INVESTMENT-RELATED DISPUTE SETTLEMENT:

REFLECTIONS ON A NEW BEGINNING

Results of an IISD Expert Meeting held in Montreux, Switzerland, October 17–18, 2014

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2 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

TABLE OF CONTENTS

EXECUTIVE SUMMARY **3**

DISCUSSIONS **4**

FOUR MODELS FOR THE INTERNATIONAL SETTLEMENT OF INVESTMENT-RELATED DISPUTES **9**

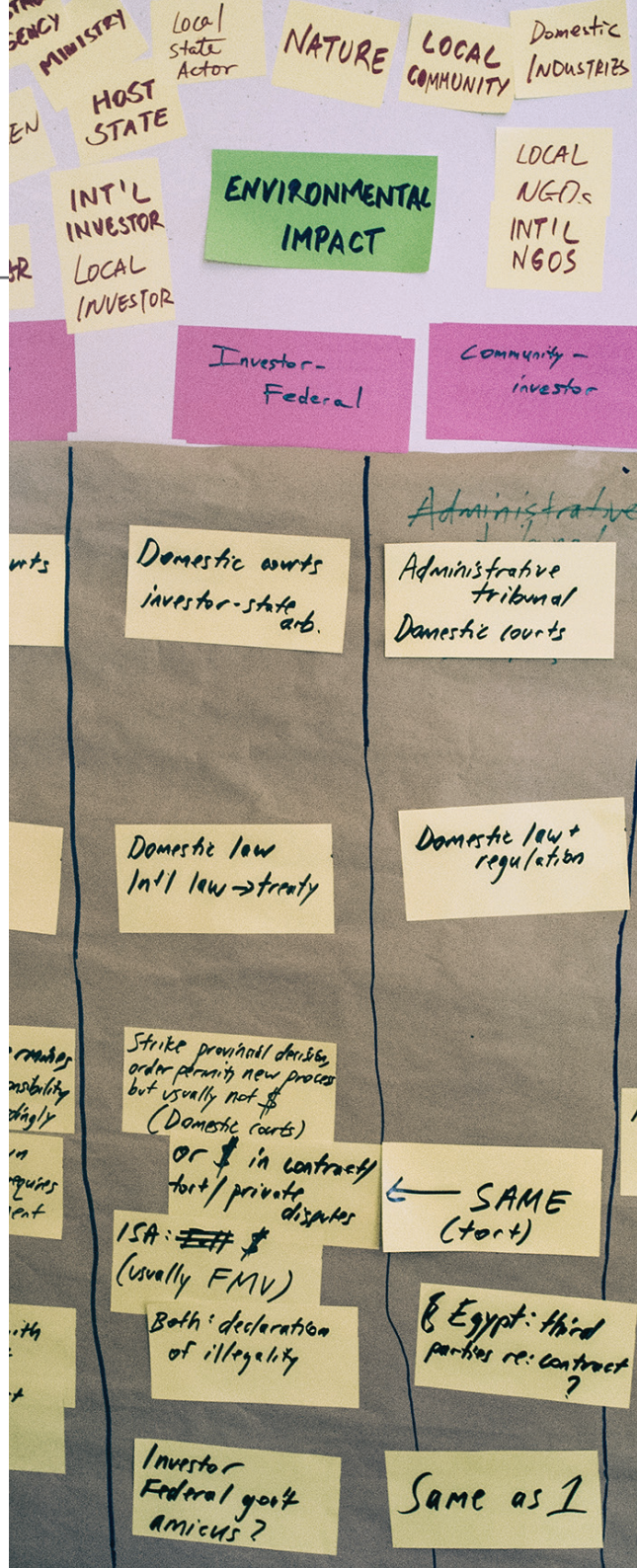
Group 1 Model: Toolbox for the settlement of investment disputes 9

Group 2 Model: International Investment Mediation Service (IIMS) 11

Group 3 Model: Multilayered dispute settlement procedure 12

Group 4 Model: Institution with judicial, investigative and mediation functions 13

FINAL REMARKS **15**



3 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

EXECUTIVE SUMMARY

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 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 the 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.
- 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 an **appeals mechanism** as means to enhance accountability.
- All experts stressed the need for more balance between different actors and ensuring **equal 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 a specific agreement** between relevant actors involved in a dispute, which could be states, investors, individuals, local communities and other interested groups. A jurisdiction clause could also be **incorporated in a treaty, contract or other instrument** (rather than in the instrument establishing the dispute settlement mechanism itself). In these instances, the subject matter would be determined through that underlying instrument. Instruments such as community

4 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

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 the establishment of 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 of new approaches.

DISCUSSIONS

What types of disputes are amenable to international dispute settlement? Between which stakeholders? Under what circumstances? And with a view to what types of remedies? These are some of the questions focused on during the opening day of the expert meeting. The purpose was to rethink the starting point for engaging international law and international dispute settlement in relation to investment disputes.

International investments create multiple forms of relationships. The experts recognized that the relationship between the investor and the state was not the only one that had already engaged international law, or that might be amenable to doing so in the interest of justice.

Foreign investment, like domestic investment, can create distinct relationships between the investor[1] and the government, the investment[2] and the government, the investor and the community where the investment is situated, the investment and local community, the government and the local community, and individual relationships between the investment and local people employed by or living in the vicinity of the investment. Just like not every element of the relationship between the investor and the host state government is properly the subject of international law, not every element of the other relationships will be, but this is not in itself determinative. In addition, the experts recognized that these relationships were based on rights, responsibilities and obligations that may run in both directions between the parties to the relationship, not just one. For example, investors do owe a number of obligations to the host state, as well as having certain rights in their favour from the state.

Some additional examples illustrate these general reflections of the meeting. For example, foreign investors have a responsibility to respect human rights. This is one form of relationship between individuals in the host state and the investment (and potentially the investor as well) that may have legal (international, national, contractual) and non-legal aspects, and is known to have created many disputes. Environmental damage or injuries to employees and local citizens can create a different form of relationship between the community or individuals and both the investor and investment, some of which already are the subject of private international law rules and international contracts. Thus, the experts saw the idea of recognizing a wider variety of relationships in relation to foreign investment as a reflection of both existing law and emerging trends.

Given the recognition of this broader set of relationships that do or could engage international

[1] The "investor" is the person or entity making the investment, and can be located anywhere in the world today.

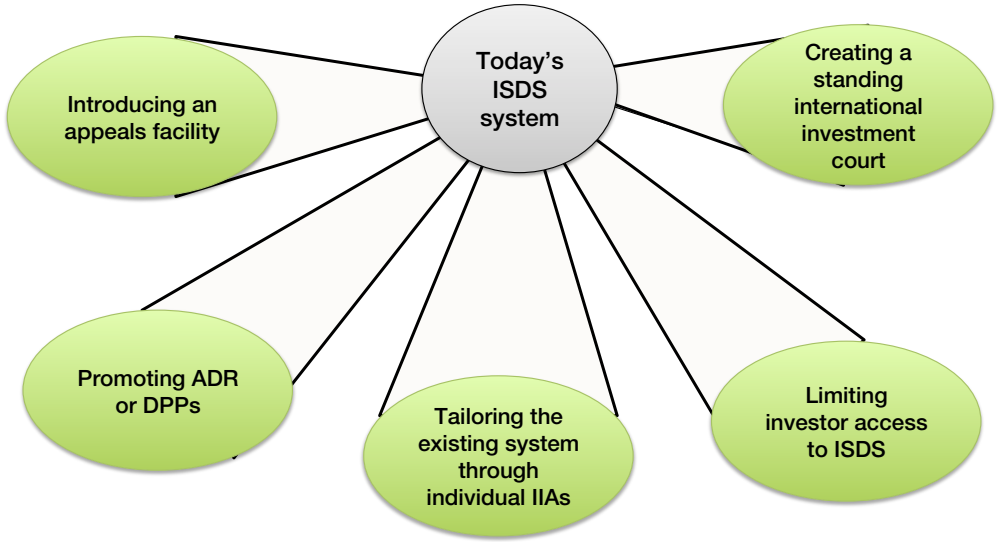
[2] The "investment," as the term is used here, is the entity that is created and operates in the host state and community, and has direct linkages, impacts, costs and benefits most immediately in relation to that community and host state.

5 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

law—and hence might reasonably be considered in rethinking dispute settlement mechanisms relating to foreign investment—the experts agreed that it was important to move away from the singular paradigm of solely focusing on investor rights and state obligations. Some experts further noted that despite very low interest rates and the profusion of liquidity following the financial crisis, investment in key areas such as infrastructure and green technology remains far below what is necessary to address social needs. Efforts to create an environment that promotes such investment, including different types of efforts to address investors' perceived risks could be further explored in order to redress this investment gap.

The experts discussed reform options and initiatives under consideration in different institutions and governments today, including at the domestic and regional levels. Among others, they discussed UNCTAD's five paths to reform of investor–state dispute settlement (Figure 1). They also considered what types of situations were amenable to international dispute settlement processes, and which stakeholders and actors should be able to participate in them. They noted that, as investment disputes often begin with simple problems that affect people's livelihoods, there should be early involvement of relevant actors in the dispute settlement process, by giving attention to processes (periodic meetings, grievance mechanisms and others) that help resolve such problems before they grow into an investment dispute ripe for litigation. They recognized that it is important to focus on maintaining healthy relationships not only between the investor and the state, but also between the communities and the government, and between the investor and the communities.

FIGURE 1. FIVE PATHS TO REFORM THE INVESTOR–STATE DISPUTE SETTLEMENT SYSTEM AS DEFINED BY UNCTAD



Source: UNCTAD World Investment Report, 2013

The experts agreed that the focus of rethinking the settlement of investment disputes at the international level should be on giving meaningful remedies to a wide range of actors and stakeholders that could suffer injury or damage. Under the current frameworks (Figure 2), investors and their investments generally are the only actors that have strong international tools available compared to other prospectively injured persons.[3] This is especially the case for more vulnerable actors, such as impacted communities and other victims of business-related human rights abuses. The experts confirmed the need for a strong role for local courts and remedies in relation to most of the stakeholders and relationships involved in investment issues leading to disputes. They expressed a preference to have issues adjudicated in local courts and proceedings, and identified exhaustion of local remedies as a preferable but not always required element for

[3] There are some exceptions to this due to contractual provisions that provide remedies for local community stakeholders in some instances.

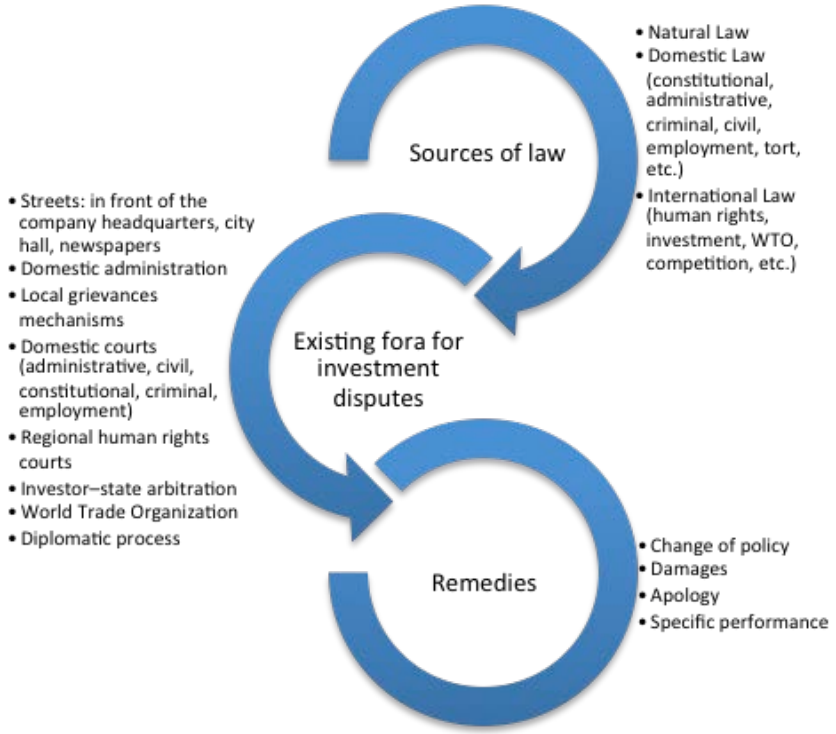
INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

access to dispute settlement at the international level. They also identified a need to reach a balance between the strong policy reasons recommending exhaustion of local remedies and the danger of its abuse by local authorities to delay justice.

The experts recognized the need for meaningful international remedies to be available in a wider variety of circumstances than is the case today to ensure that justice can be achieved in situations that are not easily amenable to justice at a national level. They also agreed on the need to develop criteria that would allow identifying these situations before they are submitted to international dispute settlement. While they did not have the opportunity to go as far as listing those criteria, they did discuss some examples that illustrate both the opportunities and the complexities. For example, in a Bhopal-type scenario, local individuals might seek recourse for injury or death against the local investment and the foreign investor through an international process where both can be equal parties. This differs from resorting to domestic courts, where the investor or the investment could raise jurisdictional barriers, such as *forum non conveniens*. The same situation could see opportunities for international mediation processes, even where adjudicative processes may not be available.

Regarding the forms of international dispute settlement that might be most useful, the experts considered that the discussion should be guided by the types of remedies that each form offers, and whether they are appropriate to each situation. They pointed out that a litigation-type approach leading to monetary damages might not necessarily be the most appropriate in every situation (for example, in some human rights cases, the most appropriate remedy might be recognition and an apology). Some experts emphasized the effectiveness of conciliation and mediation in solving disputes that had a significant political dimension to them. Others indicated that alternative non-adjudicative processes such as conciliation and mediation tend to take second billing in comparison with the more adjudicative ones, such as arbitration and judicial proceedings, when damages are the most important remedy. Yet the experts recognized that pairing adjudicative processes with preliminary mediation processes was a growing practice in this space as well. During the discussions, they developed an initial series of pros and cons of various forms of resolving disputes at the international level (Table 1).

FIGURE 2. IDENTIFYING CURRENT FRAMEWORKS FOR RESOLVING INVESTMENT-RELATED DISPUTES



INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

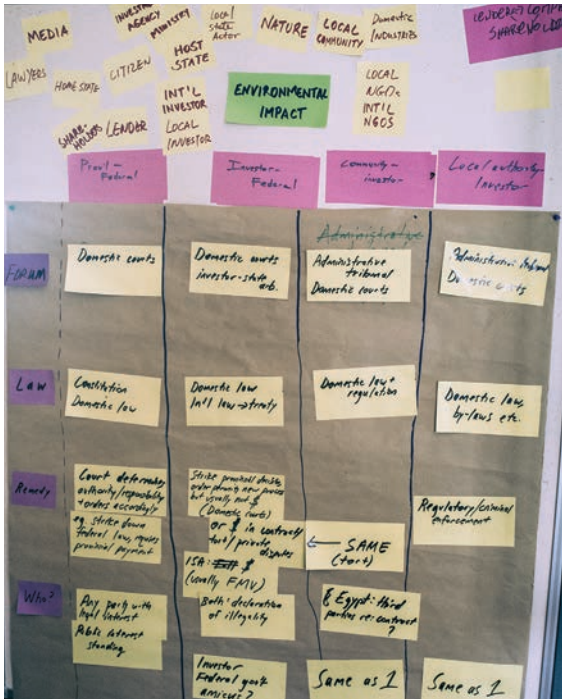
TABLE 1. EXPLORING DIFFERENT INTERNATIONAL APPROACHES FOR SETTLING INVESTMENT-RELATED DISPUTES

FORM OF INTERNATIONAL DISPUTE SETTLEMENT	PROS	CONS
Adjudication (international courts)	Consistency in decisions (jurisprudence) Reduced conflicts of interest of adjudicators Development of expertise Predictability Transparency	High costs Complexity of securing state consent (unfeasibility) Overlap with existing forms of dispute settlement Lack of accountability
Arbitration	Flexibility Expertise in some instances Neutrality (possibly) Monetary remedies Enforcement mechanisms	High costs Increasingly lengthy proceedings Inconsistency in decisions Broader interests and stakeholders can be ignored Unpredictability Marginalization of local communities Conflicts of interest
Conciliation	Informal Practical Early intervention (before dispute escalates) Limited role of lawyers Broader stakeholder participation Lower costs	Not mandatory Possibility of no outcome Lack of binding outcomes Broader stakeholders can be ignored Little experience (infrequently used) Lack of enforceable remedies
Mediation	Ability to meet parties' interests Reduced costs Limited role of lawyers Broad stakeholder participation possible Help in framing the dispute Broader issues brought to the table Help in rebuilding relationships Focus on resolving rather than settling disputes Flexibility	Not mandatory Possibility of no outcome Lack of binding outcomes Potential marginalization of weaker parties Lack of enforceable remedies Need for experienced mediators with multidisciplinary knowledge High costs if arbitral or judicial proceedings are needed after a failed mediation
Monitoring and reporting system (carried out by international inspection panels)	Open access Timeliness Reduced costs compared to arbitration or judicial settlement Success stories in changing corporate behaviour	Lack of remedies or penalties Need of capacity Complexity Lack of enforcement mechanisms Difficult to ensure jurisdiction over disputes

8 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

The experts discussed the resolution recently adopted by the UN Human Rights Council on elaborating an international legally binding instrument on business and human rights, and recognized that introducing human rights issues into the mix of issues relating to investment-related dispute settlement was important, but could also increase the complexity in some instances. Still, they generally agreed that the link between the human rights responsibilities of businesses and investment dispute settlement should be further strengthened. This included both better recognition of human rights issues in investment-focused processes, and of investment issues in human rights processes. In particular, it would be important to consider the potential roles of existing complaints procedures available under the UN system and under specific regional human rights treaty systems. It was also useful to examine the role of ad hoc commissions of inquiry, truth and reconciliation commissions and other transitional justice methods. Some experts suggested that regional human rights bodies and the International Criminal Court should strengthen their roles in protecting human rights and could play a more relevant role in settling investment disputes.

The experts considered that the potential of mechanisms to be more inclusive was a very important element for future development in this area. Their broad view was that, for any mechanism to be successful, it had to be inclusive of all key stakeholders in a dispute, both as "plaintiffs" or "defendants" and as non-litigating third parties, with access to justice as a primary value in designing and using a system.



BOX 1. UN Human Rights Council Resolution 26/9

On June 26, 2014, the UN Human Rights Council adopted (by a record vote of 20 to 14, with 13 abstentions) a resolution (A/HRC/RES/26/9) to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The following states voted in favor of the resolution: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela and Viet Nam.

9 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

FOUR MODELS FOR THE INTERNATIONAL SETTLEMENT OF INVESTMENT-RELATED DISPUTES

then developed some ideas of what forms investment-related dispute settlement might take. Four working groups were established, with each group free to choose their own direction and models. The goal was to develop ideas that reflected the discussion and would address some of the key issues, such as access to justice, inclusiveness, and others, rather than legal completeness at this stage of discussion.

GROUP 1 MODEL: TOOLBOX FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Overview

The first model aims at facilitating access to a "toolbox" consisting of ad hoc mechanisms for the settlement of investment disputes. It builds on and complements existing processes, and aims at offering solutions to disputes through negotiation, facilitation, conciliation, good offices, mediation, arbitration, litigation, and judicial or quasi-judicial processes. It also foresees incident-specific or recurrent monitoring mechanisms through inspection or self-reporting.

Access

The different tools would be available to a range of stakeholders according to their choice, including investors, states, local communities, civil society organizations, etc. There would be a need for agreed acceptance in each instance.

A key challenge lies in facilitating access to and ensuring agreement on the use of individual tools. For example, the toolbox could offer mediation and good offices procedures to ensure that agreement could be reached on the tool to be used. Poor and other marginalized communities should receive resources to foster and facilitate their access to the tools available, as well as effective participation in processes initiated by others when warranted.

Model 1: Toolbox

- *One-stop shop of ad-hoc mechanisms*
- *Accessible to a wide range of stakeholders*
- *Managed by "an institutional anchor"*
- *Wide selection of remedies with enforcement & compliance mechanisms*

The mechanism could be referred to for jurisdictional purposes, including mandatory jurisdiction of businesses, pursuant to international investment agreements or other treaties, investment contracts and domestic laws.

Structure

The toolbox would be managed by an "institutional anchor" to fulfill a few basic functions and offer limited institutional support. These would include, among others, (i) informing stakeholders about the

available tools (outreach); (ii) assisting in the choice and ultimate agreement on the best (possible) tool; and (iii) facilitating the use of the tool, by means of linking up with and sourcing expertise from the respective tool or mechanism. It would also provide an institutional structure to support implementation and enforcement of agreed decisions or adjudicated awards.

Relationship to existing mechanisms and processes

The mechanism would source the skills, expertise and institutional structure needed from selected existing mechanisms, and would be linked to existing instruments to provide a basis for jurisdiction and enforceability. Issues such as fork-in-the-road and res judicata would have to be addressed to avoid the toolbox from being used as one element of multiple remedies, although sequencing the various options in the toolbox to ensure an effective result would be encouraged.

The experts were unsure whether to include traditional investor–state dispute settlement in the toolbox. They recognized the danger that arbitration could potentially "hijack" the other tools in the box, being resorted to more frequently than the other mechanisms due to its current design and one-sided access—at least under treaties. If investor–state dispute settlement were included, there would be a need to promote the use of other mechanisms available or adapt the conditions for initiating investor–state dispute settlement to ensure it did not preempt the value of access to justice for all affected stakeholders.

Remedies, compliance and enforcement

In terms of enforcing and ensuring compliance with the outcome, the remedies that could be granted would depend on the tool chosen. The mechanism would require users to report which decisions or agreements were complied with and how. Publicity and transparency of the outcome would also help ensure compliance. Enforcement could be based on the New York Convention, particularly when issues involve monetary awards; other enforcement mechanisms would have to be considered for other tools or types of remedies.

Institutional architecture and home

Some experts suggested that the mechanism could be web-based, counting on a reduced number of supporting staff; or housed under an existing institution. Alternatively, a new independent institution could be formed. As to public accountability, the mechanism could report to the United Nations General Assembly, for example.

GROUP 2 MODEL: INTERNATIONAL INVESTMENT MEDIATION SERVICE (IIMS)

Overview

The second model suggested was an institutional design for an International Investment Mediation Service (IIMS), composed of mediators and conciliators, based on a standing body or ad hoc panels, and with a permanent secretariat and staff.

Access

While the IIMS would be broadly accessible to all stakeholders, from local communities to states to investors, some experts suggested that this would raise the issue of pre-screening: structures and standards necessary to determine which issues are the most appropriate for settlement by the IIMS. The experts also explored the possibility of establishing consolidated national focal points for the service, a mechanism that exists in other contexts and has been proven useful in allowing communities to bring claims against multinational corporations.

Funding

The experts acknowledged that options for funding should be carefully explored to ensure the success of the service, and that party funding, while considered an option, could lead to imbalances, given that some parties have extensive funds while others have very limited resources. Other funding options would have to be explored, such as state contributions through a membership structure, a voluntary fund with contributions from a few "benevolent" countries, and public and private entities.

Encouraging access and ensuring engagement

The experts considered the contractual conditions of the IIMS, that is, the means to get all the parties to the table once the dispute was brought before the institution. For example, experts suggested that international financial institutions could condition lending to the acceptance of a provision on mandatory IIMS mediation. A similar clause could be included in new international investment agreements and investment contracts. Furthermore, a mediation culture could be fostered among judges and arbitrators, who could order mediation prior to asserting jurisdiction, as is the case with court-ordered mediations in the United States.

To encourage the parties to come forward and participate, the rules of the IIMS would direct all stakeholders involved to treat the process confidentially and agree that nothing coming in or out of mediation could be used in arbitral or judicial proceedings. The proponents recognize that the option for confidentiality has pros and cons: while it may enable the parties to reach agreement, the lack of transparency may harm the public interest—although ideally the public interest would in some way also be represented in the mediation process.

Model 2: Mediation & Conciliation

- *Mediation & conciliation service with a permanent secretariat and staff*
- *Broad accessibility subject to filtering process*
- *Inclusive*
- *Confidential*
- *Remedies include voluntary measures consented by the parties*

Remedies, compliance and enforcement

As is normally the case with mediation, all remedies would be voluntary and agreed upon. The mechanism would have one single tier: if no agreement is reached, parties could still resort to arbitration, litigation or other means of dispute settlement. Here, the IIMS could be linked to other institutions or the toolbox under Model 1. If the parties do reach agreement, the IIMS would not have any power to compel it, but could assist in monitoring its implementation and resolving disputes on its application or interpretation.

GROUP 3 MODEL: MULTILAYERED DISPUTE SETTLEMENT PROCEDURE

Overview

This model proposes a multilayered dispute resolution procedure governed by rules generated through a multistakeholder process. The rules and principles generated through such process should eventually be adopted by states through a binding treaty under which state parties submit themselves as well as their nationals to the jurisdiction of an international institution. The procedure would begin with a compulsory fact-finding inquiry process conducted by an inspection panel for the purpose of identifying the parties and issues, as well as screening out the investors who intend to abuse the right to initiate cases. Following the inquiry process, parties could be guided to a voluntary mediation process. If the mediation failed to resolve the dispute within a prescribed timeframe, either an international court or an arbitral proceeding would adjudicate the dispute, as agreed by the parties. The treaty would be modelled after the United Nations Convention on the Law of the Sea: at the time of entering into the treaty, a member state would be required to choose between the judicial or arbitral proceedings as its preferred means of settling disputes; the treaty would also provide that the international court would be the default forum if parties disagree at the time of dispute, or if at least one of them, when entering the treaty, failed to indicate their preferred means of dispute settlement. Individuals or public or private entities resorting to the procedure would be bound to the means chosen by the state of which they are nationals.

Access

Although the system would be set up by the states, access to it would be available to states as well as any natural or legal persons of the member states who had demonstrated a legitimate stake or interest in the dispute protectable under domestic or international law. Some experts suggested that determining who can intervene or appear as *amicus curiae*, and the extent of their participation in the proceedings, could be modelled after domestic procedural laws.

During the adjudicating process, the system might also be open to participation by other non-litigating stakeholders, such as civil society organizations.

Levels or instances of review or appeal

The decisions of the international court would be subject to review by an appellate body established by the treaty. Seven people or more would form the appellate body, building on the European Court of Human Rights and the Appellate Body of the World Trade Organization as models. The decisions rendered by the appellate body, or the initial body if not appealed, would be final and binding to all member states and non-state parties to the dispute. The arbitral award, on the other hand, would be final and binding on the parties once rendered. No appeal would be allowed if the parties agree to submit the dispute to arbitration, but the parties could resort to an annulment procedure if provided for by the arbitration rules or the applicable treaties.

Model 3: Multilayered Procedure

- *Rules generated through multistakeholder process*
- *Mandatory inspection and fact-finding phase with voluntary mediation*
- *Choice between arbitration or judicial procedure with judicial as default.*
- *Appeals process in some cases*
- *Open to participation of non-disputing parties*

Remedies, compliance and enforcement

The decisions of the court or appellate body would be enforceable by any domestic court of the member states. The enforcement of arbitral awards would follow the existing system available to commercial arbitrations. Both the New York Convention and the ICSID Convention systems could be used for enforcement.

13 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

GROUP 4 MODEL: INSTITUTION WITH JUDICIAL, INVESTIGATIVE AND MEDIATION FUNCTIONS

Overview

The model developed by group 4 was a treaty-based international institution with a broad mandate and powers. Rather than relying on international investment agreements or contracts, a new treaty establishing a new international institution would draw on existing standards of corporate conduct and labour rights, and make them binding and enforceable. The institution would ultimately have a judicial function, which would lead to meaningful remedies; however, it would also offer investigative and mediation functions.

Upon receiving a complaint, the judicial function of the institution (and its filtering arm) would determine whether to take on the case and whether it is more suitable to be addressed by the judicial, investigative or mediation function, in accordance with a pre-established filtering process by considering factors such as the nature of the dispute, the claimants' access to other forums, their regional representativeness, the egregiousness of the alleged violation, the likelihood of deterrence, and the size of the respondent (for example, larger companies would deserve greater attention). The filtering body could provide guidelines to facilitate complaints that were less likely to proceed under existing mechanisms and processes, such as representative or organizational claims on behalf of groups or communities, and to reflect the filtering factors outlined above. The proponents recognized that, as a result of the filtering process, the institution would normally dismiss smaller or less egregious complaints. To give a chance for the complaints eliminated by the filtering process to make it to the institution's docket, the model proposed that a minor percentage of the resources available to the institution (10 per cent, for example) would be allocated to randomly selected complaints.

Once the institution decided to hear the case, the parties could first go through the mediation process within the institution. If the dispute could not be resolved by mediation, it would be submitted to a first-instance adjudicative process composed of one of the adjudicators. The adjudicator's decision would be subject to review by an appellate body composed of three or more adjudicators, or by the full plenary.

Access

The institution would be broadly accessible to all stakeholders involved in an investment-related dispute. There would be no requirement of consent by the party against which the complaint was brought (for example, a company). By ratifying the treaty, each state would give the institution jurisdiction over all persons involved and disputes resulting from behaviour occurred within that state's territory. Thus, even nationals of non–contracting states could be subject to the institution's jurisdiction, so long as their conduct occurred within in the territory of a contracting state.

Model 4: International Judicial Mechanism

- *Treaty-based institution with judicial, investigative and mediation functions*
- *Broad accessibility subject to filtering process*
- *Roster of adjudicators composed of local judges and eminent individuals*
- *Remedies include monetary damages and specific performance*
- *Appellate review body*
- *New York Convention or an ICSID-type enforcement approach*

Composition

The judicial function of the institution would be carried out by a panel of adjudicators composed of local judges and eminent individuals and would be administratively accountable to a chair selected from the panel of adjudicators. The optional investigative and mediation functions, on the other hand, would be carried out pursuant to their respective internal structure, but both would be administratively accountable to the independent judicial branch of the institution.

14 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

Relationship to existing mechanisms and processes

The experts suggested that, ideally, the treaty establishing the new institution would replace ad hoc investor–state arbitration entirely; all disputes would be channelled to the new institution. Alternatively, the new model could exist alongside ad hoc investor–state dispute settlement. It would be a supplement to ensure an enforceable and meaningful remedy for injured persons who do not have access to the existing mechanisms, rendering awards against large companies and states. The latter option, even though leading to a parallel and potentially more chaotic system, could fill the existing gap.

Institutional architecture and home

Some experts proposed that the home of the institution could be in one of the BRICS countries (Brazil, Russia, India, China and South Africa). They further suggested that the institution could also establish regional offices and roaming adjudicators so that the investigators and adjudicators would be closer to the evidence and the parties. Another option would be for adjudicators themselves to choose the legal seat of a specific proceeding.

Remedies, compliance and enforcement

The remedies determined by the adjudicators would encompass not only monetary damages, but also specific performance remedies, including orders for member states to change their domestic policies, and other sanctions. Similarly, when a dispute arose from an alleged wrongful conduct, the wrongdoing party should be given the opportunity to mend its conduct first; monetary remedies would be justifiable after it had been proven to be unwilling or unable to change its conduct. Under this model, the decisions of the adjudicators would qualify as awards under the New York Convention. In addition, the treaty establishing the institution would establish an enforcement mechanism similar to the one established by the ICSID Convention.

15 INVESTMENT-RELATED DISPUTE SETTLEMENT: REFLECTIONS ON A NEW BEGINNING

FINAL REMARKS

The issues considered by the experts when developing the models above exemplify what one would face when trying to think anew about the scope and role of international law and international dispute settlement processes in relation to international investment. At the same time, the above illustrates that creative and exciting solutions can indeed be found, some more comprehensive, yet all innovative. Approaching reform discussions in groups and proposing possible solutions helped identify some of the issues that require further thinking and elaboration. Given the wide interest today amongst states wishing to reform or move away from the current investor–state arbitration model this is good news. For those specifically seeking to build a new binding instrument on business and human rights today, this is also good news.

IISD will continue to lead the search for innovative and viable solutions to the issues identified in the meeting and summarized in this report. The options discussed will be further developed with colleagues, and will also be tied to the issues of investor obligations and responsibilities in a more thorough manner. The efforts of the participants in this meeting indicate both the need for and the feasibility of these objectives.

LIST OF PARTICIPANTS

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