



INVESTMENT-RELATED DISPUTE SETTLEMENT

Towards an inclusive multilateral approach

Results from an IISD expert meeting held in Montreux, Switzerland, May 23–24, 2016
IISD Investment and Sustainable Development Program

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Q2. Q. 1. GENERAL

FINANCING - apportioned?

Stakeholder - could this be improved?

Direct Litigation - relying on Contract / Agreement

ACCESS to Justice

DEF: What is a Dispute 25.1 \equiv P.A

State -> Could it interfere -> 57.a.

Express act to Parallel Proceedings

INT ORCS? Jurisdictional Powers (including...)

State? -> Give jurisdiction

19. IV. NECESSARY

Community ...

Could it sue? No Art 19 Agreement?

ART 57.a. PROBLEM

ELIGIBILITY - accept if sued by OTHER PARTY

IGNORANCE of INVESTMENT

VCLT issue? "content" Art 32 31.2

Principles C.I.L.? Causality

3rd Parties Counterclaims

Art 20 LANGUAGE

interest assets \neq intangible

Corruption: WDF case

interest -

Locus Standi

standards \neq Principles PP

Community "identifiable interest"

ACUTE?

GOLF HOTEL NEW CAFF



BACKGROUND AND INTRODUCTION

In October 2014, IISD convened a meeting of academic, government, civil society and international organization experts in Montreux, Switzerland to discuss a simple question:

If investment-related dispute settlement mechanisms at the international level were to be built anew, what should they look like?

While the question may be simple, the responses were complex and multi-layered. The full report of the meeting can be found at <https://www.iisd.org/publications/investment-related-dispute-settlement-reflections-new-beginning>.

EMERGING ELEMENTS OF A NEW REGIME

Despite the complexity of the responses, there were areas of consensus. The most critical, in our view, in terms of framing next steps, were the following:

1. The current range of international mechanisms available to deal with investment-related disputes is too narrow, with the predominant focus on arbitrating alleged breaches by governments of international treaties and contracts.
2. This focus is too narrow for several reasons:
 - a. It is tied to alleged breaches of obligations between only two stakeholders: investors and governments. Other stakeholders—communities and workers, for example—are



- not permitted to act as claimants or parties in a dispute.
 - b. It is based on two primary sources of law: international investment treaties and international contracts. This leaves out a wide range of international and domestic law, including human rights, labour and environmental law, that may also be relevant to initiating or resolving disputes.
 - c. It follows a commercial arbitration model, which raises a number of issues for the resolution of disputes that involve public bodies and policy.
 - d. While it allows for—and in some cases encourages—mediation, the predominant thrust is adversarial. Attempts to improve mediation and other forms of dispute resolution have not been overly successful to date.
3. Consideration of the above suggests a number of elements for inclusion in a new international regime to address investment-related disputes:
 - a. It should be inclusive, allowing access to justice for all stakeholders. Thus, avenues to engage the regime should be developed for investors, governments, communities and individuals.
 - b. It should address the variety of legal and actual relationships involved in transnational investment, for example:
 - i. Government–Investor
 - ii. Investor–Community (or Citizen)
 - iii. Government–Citizen (or Community)



- c. It should have a broader legal basis in order to address more than alleged breaches of investment treaty obligations or investor–state contracts. For example:
 - i. International law, relating to obligations of governments and corporations in the context of national and international investments, including instruments such as the binding treaty on business and human rights currently under negotiation.
 - ii. Contractual obligations that establish rights in favour of communities and individuals, as well as the type of direct agreements between investors and communities that are becoming increasingly utilized today.
 - iii. Domestic law relating to the investment and the rights of potentially impacted individuals, including labour law, environmental law and others.
 - iv. Standards established by or for the private sector, such as the Equator Principles for banks.
- d. The jurisdictional basis to access the new dispute settlement mechanism should be incorporated in these instruments, as well as investment treaties and investor–state contracts.
- e. The new dispute settlement mechanism could consider the possibility of some form of compulsory jurisdiction, under the condition that jurisdictional requirements are not “expanded” by loose interpretation of specific requirements.
- f. It should integrate a variety of dispute resolution options, including approaches to lowering confrontation. These options, many experts believed, should commence at the local level, where direct and immediate dialogue between the disputing parties can occur most easily and naturally.
- g. At the same time, the regime must be disciplined, rule-based, and efficient for all users. It must permit access for various stakeholders and must be unbiased and free of conflicts of interest.
- h. Enforceability of the outcomes of any given dispute resolution process should be given due consideration and linkages to existing mechanisms taken into account.
- i. It should be sensitive to the uneven resources available to different stakeholders, and should include mechanisms to ensure that a lack of resources is not a barrier to accessing justice.

The executive summary of the 2014 meeting report concludes that:

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.

CHANGING INTERNATIONAL LANDSCAPE

Since the meeting in October 2014, there have been some important developments in international practice regarding investment-related dispute settlement. Domestic courts in several countries, including Australia, Canada and the Netherlands, have become more assertive in assuming jurisdiction over investors for alleged misdeeds or liabilities of their investments, recognizing the need for more governance for overseas conduct of transnational businesses and the need to ensure legal responsibility for their decision making.

Also, states, legal scholars, and civil society more generally have become more aware of the need for significant reforms in the realm of the increasing number of international disputes between investors and governments that implicate public law and public policy. At the same time, lobby groups against any reform, backed by a number of international law firms, have emerged, adding complexities to the strategic landscape going forward.

Finally, and most importantly, the European Union has proposed an international investment court, signing agreements with Canada and Viet Nam that replace investor–state arbitration with a defined judicial process, including an appellate mechanism. These groundbreaking agreements also include clearer obligations relating to jurisdiction, making deliberate choices on key aspects of debates around corruption and fraud in the making of an investment.



MAY 2016 EXPERT MEETING

Building on the previous expert meeting and recent developments, IISD prepared a **Draft Agreement Creating an International Dispute Settlement Agency for Transboundary and Other Investments** as a basis for the discussions. An initial draft was completed and distributed to meeting participants shortly before the May 2016 meeting, and participants considered and critiqued elements of the draft outline, suggested alternative approaches and identified additional resources and sources to consider. Participants also discussed institutional and strategic options for further development of an institutional basis for an expanded international regime for the resolution of investment disputes.

Throughout the discussion, participants were cognizant of the fact that no matter how good a dispute settlement system could be, it would not resolve problems relating to incomplete or inadequate law. Therefore, the discussion on dispute resolution at the international level necessarily involves an anticipation of additional changes to the substantive elements of international investment law and of international law more broadly as it relates to both domestic and transnational investment, for example, processes relating to business and human rights.



On May 24, Nobel Prize laureate Professor Joseph E. Stiglitz paid a surprise visit to the participants and shared with them his views on the current state of play of the international investment regime.

DRAFT TEXT OF AN INTERNATIONAL AGREEMENT

The draft text discussed was intended to focus and enhance the discussion by giving some concrete ideas and language to consider and reflect upon. The goal was not to engage in a technical edit but to be able to visualize how different elements may relate to each other and help digest many of the complexities that will emerge in the design of a comprehensive multilateral mechanism to resolve investment-related disputes.

The discussions centred on:

- Jurisdiction: what disputes could be brought to new with dispute settlement agency or agencies (“Agency”)
- The types of functions the Agency could cover, including fact-finding, mediation, and dispute settlement
- Enforcement
- Composition and structure of the mechanisms
- Financial mechanisms and access to justice
- Potential institutional homes



TOPIC 1 – JURISDICTION

Participants discussed what types of disputes should be resolved in the proposed multilateral Agency on investment. The discussion also focused on both personal jurisdiction (jurisdiction *ratione personae*) and subject matter jurisdiction (jurisdiction *ratione materiae*).

RELEVANT EXCERPTS FROM THE DRAFT AGREEMENT

DRAFTING NOTES:

The draft text takes a broad approach, aiming to accommodate a wider range of stakeholders and circumstances. The intention is to have an instrument with broad jurisdictional coverage without laying out specific substantive rights and obligations. From this perspective, the approach is comparable to the Convention on the Settlement of Disputes between States and Investors of Other States (ICSID) Convention. As in the ICSID framework, “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention ... be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration” (Preamble). At the same time, the proposed Agency goes beyond the scope of ICSID, which covers only investors and states. Although its scope also relates to investment disputes, the Agency would be competent to resolve disputes between a range of stakeholders, including communities or individuals affected by an investment. The proposed system is a two-tier jurisdictional system with broad (potential) jurisdiction for the Agency and the key jurisdictional scope and limitations set out in the other agreements or laws. The key issue will be

EXCERPTS – SECTION I OBJECTIVES

The objectives of this Agreement are to establish a Dispute Settlement Agency that is inclusive of all stakeholders in the transnational investment process, and that provides opportunities to resolve disputes through various means in order to ensure harmonious relationships between government, business and communities.

The Dispute Settlement Agency shall be available to resolve

- a. disputes in relation to transnational investments, and*
- b. disputes concerning the interpretation or application of international law or international principles in relation to an investor or its investment.*

how to ensure proper interpretation of those other agreements by the Agency rather than delimiting the Agency’s jurisdiction in the Draft Agreement.

An objectives article sets the stage for both subject matter jurisdiction and broad personal jurisdiction.

Section II (Definition) and Section IV (Jurisdiction) of the current Draft Agreement contain some key jurisdictional provisions that define the scope further. One key definition for determining personal jurisdiction is the term “stakeholder,” which includes terms further defined in turn, such as “business entity” and “community.” The definition was inspired by the approach taken by the World Bank’s Inspection Panel’s Standard Operating Procedures (adopted in 2014), which accept requests from “two or more people with common interests and concerns who claim that they have been or are likely to be adversely affected by a Bank-financed operation.”

EXCERPTS – SECTION II DEFINITIONS

***Stakeholder** means a person, business entity, community or government that is associated with, impacted by, or otherwise has an identifiable interest in the establishment and operation of an investment. [The State Parties understand this should be interpreted broadly within the spirit of inclusiveness endorsed by this Agreement.] ...*

***Community** means [two or more persons, such as an organization, association, society or other grouping of individuals, with common interests or concerns]. ...*

***Business entity** means any form of business enterprise legally established in accordance with the laws of the state in which it is established.*

In addition to definitions required for determining personal jurisdiction, the text sets out key terms with respect to the material coverage of disputes. Disputes covered include transnational investments and disputes that involve the interpretation of international law or international principles relating to investment, such as international human rights law. The term “international principles” is broadly defined to include principles or policies, such as the Equator Principles, adopted by commercial banks.

EXCERPTS – SECTION II DEFINITIONS

***International principles** mean principles adopted by international governmental and non-governmental organizations that have achieved significant acceptance and use in international investment practice, or such principles as are expressly agreed by stakeholders to apply in relation to a given dispute. (The Equator Principles, IFC Performance Standards and UN Principles on Business and Human Rights are examples.)*



With this broad approach in mind, the text spells out seven scenarios that provide a basis for jurisdiction:

- a. The parties to the disputes have agreed in an ad hoc agreement.
- b. The parties to the dispute have agreed in a treaty, contract or other instrument.
- c. The investor has agreed to be bound by obligations under a treaty and to be subject to the jurisdiction of the Agency.
- d. The domestic law of the host state or home state expressly provides for the submission of a dispute between the investor and another stakeholder to the Agency.
- e. A State Party has declared in the present text that it recognizes the jurisdiction of the Agency as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation.
- f. A transnational investor has declared in advance that it accepts the jurisdiction of the Agency in relation to a transboundary investment, whether concerning a specific issue or in general terms.
- g. Another treaty establishes compulsory jurisdiction over a business entity and the conditions set out in the treaty for this are fulfilled.



DISCUSSIONS

CLARIFYING TERMS AND DEFINITIONS

Participants discussed the jurisdiction article and selected definitions. They acknowledged the breadth of the Draft Agreement and the objective of adopting an inclusive approach when defining terms and listing the grounds for jurisdiction. This was especially important because of the two-tier approach on jurisdiction, according to which the jurisdictional limits are primarily determined in the principal agreement or law which refers the settlement of disputes to the Agency and its rules. While noting this stated objective, several participants suggested that certain terms as currently defined in the Draft Agreement, including “stakeholder” and “community,” require further clarification. It was not clear whether current definitions covered certain economic actors, such as international financial institutions, international organizations, civil society organizations and domestic investors. In addition, questions were raised on what constitutes “interest” given that the term “stakeholder” is defined as “a person, business entity, community or government that is associated

with, impacted by, or otherwise has an identifiable interest in the establishment and operation of an investment.” For example, would this cover all collective interests commonly seen in environment-related disputes? It was suggested that a looser test might apply to fact-finding (if non-binding) and possibly mediation, and that jurisdiction for a non-binding process could be generally more flexible than for a binding one. Participants also discussed the need to differentiate right of action from right of intervention, as well as the right to initiate cases from the right to bring claims. A few participants also suggested that, in order to avoid confusion, the concepts and language used in respect of the activities of the Agency should be better integrated into the conceptual framework of international dispute settlement. It was further suggested that the language barrier should be considered when drafting the instrument, as terms such as “stakeholder” may be difficult to translate or have drastically different meanings in different languages.

Participants also explored the idea of defining the terms from the perspective of the impact of investment activities rather than trying to identify particular economic actors. One participant suggested, for example, that instead of listing the possible grounds for personal and subject matter jurisdiction of the Agency, the jurisdictional provisions could be formulated as a negative list, excluding the persons and matters that may *not* be brought into the jurisdiction of the Agency.

A number of participants addressed the importance of flexibility in determining jurisdictional issues so that jurisdictional thresholds do not prevent access to justice. For example, the definition of “investor” as currently drafted may exclude claims



intentionally raised against shell companies precisely for jurisdictional concerns. In this regard, one participant noted the possibility of using the Draft Agreement as a guiding instrument by only specifying guidance or criteria to articulate jurisdictional reach, and allowing the Agency to determine its jurisdiction on a case-by-case basis. Another participant suggested that, as long as the Draft Agreement contains strong enforcement mechanisms, it might be advisable for the treaty merely to suggest language for default provisions, allowing individual jurisdictional provisions to be developed through other instruments.

Some participants raised concerns about extending jurisdiction to disputes involving alleged breaches of international principles. Acknowledging that the Draft Agreement could be an opportunity to incorporate well-accepted soft law principles such as the [Equator Principles](#) and the [UN Guiding Principle on Business and Human Rights](#) participants noted the challenges in persuading state parties to subject these to international accountability or dispute settlement processes.

CONSENT, DOMESTIC REMEDIES, DOMESTIC LAW, AND JOINDERS

Some participants highlighted that some form of consent would be needed for the Agency to have jurisdiction over a dispute. This could be achieved by express or implied consent provided by the disputing parties. It was suggested that jurisdiction over non-state actors could also be grounded on the theory of delegation of powers from the states with primary jurisdiction.

Issues were raised in terms of the relationship between the Agency and the available domestic

remedies: simple acceptance of the Agency's jurisdiction should not allow a party to deliberately avoid domestic forums. Others suggested in this respect that the consequences of acceptance of Agency jurisdiction would in any event be defined in the main agreement referring to the Agency rather than in the Draft Agreement itself. Participants also noted the need to envisage how jurisdiction can actually be transferred from a domestic forum to the Agency. For example, one participant questioned whether the mere alleged breach of domestic law alone would be sufficient for accessing the Agency or whether the Draft Agreement would establish a framework imposing international law obligations on state parties to enact domestic laws, providing additional jurisdictional bases. Similarly, another participant questioned the limits of countries' powers to use their domestic laws to force parties from other jurisdictions to settle disputes through Agency mechanisms.

Some participants felt the Draft Agreement presents limitations in terms of the relationships and situations that should be covered by the Agency. For example, it does not seem to cover circumstances in which a community needs to seek an international remedy against a transnational investor under domestic law, especially if such domestic law is the only source of law on which a community can rely—for instance when there is no direct contractual relationship between the community and the investor. Some suggested the Draft Agreement could include provisions on jurisdiction for intervention, so that affected parties would have an opportunity to join the dispute at a later stage even when they would not have standing to initiate a proceeding in the first place.

PRE-ESTABLISHMENT JURISDICTION AND ADVISORY JURISDICTION

Given the nature of investment operations, participants saw a need to cover jurisdiction for the pre-establishment phase, to allow disputes arising out of certain investment-related activities, such as land survey, exploration, impact assessment, etc. However, they cautioned against the risks of expanding the jurisdictional coverage to all pre-establishment activities, thereby providing investors with otherwise unavailable pre-establishment rights. In this respect it was countered that pre-establishment rights would be determined based on another agreement or law and would not depend on the Draft Agreement.

One participant suggested including advisory jurisdiction in the instrument so that the Agency would have jurisdiction to provide opinions to clarify specific issues of law.





TOPIC 2A – MECHANISMS (FACT-FINDING AND MEDIATION)

The Draft Agreement proposed three dispute resolution options: fact-finding, mediation and judicial mechanisms, which are intended to be broadly available to all stakeholders. One session of the discussions was devoted to the first two of these dispute resolution mechanisms. These two are intended as options that could lower confrontation levels and reduce the risk of escalation before issues or concerns become major disputes.

RELEVANT EXCERPTS FROM THE DRAFT AGREEMENT

DRAFTING NOTES: FACT-FINDING

Fact-finding can be used in different contexts. For example, the United Nations has mandated commissions of inquiry, fact-finding missions and investigations in response to situations of serious violations of international humanitarian law and international human rights law. The aim is to promote accountability for such violations and counter impunity. They are undertaken through international investigative bodies established by the Security Council, the General Assembly or the Human Rights Council, for instance. These missions differ from the consensual form of fact-finding, such as those under the [ICSID Fact-Finding \(Additional Facility\) Rules](#). The ICSID Fact-Finding Rules provide states or foreign nationals the opportunity to constitute a committee to inquire into and to report on relevant circumstances in the pre-dispute or dispute phase. The objective of these rules is “to

prevent legal disputes from arising by providing an impartial assessment of facts that might avoid differences arising in the course of a long-term contractual or other business relationship between the parties” (ICSID website). The scope of this procedure is quite narrow, as it can only take place between the investor and a government, and only investors or states may launch a request. Also, the request shall “set forth the agreement between the parties providing for recourse to the fact-finding proceeding.” Perhaps due to its narrow focus, the mechanism has never been used to date.

Further fact-finding mechanisms include those set up to deal with the implementation of certain policies and guidelines, such as the Inspection Panel at the World Bank. The Panel provides an independent process for people who believe that they have been or are likely to be harmed by World Bank-funded projects. The Panel carries out this mandate through its work as an impartial fact-finding body, which is independent of World Bank management. Its mandate is to determine whether World Bank management is ensuring the implementation of its own operational policies and procedures. This process focuses on the potentially harmed person or community. It does not specifically mention the “parties” in this process, which is not relevant to launch a fact-finding mission.

The Draft Agreement needs to be read in conjunction with the provisions on jurisdiction and the stated objectives, which are broad. The aim is to cover a range of situations, covering the more traditional types of fact-finding known in the area of human rights and humanitarian law as well as to assist stakeholders in clarifying facts through a third party based on an agreement of the parties. It

could also serve as a basis for fact-finding related to a series of principles adhered to. For example, the banks adhering to the Equator Principles could decide to allow for people and communities who believe they have been harmed or are likely to be harmed to bring requests to the Agency for independent fact-finding relating to projects financed by one of Equator banks. The same mechanism could be used for development banks that do not have their own internal inspection panel or ombudsman office, such as the IFC’s Compliance Advisor Ombudsman (CAO).





EXCERPTS – SECTION V DISPUTE RESOLUTION MECHANISMS

[...]

V.1 Fact-finding Commission

23. **Functions.** A Fact-finding Commission shall seek to facilitate the solution of a factual disagreement between the parties to a dispute by elucidating the facts in disagreement through an impartial and conscientious investigation. The Fact-finding Commission will prepare a report on the facts subject to their mandate.

24. **Limitations.**

- a. The Commission shall not seek to interpret the facts in relation to the positions of the parties in disagreement, or to apply the facts to any legal issues raised by the parties or any other person or any government.
- b. Except as the parties to the dispute shall otherwise agree, neither party to a fact-finding proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, [to invoke the fact of or results of a Fact-finding Commission][rely on the facts established by the Commission as determinative (*res judicata*) of any factual issue].

25. **Scope of fact-finding Inquiry.** The disputing parties shall agree on the scope of facts to be examined and the extent of the Commission's powers, failing which the Commission may determine the scope of its inquiry after consultations with the disputing parties.

[...]

29. **Publication of Report.**

- a. Subject to the redaction of confidential business information, if any, the report of the Fact-finding Commission shall be made public within 15 days of its release to the parties.
- b. The parties may append summary comments to the Fact-finding Commission report, and these comments shall then be released as an appendix to the report.



DRAFTING NOTES: MEDIATION

Mediation is an alternative dispute settlement method that can be used at any stage of a dispute—before or during litigation—to facilitate an amicable resolution. It requires a neutral third party to meet with the disputing parties and actively engage with them to help reach a settlement. The considerations in mediation go beyond legal considerations. Unlike litigation in courts or through arbitration, mediation is voluntary in that the mediator does not issue binding decisions. Instead, the parties must agree on how the dispute should be settled by mutual agreement. If they do not, there will be no binding outcome. Sometimes a mediation or conciliation process may be required in the law or other applicable instrument such as a contract or treaty.

The Draft Agreement's provisions on mediation suggest that this mechanism may involve a range of stakeholders to the dispute. Not all stakeholders would necessarily have legal rights of action, but even so they might be relevant for a successful resolution of a dispute. In this spirit, the Draft Agreement provides a multistakeholder mediation process that can be initiated by any stakeholder. It provides that any stakeholder may seek the good offices of the Executive Director of the Agency to establish a multistakeholder mediation process. The objective here is finding solutions and avoiding a legal dispute altogether.



EXCERPTS – SECTION V DISPUTE RESOLUTION MECHANISMS

V.2 Mediation Service

30. Functions.

- a. *The Mediation Service shall assist disputing parties to settle the dispute, and to prevent a dispute from escalating further.*
- b. *A Mediator shall act as a neutral facilitator to help the disputing parties try to arrive at a negotiated settlement of their dispute, based on the issues, facts, and interests of the parties.*
- c. *The disputing parties shall have full control over both the decision to settle and the terms of any settlement agreement.*
- d. *The disputing parties shall respect the confidentiality of the process before, during and after the process, except as set out in these provisions or unless expressly agreed otherwise by the disputing parties.*

31. Limitations.

- a. *The parties recognize that a multistakeholder mediation process, if initiated, will generally require significant levels of understanding and engagement by the public about the issues subject to the mediation for such a process to succeed.*
- b. *The mediator shall not seek to impose any settlement or advocate for any approach to settlement. The mediator shall seek to assist the parties in finding a joint resolution to the disagreement.*
- c. *The full content of the mediation process, including any positions taken by the parties, approaches to settlement discussed or suggested, options discussed, offers made by any party, shall not be used by any disputing party in any other proceedings, legal or otherwise, in relation to the matters considered...*

32. Multistakeholder Mediation Process.

- a. *If more than two stakeholders are involved in a dispute, a Multistakeholder Mediation Process may be commenced by any stakeholder requesting a mediation with two or more stakeholders.*
- b. *A stakeholder may seek the good offices of the Executive Director to establish a Multistakeholder Mediation Process where the stakeholder believes that the effective resolution of a dispute can best be resolved by a multistakeholder process.*
 - i. *Where the Executive Director has received such a request, he or she shall seek the advice of other stakeholders for this purpose in order to:*
 - (1) *Assess whether sufficient interest may exist to engage such a process;*
 - (2) *There is a reasonable opportunity for such a process to succeed in resolving or preventing the escalation of a dispute; and*
 - (3) *There are sufficiently representative persons available to ensure a viable and legitimate process.*
- c. *If the Executive Director has concluded that the criteria for such a multistakeholder process are met, he or she may enter into consultations with the identified stakeholders with a view to establishing such a Multistakeholder Mediation Process through an ad hoc agreement.*

33. **Scope of mediation.** *The disputing parties shall agree on the scope of issues to be considered in the mediation process, failing which the Mediator may, after consultations with the disputing parties, determine the scope of its mediation. The scope of the mediation may be adjusted as needed by mutual agreement of the disputing parties and mediator.*

[...]

37. **Enforcement.** *A mediation settlement adopted by the disputing parties shall be subject to any future international treaty on the enforcement of mediated settlements.*



DISCUSSIONS

NEED FOR FLEXIBILITY

Participants suggested that practices from other international fact-finding panels and mediation centres should be examined further to determine the best practice in the field. For example, in terms of the fact-finding proceeding, participants suggested the Draft Agreement should establish clear guidance and qualifications for determining the scope and functions of the fact-finding inquiry. However, flexibility should be preserved so that a fact-finding commission can determine the scope of a particular mission and effectively carry out its work. Similarly, for mediation proceedings, participants also suggested that, although there might be value in having robust default provisions, it would be critical to have flexibility for parties and mediation panels to adapt depending on the nature of the dispute. In addition, the Agency should also have certain discretion when dealing with a request for fact-finding or mediation to prevent frivolous proceedings.

POWER OF THE PANELS

One participant noted the powers of mediators and fact-finding commissions could be further clarified. For example, the current draft allows a mediator to engage in fact-finding activities and in communicating with third parties. It fails, however, to clarify to what extent a mediator can exercise this power without compromising the fact-finding proceedings. Participants also noted the need to include more options for the Agency to conduct an inquiry, including whether to grant the fact-finding commissions certain police powers as well

as related resources. This could also be interrelated with burden of proof issues; for example, one participant suggested that disputing parties may be more willing to submit themselves to the jurisdiction of the Agency if the party initiating the proceedings bears the full burden of proof. Other related questions include whether the power of the Agency and its members should extend to persons who have not given any consent. In this regard, participants cautioned that the Draft Agreement should not create a “super agency.”

LOWERING CONFRONTATION

To help lower confrontation, some participants suggested referring to incidents involved in the fact-finding or mediation proceedings as “situations” rather than “disputes.” References to the parties to those proceedings should also be modified accordingly. Further, the proceedings as designed should at least demonstrate a reasonable likelihood to be able to resolve the disputes. Another important factor to ease confrontation is the issue of consent. Participants suggested that, although consent of the parties was in most cases an important prerequisite for the mediation proceeding to achieve mutually acceptable results, in some cases mandatory mediation proceedings could act as a cool-off mechanism. In comparison, when evaluating the importance of the consent element in fact-finding proceedings, participants suggested differentiating between two scenarios. Requiring consent could be more effective in lowering confrontation in hostile situations, in which the purpose of the fact-finding inquiry is to support certain allegations, but not necessarily in a friendly situation, in which the purpose of the fact-finding inquiry is to establish knowledge.

FINAL PUBLIC FACT-FINDING REPORT

Some participants questioned the seemingly conflicting provisions of the current draft requiring publishing the final fact-finding report as a public document on one hand, and on the other hand rendering the final report inadmissible in other forums. Transparency and admissibility of mediated settlements were also discussed. One participant suggested that, although settlement agreements have traditionally been considered as confidential in nature, there were valid policy reasons in investment-related situations to make them public subject to redaction of confidential information. Participants also discussed whether the final report or settlement agreement should be a binding document. Including a review process before the adoption of the final report was also discussed.





ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AS TOOLS TO LOWER CONFRONTATION LEVELS AND REDUCE THE RISK OF ESCALATION

Again, participants recognized the importance of maintaining flexibility when the Draft Agreement deals with the procedural rules of Fact-finding Commissions or the Mediation Service.

Participants agreed that the proceeding should be friendly to non-lawyers. Parties should be allowed to work with fact-finders and mediators to determine procedural issues in a particular proceeding. Participants agreed that solid guidance and rules are necessary to help identify the right fact-finders and mediators. A strictly roster-based approach, as reflected in the current draft, might not yield the best result. Participants suggested referring to experienced practitioners for recommendations in this regard. Flexibility should also be maintained for fact-finders and mediators to carry out their duties.

MECHANISM-SPECIFIC JURISDICTIONAL PROVISIONS

Participants further discussed the need for separate jurisdictional provisions tailored to each mechanism. Some participants suggested that the answer to the question depends on whether additional qualifiers need to be met before a party can use a particular mechanism. If so, it might be advisable to develop separate jurisdictional rules for each mechanism. Others suggested that, in any event, mediation should have broader jurisdiction than adjudicatory processes, and that jurisdiction generally has a different role depending on whether it was based on consent and whether the outcome was binding.





TOPIC 2B – MECHANISMS (TRIBUNAL)

Another session was devoted to the judicial component of the dispute resolution mechanisms, including what the Draft Agreement sets out as three “Chambers”: Jurisdictional, Judicial and Appellate. This judicial arm is intended to replace the existing investment arbitration model as between investors and states, as well as to broaden the base of access to judicial mechanisms and remedies by other stakeholders. This session included a discussion of the interrelationship between the different mechanisms as well.

RELEVANT EXCERPTS FROM THE DRAFT AGREEMENT

DRAFTING NOTES

In addition to a trial-level function (Judicial Chamber) and an appellate-level function (Appellate Chamber), the Draft Agreement also provides a jurisdictional function (Jurisdictional Chamber) to the dispute resolution mechanisms. It considers the jurisdictional issues as preliminary issues separated from the merits, covering not only the adjudicatory processes, but also alternative processes such as fact-finding and mediation, especially where those proceedings were initiated upon mandatory jurisdictions over the participants. To maintain a separate Jurisdictional Chamber to address these jurisdictional challenges would ensure an expedited process and a consistent result in interpreting relevant provisions. The applicable law provision (Art. 39) is drafted to echo the jurisdictional provision of Article 19. In particular, it is drafted to cover two situations, where disputes

concern “the application of international law or international principles,” and disputes involving “transnational investors and their investments.” The general rules on transparency (Art. 40) largely follow the UNCITRAL rules on transparency with a few amendments. A clean-hands provision (Art. 44) is incorporated into the subsection on the Judicial Chamber, largely following, yet broadening, the approach adopted in the Canada–European Union Comprehensive Economic and Trade Agreement (CETA). The Investment Chapter of the CETA prohibits an investor from bringing claims against state parties if “investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.” The Draft Agreement goes beyond the CETA approach and excludes claims brought by claimants whose hands are soiled even after the investment is established. The Draft Agreement also requires both notice and cooling-off periods while the question of whether or not to include a requirement of exhaustion of local remedies in the Draft Agreement itself, rather than in the underlying treaty, was left open for discussion. The subsection on the Appellate Chamber largely follows the text proposed by the European Union for its treaty negotiations.





EXCERPTS – SECTION V DISPUTE RESOLUTION MECHANISMS

[...]

V.3 Tribunal

38. *Composition of Tribunal. The Tribunal is composed of three Chambers:*

- a. *Judicial Chamber;*
- b. *Appellate Chamber;*
- c. *Jurisdictional Chamber*

39. *Applicable law.*

- a. *The Tribunal shall apply the law of the treaty, contract, or other instrument under which they have jurisdiction, the international law at issue, the domestic law of the host state and general principles of international law. Treaties shall be interpreted in accordance with the Vienna Convention on the Law of Treaties.*

[...]

40. *Transparency and Amicus Curiae.*

- a. *The UNCITRAL Transparency Rules, as modified by this Agreement, shall apply mutates mutandis in connection with all the proceedings of the Tribunal.*

[...]

41. *Final award.*

- a. *If a Judicial Chamber or Appellate Chamber makes a final award for against a disputing party, the Chamber may only award, separately or in combination:*
 - i. *monetary damages and any applicable interest;*
 - ii. *restitution of property.*

[...]

- d. *The Chambers shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, a Chamber may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim [...]*

[...]

42. *Rules of Procedure and Administration of Tribunal. The Conference of the Parties shall, at their first meeting, adopt a decision setting out the following administrative and organizational matters regarding the functioning of the Tribunal:*

[...]

V.3.1 Judicial Chamber

43. *Functions.*

- a. *The Judicial Chamber shall be the court of first instance to hear legal disputes and provide binding legal decisions on them.*

[...]

44. *Clean Hands. A stakeholder may not submit a claim to the Tribunal where that stakeholder has acted in a manner that involves fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process in relation to the investment in question. A stakeholder that wishes to raise this issue may do so under the provisions on the Jurisdictional Chamber.*

[...]

V.3.2 Appellate Chamber

47. *Functions. The Appellate Chamber has the competence, in accordance with these provisions, to review any decisions rendered under this Agreement.*

V.3.3 Jurisdictional Chamber

[...]

52. *Function.*

- a. *Any potential [mandatory] disputing party to a proceeding under any mechanism in this Agreement may challenge the jurisdiction of that mechanism on the basis of the absence of jurisdiction over that person [ratione personae] or over the matter [ratione materiae].*
- b. *A disputing party that has accepted the jurisdiction of a mechanism may raise a challenge as to the scope of a decision by a Fact-Finding Commission or Mediator as to the scope of their jurisdiction.*
- c. *[Claims manifestly without merit]*
- d. *[Claims unfounded as a matter of law]*



DISCUSSIONS

SPLITTING THE JURISDICTIONAL AND JUDICIAL PHASES BETWEEN TWO BODIES

While recognizing the potential benefit of having consistent outcomes for jurisdictional challenges, a number of participants questioned the need for a division between the jurisdictional and judicial chambers. In any given proceeding, the two chambers would need to examine many of the same facts, a duplication that would be inefficient and costly. It was also mentioned that the self-interests that cause concern in investment arbitration—namely, the perceived economic incentive for tribunals to affirm jurisdiction—would be less of a concern for a court-like agency with a permanent roster of judges. However, this would depend on the structure and form of remuneration; for example, whether judges received a permanent retainer or salary, or were paid on an hourly or daily basis for services provided. In either case, one participant recommended strict time limits be set for jurisdictional decisions, to avoid dragging deliberations over jurisdiction over several years, as often happens in investment arbitration cases.

SHOULD CLAIMANTS BE REQUIRED TO EXHAUST LOCAL REMEDIES?

The question of whether claimants would first need to exhaust local remedies—that is, bring their claim to domestic courts—before resorting to the Agency was a major point of discussion. It gets to the heart of the relationship between international and domestic systems of dispute resolution. On one hand, exhaustion of local remedies is a principle of human rights law, and thus appropriate to consider in this forum as well. On the other hand, requiring the exhaustion of local remedies can be inefficient and expensive—particularly where environmental or human rights concerns are at stake, or where expediency is critical. One participant suggested

that where there is no exhaustion requirement, it should be expected that the international tribunal nevertheless examine efforts by the claimant to resolve the dispute through locally available means, and that the degree to which the claimant pursued local remedies would influence the tribunal’s assessment of the claim, as opposed to forming a jurisdictional step that must be completed to access the Agency.

Taking a step back, a participant emphasized that a requirement to exhaust local remedies sends the message that the international court serves as an appellate body, reviewing the domestic system to rule out a denial of justice. Picking up on this theme, another participant said that, in this respect, the European Court of Justice (ECJ) plays a similar role. While that resulted in an “uneasy situation” between the ECJ and domestic courts early on, these tensions have relaxed as the ECJ and member state courts have developed a dialogue. A number of participants favoured a flexible approach in which requirements would vary depending on the nature of the case.

WHO BEARS THE COSTS OF PROCEEDINGS?

There was some discussion on the question of who is to bear the legal costs and the costs of proceedings. In investment arbitration, for instance, tribunals have broad discretion in assigning responsibility for cost of counsel and proceedings, though there has been a discernible trend towards some adjustment of costs in favour of the successful party in recent years. A participant noted that this approach in other areas might be problematic, as it could lead to unsustainable cost burdens being placed on the losing party, such as communities that cannot afford to cover the high legal costs and costs of proceedings. This issue warrants further thought, including the potential chilling effects on legitimate claims or potential capitulation by defendants.

ORGANIZATIONAL RULES VERSUS PROCEDURAL RULES

A participant recommended that the Draft Agreement should concern itself primarily with rules of the organization (and basic rules of procedure that would be relevant to all cases), while a separate document would deal with rules of procedure. This is because rules of procedures would presumably vary depending on the type or category of case—for example, investor–state, state–investor and community–investor cases.

ADJUDICATORS

Several participants emphasized the importance of the individuals that will be applying the rules of procedure. The judges will have discretion, and it will be critical that they be widely trusted among different stakeholders. It was also suggested that it would be important for some members of the court to have experience in domestic courts in terms of the interface between the domestic and international systems.

RELATIONSHIP BETWEEN DIFFERENT MECHANISMS

It was suggested that bundling multiple types of dispute settlement mechanisms into one body would result in a number of complications. Although in principle the initiation of a process under one mechanism would not rely on the exhaustion of another, in practice the initiation as well as outcome of one mechanism would most likely have some impact on other dispute settlement mechanisms. For example, if a disputing party initiated a fact-finding process, would this have an impact on a parallel or subsequent arbitration proceeding and how? Participants suggested that the Draft Agreement should include guidance on the choice of mechanisms as well as provide further clarification on the relationships between the different mechanisms.



TOPIC 3 – ENFORCEMENT

Participants further discussed the means and modalities of ensuring the enforceability of the outcomes of any given dispute resolution process as well as their linkages to existing mechanisms, such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

RELEVANT EXCERPTS FROM THE DRAFT AGREEMENT

DRAFTING NOTES

Each of the three dispute resolution options proposed in the Draft Agreement would render individual outcome documents for any particular proceedings. The Draft Agreement provides that the final report of the fact-finding commission shall be made public so that the public can be informed on the issues. On the other hand, the content and settlement agreement of the mediation are generally kept confidential, in line with traditional practice. Nevertheless, the Draft Agreement provides that the settlement can be enforced through future treaties on this issue. In terms of enforcing the final decisions issued by the Tribunal, the Draft Agreement proposes taking the ICSID approach, namely, is once the final decision is rendered, it is to be treated as a judgment by the domestic court of the Parties. The draft left open the issue of how the New York Convention might come into play.

EXCERPTS – SECTION V DISPUTE RESOLUTION MECHANISMS

[...]

V.1 Fact-finding Commission

[...]

29. Publication of Report.

- a. Subject to the redaction of confidential business information, if any, the report of the Fact-finding Commission shall be made public within 15 days of its release to the parties.
- b. The parties may append summary comments to the Fact-finding Commission report, and these comments shall then be released as an appendix to the report.

V.2 Mediation Service

[...]

37. Enforcement. A mediation settlement adopted by the disputing parties shall be subject to any future international treaty on the enforcement of mediated settlements.

V.3 Tribunal

41. Final award.

- a. If a Judicial Chamber or Appellate Chamber makes a final award for against a disputing party, the Chamber may only award, separately or in combination:
 - i. monetary damages and any applicable interest;
 - ii. restitution of property.

[...]

Section IX ENFORCEABILITY

67. All Final Decisions issued by the Tribunal pursuant to Section V (Dispute Resolution Mechanisms):

- a. shall be binding between the disputing parties and in respect of that particular case; and
- b. shall not be subject to appeal, judicial review, set aside, annulment or any other remedy except as set out in this Agreement.

[...]

70. Each State Party shall recognize a Final Decision rendered by the Tribunal pursuant to Section V as binding and enforce any resulting pecuniary obligation within its territory as if it were a final judgement of a court in that Party.

[...]

72. Execution of the Final Decisions shall be governed by the laws concerning the execution of judgments or awards in force where such execution is sought.

73. Any failure by a Party to enforce a Final Decision rendered pursuant to Section V (Dispute Resolution Mechanisms) may be referred to the Executive Director of the Agency by any disputing party affected by the decision.

74. If the Executive Director is advised of a failure to comply with a binding award, he or she shall establish the facts surrounding such non-compliance and report its findings to the Conference of the Parties for the latter, where appropriate, to take any follow-up action.



DISCUSSIONS

Underlying the question of enforcement is the question of whether a decision issued by the new Agency is to be treated like a judgment of the domestic courts in the country where the decision is being enforced, or whether it should rather be treated like a foreign judgment or an arbitral award pursuant to the New York Convention. Another question relates to the types of remedies available. Some participants suggested the remedies provided by the Agency should be limited to an award for damages, rather than broadened into other remedies such as restitution. It was suggested that this would allow a more favourable interpretation of a tribunal's decision being deemed an award for the purposes of enforcement under the New York Convention.

However, the desired scope of the Agency—encompassing not just investor–state disputes, but

also accommodating other stakeholders—indicates that remedies would likely not be limited to monetary damages, which raises issues of what could be enforced under the New York Convention.

Questions were raised in terms of enforcement in the context of environment and human rights: remediation of environmental damage, for example. This in turn requires consideration of existing forums for addressing human rights and environmental issues, and where the new Agency would complement these. Injunctive relief is another example where enforcement relying on international mechanisms could be problematic. On a related note, whether state–state disputes could be enforced under the New York Convention also needs to be addressed.

In this regard, some suggested that focus could perhaps shift from enforcement of awards to

compliance with decisions and rulings of the tribunal, which would have to do with its legitimacy. One participant suggested that, although the enforceability of certain outcomes of Agency mechanisms under the New York Convention remains questionable, the Draft Agreement could look into the fact of non-compliance and allow the imposition of monetary penalties per unit of time for failure to comply, which in turn can be treated as an award enforceable under the New York Convention.

In summary, participants generally agreed that the enforcement mechanism provided by the New York Convention should be used to the extent possible. For other types of remedies that may not fall within the scope of New York Convention, other means of compliance have to be explored, including countermeasures and retaliation as recognized in the World Trade Organization (WTO) context.





TOPIC 4 – COMPOSITION AND INDEPENDENCE

Another topic the participants focused on was the composition of the mechanism (adjudicators, mediators, fact-finders) and the issues that need to be included in the Draft Agreement to ensure independence and to address conflicts of interest.

RELEVANT EXCERPTS FROM THE DRAFT AGREEMENT

DRAFTING NOTES

The Draft Agreement adopts a roster approach for all three components of the dispute settlement mechanisms. The qualifications and compositions of the members of the Judicial and Appellate Chambers were largely inspired by the rules governing the WTO Appellate Body. The Draft Agreement has not yet addressed the issues relating to compensations of the members. Provisions to ensure members' independence are proposed in Section VII (Ethics). Currently, the Draft Agreement provides one set of ethics rules applicable to all members. Another approach could be to develop mechanism-specific rules on this issue.



EXCERPTS – SECTION V DISPUTE RESOLUTION MECHANISMS

[...]

V.1 Fact-finding Commission

[...]

26. Roster of Fact-finding Experts.

- a. State Parties shall have the right to designate two persons to the Roster of Fact-finding Experts.

[...]

V.2 Mediation Service

[...]

33. Roster of Mediators.

- a. Each State Party shall have the right to designate two persons to the Roster of Mediators.

[...]

V.3.1 Judicial Chamber

45. Composition.

- a. There shall be a roster of 35 judges from which all Judicial Chamber judges shall be drawn for each specific instance.
- b. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. They shall have demonstrated expertise in public international law, such as in relation to international investment law and policy, international human rights law, and in the resolution of disputes arising under international law.

[...]

V.3.2 Appellate Chamber

[...]

49. Composition.

- a. The Appellate Chamber shall be composed of nine individuals with recognized expertise in the matters covered by this Agreement. Appellate Chamber judges shall be appointed on a full-time basis. Three judges of the Appellate Chamber shall hear each specific case on appeal.
- b. Appellate Chamber judges shall be chosen by the Conference of the Parties for a term of seven years. The Conference of the Parties shall choose a replacement for any judge who is incapable of continuing to fulfill their duties for the remainder of their term. Judges may be re-elected one time.

[...]

V.3.3 Jurisdictional Chamber

51. Composition.

- a. A Jurisdictional Chamber is hereby established. The Chamber shall be composed of [10] sitting members of the Tribunal.

[...]

EXCERPTS – SECTION VII ETHICS

60. The Members of a Fact-finding Commission, or Mediation in any specific instance, and all persons nominated to the Roster of Judges shall be independent.

[...]

64. Upon a reasoned recommendation from the Executive Director, or on their joint initiative, the Parties, by decision of the Conference of the Parties, may relieve a Member of any roster of their functions where his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued fulfillment of their functions.

[...]



DISCUSSIONS

FLEXIBILITY IS REQUIRED TO ADJUST TO THE WORKLOAD

Considering the Agency will most likely be sized and structured in a way that is responsive to the caseload, a fixed roster of judges may not correspond to the workload: there may be not enough or too much work for the number assigned. Therefore, the Agency needs some flexibility—scaling up or down—depending on the caseload before it. A variety of approaches could be taken. One participant suggested the Agency could have a mix of tenured and non-tenured judges or adjudicators.

ENSURING INDEPENDENCE OF ADJUDICATORS

How to address conflicts of interest was a significant point of discussion. A concern with the current system of investment arbitration is that the same individuals may serve both as counsel and arbitrator in different cases. Considering a new system to be established, a participant suggested that, if judges

or arbitrators are not salaried, it would be hard for them to limit their work as counsel through conflict of interest rules. In effect, such limitations would limit the pool of applicants to a narrower field—academics, for example, or semi-retired lawyers; in other words, individuals who would not need to draw additional income by serving as counsel. A second issue discussed concerns challenges to a judge appointed to a case. Here, experts discussed the question of who would decide whether disqualification was appropriate. The other judges in the Agency, for example, could make the decision. Another idea discussed was an ad hoc ethics committee, which would include sitting judges of domestic or other international courts, taking the decision away from the judges that are working together in the Agency.

ENSURING DIVERSITY AND LEGITIMACY

A second issue discussed was that the interests of late-coming states may be harmed where members of the Agency have already been selected by earlier joining states.

A variety of comments referred to professional and cultural qualities of the members. Having a diversity of legal traditions would be important, as would representation from different geographic background and economic systems. It was also stressed that the Appellate Chamber should be formed by individuals who have clear legitimacy as judges, including some coming out of domestic legal systems. For the sake of practicability, it was suggested certain professional qualifications could be loosened in this case, as the requirement of strong public international law background might be a problem for domestic judges.

Considering the proposed Agency would be a multistakeholder institution, a question relating to legitimacy would be how to involve stakeholders other than states in selecting its members. Another issue discussed involved the composition of the secretariat. Depending on the role of the secretariat, the Agency could either employ a large secretariat to support the three mechanisms or adopt a lighter, ad hoc approach on this matter.





TOPIC 5 – INSTITUTIONAL HOME

The participants also brainstormed on the potential institutional home and the process needed to negotiate the establishment of the Agency.

DISCUSSIONS

EXISTING INSTITUTIONAL STRUCTURE OR *SUI GENERIS* INITIATIVE?

Participants explored the possibilities of housing the Agency under several existing institutions. Although integrating the Agency into an existing institutional home would alleviate various issues relating to governance and organization, any such attempt would tend to require a modification and amendment to the constitutional instrument of the existing institution. Therefore, several participants were of the opinion that the need to amend a pre-existing multilateral treaty and requiring consensus could stall the process altogether. Moreover, it was suggested that several of the existing institutions—the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), the WTO, among others—would seem to be narrowly focused in terms of parties or content area. Several experts were of the view that a new institutional home should be created for the Agency by commencing a *sui generis* initiative.

However, before that takes place preparatory work needs to be conducted under institutions that have an investment mandate, such as the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic

Co-operation and Development (OECD) and the United Nations Commission on International Trade Law (UNCITRAL), establishing a coalition of the willing to promote the initiative. Such a coalition would not necessarily be composed only of states, but could also include the business community, practitioners and civil society. Participants indicated various successful processes to establish such a coalition. One of them was the process of the UN Framework Convention on Climate Change (UNFCCC). One participant also noted the possibility to appoint a Special Representative of the UN Secretary-General to study the issue. The financing for the development process was also mentioned in this context, which is linked to the UN General Assembly and the Economic and Social Council.

Participants agreed in any event that this process would require multilateral discussions rather than bilateral negotiations. However, experts also noted the inherent risk of a multilateral process—namely, allowing a small group of states to block consensus. In this sense, it was suggested that it might be easier to begin the coalition-forming exercise within a group of like-minded countries.

WHETHER AND HOW TO ADDRESS SUBSTANTIVE CONTENT

While the participants recognized that reforming dispute settlement was riper for discussion than some of the substantive issues relating to investment, it was suggested that the substantive issues needed be kept in mind and that it would be useful for contracting parties to think through and address some of the substantive rights and obligations together with procedural issues. Some



found that it would be difficult—if not impossible—to establish a dispute settlement institution without even discussing any substantive law. However, considering it would already be difficult to achieve consensus regarding the procedural aspect alone, some participants cautioned about the risk of derailing multilateral negotiations by including substantive content in the Draft Agreement. One of the approaches to alleviate such a risk would be to refer to other instruments when such substantive issue is involved. However, it would be important to make sure the substantive rights and obligations provided in the referred instruments are not hollow or superficial.



TOPIC 6 – FINANCIAL ARRANGEMENT AND ACCESS TO JUSTICE

Other important topics discussed by the participants were the mechanisms to fund the operation of the Agency as well as the financial resources available to different stakeholders to ensure their access to justice. While the two are notionally separate, in practice they may be inextricably linked in this context.

DISCUSSIONS

Financing is key to the success of the Agency as well as to its legitimacy. As a *sui generis* institution

with a broad scope, financing options should also be diverse. Different options discussed included case-generated funding, a self-funded foundation, state funding, business and individual donations and crowd funding. Participants agreed that openness, transparency and stability regarding the funding sources would be key to ensuring the independence of the Agency.

In terms of access to justice, a number of participants suggested establishing a legal aid system or pro bono institution. A few participants also suggested exploring the potentials of university-associated legal clinics. Establishing independent funds for access to justice was discussed. Third-party funding was also discussed as an option to facilitate access to justice. One participant noted

the importance of raising awareness at national and local levels so that the Agency and its functions are made known to affected persons.

Another related issue is how costs can be reduced while still ensuring various stakeholders' access to justice. Discussions were focused on the tribunals' power to formulate their rules of procedure to expedite the process and reduce unnecessary costs. Participants also discussed options to reduce costs for experts, including changing from a party-driven to a tribunal-driven process. The option to retain full-time experts by the secretariat was also discussed. One participant also noted the possibility of establishing an online platform to solicit public participation in terms of fact-finding and damage calculations.





FINAL SESSION – WRAPUP AND WAY FORWARD

The experts welcomed IISD's work on the draft and the discussion. They recognized the value of the work done so far and the need for additional discussion and analysis with regard to the Draft Agreement. Experts reiterated the difficulty of separating procedural and institutional reform from substantive content. In order to bridge that gap, it would be necessary for IISD to consider testing the application of the rules of procedures to various dispute scenarios. This would better flesh out the interaction between substantive and procedural aspects.

Several experts found that it was important to establish separate and more specific provisions for different types of scenarios and that jurisdictional thresholds and related issues should be adapted accordingly. This would also better address the need for an inclusive approach involving all relevant actors. Experts also suggested that while it was useful to propose a framework for a multilateral agency to resolve investment-related disputes in a more inclusive fashion, this approach would also be useful for ongoing initiatives that could integrate and adopt elements of the Draft, similar to how the many aspects of substantive content of the [IISD Model International Agreement on Investment for Sustainable Development](#) found their way into regional or national investment treaties and investment treaty models.

IISD will conduct further research on various issues raised in the expert meeting and prepare a revised draft of the Agreement to address the gaps identified. This text will then serve as a basis for targeted meetings to be organized in April 2017 during the annual conference of the American Society of International Law in Washington, DC, where special emphasis could be given to the experience of the Washington-based accountability mechanisms, such as those under the World Bank and IFC in relation to investment-related fact-finding and problem-solving.





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