

WORKSHOP ON INTERNATIONAL INVESTMENT COURT PROPOSALS

Drivers of Reform/ Evaluating Processes for the Resolution of Investor-State Disputes

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Drivers of Reform: Evaluating Investor-State Dispute Resolution Processes

1. Consistency of decisions in investor-state dispute resolution
2. Coordination of investor-state proceedings
3. Decision-makers in investor-state dispute resolution: appointment, ethics, qualifications
4. Structure and cost of investor-state dispute resolution processes
5. Levels of state control over investor-state dispute resolution processes

Consistency and Correctness of Decisions

- **Perceived problem:**
 - Inconsistent interpretations of the same or similar investment treaty provisions by different tribunals.
 - Incorrect decisions, either with respect to substantive law or as a matter of factual finding.

Consistency and Correctness of Decisions

- **Possible ways forward:**
 - Clarify the substantive provisions in investment treaties (maintains current DR system)
 - *Ad hoc* appellate mechanism with power to review questions of law and/or fact of the investment tribunals' awards (reforms current DR system)
 - Standing bilateral/multilateral appellate mechanism with power to review questions of law and/or fact of the investment tribunals' awards (reforms current DR system)
 - Standing bilateral/multilateral investment court for first instance and appellate adjudication (replaces current DR system)

Coordination of Investor-State Proceedings

- **Perceived problem:** The possibility of pursuing claims arising out of the same facts in several parallel investor-State proceedings.
 - e.g., investment treaty claims and related contractual claims
 - e.g., claims by direct and indirect investors

Coordination of Investor-State Proceedings

- **Possible ways forward:**

- Circumscribe the number of protected investors under investment treaties (minority shareholders, protection of indirect investments) (maintains current DR system)
- Omit umbrella clause maintains current DR system)
- Include “waiver”/“no-U-turn” clause precluding investors from seeking redress in multiple fora (maintains current DR system)
- Provide for the consolidation of proceedings based on the same facts arising out of the same investment treaty/different investment treaties (maintains current DR system)
- Create a standing multilateral investment court with the power to consolidate related proceedings (replaces current DR system)

Decision-Makers in Investor-State Disputes

- **Perceived problem:**
 - Repeat appointments of a limited number of arbitrators, some of whom also participate in the proceedings as counsel and/or experts.
 - The system of party-appointment, combined with the common substantive standards of investment protection which are litigated, perceived as incentivizing parties to appoint people from the “club.”
 - Party-appointed arbitrators seen as subject to greater potential external influences the panel than an outsider (e.g., a tenured judge).
 - Certain arbitrators seen as reflecting ‘commercial arbitration’ values instead of ‘public law’ values.

Decision-Makers in Investor-State Disputes

- **Possible ways forward:**

- Code of conduct prohibiting certain practices, such as ‘double-hatting,’ and imposing minimum qualifications on arbitrators (maintain current DR system)
- Establish a roster of qualified arbitrators and assign cases by lot (maintain current DR system)
- Court system consisting of standing judges/members appointed by State parties specific to each investment treaty (replace current DR system at bilateral/regional level)
- Court system consisting of standing judges appointed by the international community (replace current DR system at multilateral level)

Structure and Cost

- **Perceived problems:**
 - Excessive length of proceedings under the current system of investor-State arbitration.
 - Excessive/substantial cost of proceedings under the current system of investor-State arbitration.
 - Unpredictability of cost-shifting awards.

Structure and Cost

- **Possible ways forward:**

- Firm rules on allocation of costs proportionately to the success of the respective party in the dispute and/or abusive nature of the initiated proceedings (maintains current DR system)
- Greater scope for the order of security for costs against investors (maintains current DR system)
- Mechanisms for early discharge of frivolous claims (maintains current DR system)
- More detailed guidance/create best practice soft law instruments on the conduct and effective management of the proceedings (maintains/replaces current DR system)
- Strict deadlines for all stages of the proceedings and/or limit the remuneration of decision-makers (replaces current DR system)

Level of State Control

- **Perceived problem:**
 - The delegation of the interpretation and application of investment treaties to investor-State tribunals, together with the vague provisions in them, has led to an unanticipated imbalance of power between States and tribunals regarding the content of the obligations under investment treaties.

Level of State Control

- **Possible ways forward:**
 - Joint interpretations mechanisms made expressly binding on investor-State tribunals (maintains current DR system)
 - Reference of certain sensitive issues to joint determination by the State parties before arbitration can be initiated (maintains current DR system)
 - Exclusion of certain issues/sectors from the scope of the arbitration clause (maintains current DR system)
 - Any/all of the above combined with replacement of *ad hoc* investor-State arbitration with standing investment court(s) (replaces current DR system)