

Towards a Repository of Policy Options for IIA Reform

Meeting

Investment-Related Dispute Settlement: Reflections on a New Beginning¹

Multi-stakeholder Expert Meeting, International Institute for Sustainable Development (IISD), 17–18 October 2014, Montreux, Switzerland

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If investment-related dispute settlement mechanisms at the international level were to be built anew, what should they look like? That question was the focus of an interactive expert's meeting hosted by the International Institute for Sustainable Development (IISD) ("Investment-Related Dispute Settlement: Reflections on a New Beginning"), on October 17 and 18, 2014, in Montreux, Switzerland.

The meeting gathered a diverse group of over 20 experts, including academics, government officials and representatives of intergovernmental and non-governmental organizations. The group's expertise ranged from diplomacy, economics and law, to the fields of investment, human rights and trade.

The experts all agreed that the status quo of international investment-related dispute settlement was unsatisfactory and there was much room for reform and new thinking. One of the key topics experts focused on at the meeting was to explore **alternative models for settling investment disputes at the international level** to supplement or replace the existing mechanisms.

Experts considered following issues when evaluating the effectiveness of the models proposed:

- All experts made clear that **access to justice as well as the range of mechanisms available for resolving investment-related disputes needed broadening**; and they all proposed going beyond the participation of only state actors, or investors and states, and to include other stakeholders, such as individuals and communities affected by investment activities.
- All experts stressed the need for **alternative mechanisms** to resolve disputes, such as **mediation**. Some experts proposed an institution providing structured mediation and conciliation services. Other experts looked at a broader range of approaches, all including mediation, sometimes as a mandatory precondition to the more formal settlement of disputes, others offering more flexibility in the choice of tools or mechanisms. The experts agreed that mediation had to be open enough to be triggered by and involve actors beyond the parties involved in international investment disputes today, that is, states and investors. Furthermore, sufficient resources and processes needed to be put into place to allow for this broader involvement and ensure a more level playing field.
- Beyond mediation, experts also stressed the **importance of investigation and fact-finding** as an integral part of any new model. Some experts described this function as inspired by the inspection panels established in some of the development banks. For this model, the inspection panel phase would be a mandatory first step.

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.

- Most experts did not rule out the use of **arbitration**, though they put more emphasis on the need for a **judicial mechanism**, which most experts viewed as more independent and contributing to predictability than arbitration. Some experts also proposed using **appeals mechanism** as means to enhance accountability.
- All experts stressed the need for more balance between different actors and ensuring **even access to justice**. They explored various ways of ensuring **access to funds** through a dedicated funding mechanism with contributions from states, the private sector, or both, that could be used to pay for costs of mediation or dispute settlement. Third-party funding for victims of significant impacts of an investment was also mentioned and not ruled out. Finally, there was agreement on the need for **effective remedies** and **compliance monitoring**. Several groups relied on existing mechanisms (such as the New York Convention) playing a role.
- While all groups agreed that access to justice should be broad, they offered a number of different approaches to the **question of jurisdiction**. There was agreement that jurisdiction could be **based on express consent** through specific agreement of relevant actors, which could be states, investors, individuals, local communities and other interested groups. Some experts suggested that jurisdiction could also be **based on general consent incorporated in a treaty, contract or other instrument** (rather than in the instrument establishing the dispute settlement mechanism). In these instances, the subject matter would be determined through that underlying instrument. Instruments such as community development agreements, investment contracts, or any future binding instrument on business and human rights could also form this type of jurisdictional basis and refer disputes under those instruments to the proposed dispute settlement mechanism. Other experts proposed to establish a new treaty-based dispute settlement mechanism that would provide a type of **compulsory jurisdiction**, allowing both state and non-state parties to the treaty and nationals of a state party to bring claims if they can show a legitimate stake or interest. Here, jurisdiction would not have to rely on a special agreement or a treaty or contract. In this context, the subject matter jurisdiction would have to be further defined. This approach could extend to non-state defendants having allegedly committed a defined breach in the territory of a state party.

The discussions presented at the meeting illustrate that creative and innovative solutions can be found to resolve investment-related international disputes, although some of the technical issues would require further thinking and elaboration. The efforts of the participants in this meeting indicate the time is ripe for meaningful discussions for new approaches.