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Dispute Settlement in International Investment Agreements

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State – State Dispute Settlement

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 (e.g. BITs and many FTAs).
- Most IIAs contain both types of mechanisms.

Two reasons to use State-State

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

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.

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
**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.

**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 (e.g. tariff reductions).
  - suspension of concessions (cross-retaliation).

**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.

**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 (e.g. irregularities in the procedure).

**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

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<tr>
<th>DSU under WTO</th>
<th>Investor-to-State</th>
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<tr>
<td>- No access of private parties to DSU.</td>
<td>- Direct access to international arbitration.</td>
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<tr>
<td>- No award of damages.</td>
<td>- Monetary compensation.</td>
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<td>- Bring the measure into conformity with WTO.</td>
<td>- No requirement to change policies.</td>
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<td>- Affected Member can resort only to the remedies available under DSU.</td>
<td>- If non-compliance: home State can resort to inter-State procedures or to international law remedies.</td>
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