly suffered by investors and States that were involved in actual investor-State dispute settlement cases, and not by the overall business community or founding States, as would be the case with the establishment *ex novo* of an international investment court. Among the disadvantages of establishing a new international investment court would be the need for significant financial contributions by States in order to fund the new court. Besides the funding issue, potential problems connected with the selection method of court judges were pointed out. Assuming that the founding States would appoint or elect those judges, it was noted that the claimant investors would be deprived of their right to participate in the constitution of the tribunal, as provided for by the current regime; as a consequence, investors' claims would be decided by judges exclusively appointed by the founding States (the respondent State included).

A second group of experts supported the institution of an international investment court. Some experts considered the establishment of an investment court as a long-term reform proposal that aimed at responding to the widespread legitimacy concerns raised by the current investment regime. While some experts called for further studies and research in this area, the need to develop more immediate and practical solutions addressing the legitimacy issues raised by the existing investment arbitration mechanism was also stressed. Among the legitimacy issues mentioned during the discussion were: i) the perceived lack of independence, impartiality and neutrality of arbitrators; ii) the loss of State sovereignty in favour of unaccountable arbitral tribunals; iii) the competence of ad-hoc arbitral tribunals on issues of public or general interest; and iv) the lack of an appeals facility. With regard to the latter, one expert observed that the proposal of an investment court would be best dealt with alongside the proposal of an appeals facility, which was discussed by a parallel session.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

2. A few experts provided their affirmative views on the second question for consideration which was whether or not "*other affected stakeholders*", besides investors, should have access to the proposed investment court. One expert proposed the institution of a world court on human rights-related matters.

3. The experts in the discussion made few observations on the third question for consideration (*What could be the basis of the court's jurisdiction? A multilateral treaty, individual IIAs, investment contracts, or other instruments?*). Some experts pointed to the need to link the proposed establishment of an investment court to a multilateral agreement, or (at least) a plurilateral agreement (open to third parties willing to access the agreement and join the investment court at a later stage). Another expert mentioned the difficulties for States to agree upon investment issues at the multilateral level. In this respect, the experts referred to the failure of the negotiations of the Organisation for Economic Co-operation and Development (OECD) on the draft Multilateral Agreement on Investment, as well as the failure of any attempts to further include investment matters in the World Trade Organization (WTO) framework.

4. Some experts referred to the WTO system, or the International Court of Justice (ICJ) as examples of best practices or for lessons learned. They could also be seen as possible forums to which investment matters might be deferred in order to solve (at least) the funding problems related to the institution of a new court. The issue of whether or not the two aforementioned forums could be alternatives to a new investment court was not discussed at length. One expert observed that the compulsory jurisdiction of the ICJ under the optional clause is far from being universally accepted. Several experts called upon UNCTAD and other organizations to further explore and study the option of creating an international investment court and related questions.