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Submission by IISD regarding the reform of investment-related dispute settlement

IISD Investment Program
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Background

In 2015–2016 the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) conducted a study on whether the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (Mauritius Convention) could provide a useful model for possible reforms in the field of investor–state arbitration.¹ At its 49th session in 2016, the secretariat presented the result of a study prepared by the Center for International Dispute Settlement (2016 Report²).³ After deliberation, UNCITRAL decided to retain the issue on its agenda for further consideration at its 2017 session and to decide whether to mandate a working group to undertake related work.

These developments are taking place as many countries and regions are reassessing the investor–state dispute settlement (ISDS) regime. There is an appetite in a number of states to explore domestic, regional and multilateral alternatives to the traditional investor–state arbitration model, including a more permanent and judicialized form of dispute settlement.

The 2016 Report “proposes a possible roadmap that could be followed if States were to decide to pursue a reform initiative aimed at replacing or supplementing the existing investor–State arbitration regime in international investment agreements (IIAs) with a permanent investment tribunal and/or an appeal mechanism.”⁴ The report suggests to first determine the features of the mechanism to be created, including its “mandate, nature, structure, and organization.”⁵ It further suggests that, following that first phase, discussions could focus on the drafting of an opt-in convention, which would deal with the extension of the new rules on the mechanism to existing investment treaties.⁶

¹ United Nations. (2015). *Report of the United Nations Commission on International Trade Law* (para. 268). U.N. Doc. A/70/17 (2015). Retrieved from <http://undocs.org/A/70/17>.

² Kaufmann-Kohler, G. & Potestà, M. (2016, June 3). *Can the Mauritius Convention serve as a model for the reform of investor–State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*. Geneva: Geneva Center for International Dispute Settlement (CIDS). Retrieved from http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf [2016 Report].

³ United Nations. (2016, May 24). *Settlement of commercial disputes: Presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor–State Arbitration as a possible model for further reforms of investor–State dispute settlement*. U.N. Doc. A/CN.9/890 (2016). Retrieved from <http://undocs.org/A/CN.9/890>.

⁴ 2016 Report, *supra* note 2, p. 4.

⁵ 2016 Report, *supra* note 2, para. 75.

⁶ *Id.*



Phase 1: A comprehensive approach to designing a new investment dispute settlement mechanism

The International Institute for Sustainable Development (IISD) supports in principle initiating a discussion on reforming the ISDS regime and building a new mechanism for resolving investment-related disputes. There is a need for an alternative to the traditional arbitration model in the form of a more structured and permanent dispute settlement process—one that is better adapted to investment disputes that involve public policy issues and a range of different stakeholders and interests.

In that vein, it will be important for discussions around the first phase of the roadmap (as proposed in the 2016 Report) to be broad and not limited to deliberations on treaty-based disputes brought by investors against states. States need the opportunity to explore the design of a mechanism that can be widely used to resolve investment disputes and that can adapt to future developments in the substantive law. For example, the UNCITRAL Arbitration Rules, first adopted in 1976, were designed to be wide in scope, allowing their use for different parties and situations, making them relevant still today. A new mechanism to resolve investment disputes should be similarly broad and comprehensive. It should take into account the complexity of cross-border investments and be flexible enough to deal with a variety of disputes involving diverse and potentially conflicting interests, rights and obligations. It should be readily available for reference in future negotiations of treaties, contracts and other relevant instruments to resolve investment disputes between states, between investors and states, and between other stakeholders, including in multi-party contexts. With a more permanent structure, the new mechanism will provide stakeholders with an alternative to the UNCITRAL and other available arbitration rules that is better adapted to investment disputes involving public interests.

Phase 2: An opt-in approach for reforming isds provisions in existing treaties

Once Phase 1 is completed and agreement is reached on the design of the mechanism, the discussions in Phase 2 would be narrowed down. In line with the roadmap of the 2016 Report, the discussion in Phase 2 would centre on an opt-in mechanism modelled on the Mauritius Convention or other similar initiatives. The resulting treaty would establish a mechanism through which all parties to existing investment treaties could efficiently and effectively replace the applicable dispute settlement process with the new mechanism resulting from Phase 1. The discussions in Phase 2 would focus specifically on how to deal with issues arising under existing investment treaties in relation to ISDS.

Conclusion

Transnational investment is more complex than relationships between foreign investors and their host states, involving a range of different actors and situations, and the law is in constant evolution. Making a tremendous multilateral effort to design a new mechanism that would only cover claims brought by investors against states would be a missed opportunity for the much-needed development of a comprehensive and inclusive investment-related dispute settlement mechanism. Making the effort worthwhile will require working in Phase 1 towards a more broadly applicable investment mechanism that respects regional and cultural differences, and leaving the narrowing of issues relating to the reform of existing treaties for Phase 2.

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Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Fax: +1 (204) 958-7710

Website: www.iisd.org

Twitter: @IISD_news

Geneva Office

International Environment House 2
9 chemin de Balexert, 1219 Châtelaine
Geneva, Switzerland

Tel: +41 22 917-8683

Website: www.iisd.org

Twitter: @IISD_news



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