



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

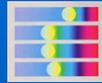
## **Presentations**

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## Dispute Settlement in International Investment Agreements

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## State – State Dispute Settlement

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### Types of dispute settlement

- **State-to-State:** the settlement of disputes between State parties to the Agreement. (e.g. investment agreements; the WTO Dispute Settlement Body).
- **Investor-to-State:** allows private investors to submit claims against a host State to international arbitration (eg. BITs and many FTAs).
- Most IIAs contain both types of mechanisms.

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### Two reasons to use State-State

1. Exercise of diplomatic protection
2. Dispute over the interpretation or application of an investment treaty

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### What's in State-to-State provisions

- Consultations and negotiations (time-period).
- Ad-hoc arbitration.
- Constitution of tribunal (standard).
- Applicable law (not always specified): provisions of the IIA and rules and principles of international law.
- Arbitral award: final and binding.
- Most IIAs are silent on the nature of remedies to be awarded by tribunals and on the implementation of arbitral awards.
- Costs.

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### Investor-to-State Dispute Settlement

- Consultations and negotiations (time-period).
- Most IIAs do not require exhaustion of local remedies.
- In some, resort to local courts precludes subsequent submission to international arbitration.
- Direct resort to international arbitration (institutional or ad hoc):
  - ICSID Convention
  - ICC or the Stockholm Chamber of Commerce
  - UNCITRAL Arbitration Rules

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### Investor-to-State

- Constitution of tribunal (as per arbitral rules).
- Applicable law: IIA's provisions; law of the host-State; investment contract, rules of international law.
  - ICSID Convention (Article 42): *absent agreement between parties, the tribunal shall apply the law of the host State and the applicable rules of international law.*
- Arbitral awards: final and binding, but require *exequatur* (except in the case of ICSID awards).
  - ICSID Members shall recognize and enforce the awards in their territory as if they were final judgements of a State court.

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### WTO dispute settlement

- Consultations (60 days).
- Establishment of a panel (3 experts).
- Final panel report (within 6 months).
- Adoption of report (60 days) unless DSB rejects it by consensus or one of the parties appeals it.
- Appellate Review (60 days); adoption of report (30 days).
- Bring the measure into conformity with the agreement within a "reasonable period of time" (15 months); if not:
  - compensation (eg. tariff reductions).
  - suspension of concessions (cross-retaliation).

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### Access to dispute settlement

- **WTO DSU:** only Member States can initiate proceedings under the DSU. Non-governmental bodies do not have direct access to the system.
- **Investor-to-State:** investors may submit a dispute with a host State to an international tribunal, without having to resort to the diplomatic protection of their home State.

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### Access to dispute settlement

- Investors in services act as the pivotal link between "investment law" and "trade law".
- Services companies can either pursue a remedy under:
  - the WTO General Agreement on Trade in Services (GATS).
  - ISDS.

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### Types of legal remedies

- **DSU:**
  - bring the measure into conformity with WTO rules.
  - no award of damages.
  - appellate review.
- **Investor-to-State:**
  - monetary compensation or restitution in kind.
  - no requirement to modify laws or policies.
  - review or annulment of the award (eg. irregularities in the procedure).

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### Implementation and enforcement

- **DSU:**
  - immediately or within "a reasonable period of time".
  - compensation or suspension of equivalent concessions.
  - only DSU remedies authorized. No unilateral sanctions.
- **Investor-to-State:**
  - reference to international conventions for the enforcement of awards (New York Convention, ICSID).
  - non-compliance: home State can bring a claim under the IIA's State-to-State procedures, or
  - resort to remedies provided under international law.

## Differences between two types of dispute settlement systems

### DSU under WTO

- No access of private parties to DSU.
- No award of damages.
- Bring the measure into conformity with WTO.
- Affected Member can resort only to the remedies available under DSU.

### Investor-to-State

- Direct access to international arbitration.
- Monetary compensation.
- No requirement to change policies.
- If non-compliance: home State can resort to inter-State procedures or to international law remedies.

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