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**Expert Meeting on the Settlement of Disputes in International Trade and Investment**

**17 September 1999**  
**Geneva**

**Note by the UNCTAD secretariat**

## INTRODUCTION

This note contains a summary of the discussions of an expert meeting on the settlement disputes in international trade and investment. The note was prepared by the UNCTAD secretariat.

The Secretary-General of the United Nations recommended to the General Assembly at its fifty-second session that UNCTAD be authorized to convene a meeting of 10 experts to study the possibility of developing a curriculum for a training workshop dealing with the complexities of the settlement of disputes in international trade and investment for lawyers and businesspeople in least developed countries (resolution 52/220, section III, operative paragraphs 52 and 54). The General Assembly endorsed the proposal of the Secretary General in operative paragraph 1 of its resolution 53/3 of 9 November 1998 on the reallocation of savings resulting from the improved overall cost-effectiveness achieved pursuant to the ninth session of the United Nations Conference on Trade and Development.

In the implementation of this mandate, the UNCTAD secretariat, in cooperation with the United Nations Institute for Training and Research (UNITAR) convened a small and informal expert meeting on dispute settlement in international trade and investment on 17 September 1999, at the Geneva Executive Centre in Geneva.

The UNCTAD secretariat invited about 30 experts, including professors of law, legal practitioners, officials from the secretariats of the World Trade Organization (WTO), World Intellectual Property Organization (WIPO) and the World Bank. Also present were representatives of Permanent Missions in Geneva who specialize in dispute settlement in international trade, investment and intellectual property. Some experts informed the secretariat that, although they supported UNCTAD's initiative on training in this field and were ready to extend their cooperation, they were unable to participate in the meeting as a result of other professional commitments. A list of the participants is contained in annex II to this note.

The experts adopted the following agenda:

- Presentation of the training proposal
- Discussion of the training proposal
- Consideration of the programme for the first workshop
- Recommendations and their implementation

### I. PRESENTATION OF THE TRAINING PROPOSAL

Mr. Erik Chrispeels, Senior Legal Advisor of UNCTAD, presented the training proposal of the Secretary-General at the expert meeting.

The rationale for the proposal was that, as the domains encompassing international trade, investment and intellectual property become increasingly integrated, the fragmented state of existing mechanisms for the settlement of disputes is also more evident. Officials, policy makers, commercial operators and traders in developing countries have limited knowledge about existing procedures and case law applicable within the principal dispute settlement institutions and mechanisms. This lack of knowledge and the resulting inefficiencies lead in part to the inability of parties to resolve disputes, and create added expenses for traders and Governments.

The uniqueness and the value-added of the training proposal is that it represented a comprehensive

approach to addressing issues relevant to dispute settlement in the fields of trade, investment and intellectual property as they affect the interests of developing and least developed countries and LDCs.

The training proposal does not duplicate with other training initiatives. While the demand was growing for information and training in this field, several other training initiatives do not have dispute settlement as their principal focus, and none of them look at dispute settlement in the fields of trade, investment and intellectual property in an integrated manner.

The objective of the training would be to provide the participants with an overall view of the functioning of the different dispute settlement mechanisms. The programme should concentrate on the functioning of existing dispute settlement mechanisms, including applicable case law as established by intergovernmental organizations. The participants would be equipped with information and guidance to counsel their Governments and domestic commercial actors on the most appropriate means available to enforce their rights and to seek enforcement of the obligations of their trading partners.

The beneficiaries of the training should be persons in developing countries, in particular the LDCs, who are called upon to deal with the settlement of disputes in the fields of trade, investment or intellectual property. The participants would all benefit from a training based in part on an exchange of experiences. Representatives of relevant national institutions and professionals involved in dispute settlement in these areas would be offered a forum and opportunity to engage in substantive exchanges with experts from the academic community, specialized agencies, dispute settlement and arbitration bodies and legal practice.

In the implementation of this proposal, UNCTAD wishes to work with all competent intergovernmental and non-governmental institutions with a view to ensuring coordination and complementarity. The UNCTAD secretariat initiated this training proposal because it would serve to complement training courses in preparation on commercial diplomacy, the negotiation of investment agreements, competition policies, and trade/environment. These various initiatives would create a comprehensive body of training activities available to developing countries.

## **II. DISCUSSIONS OF THE TRAINING PROPOSAL**

It was agreed that the following subjects would be addressed in the discussions: scope of the substance of the training; existing arrangements for training; dispute settlement bodies, applicable procedures and case in the different dispute settlement bodies; particular issues of interests to developing countries; teaching methods and materials; the identification of prospective participants, project advisors and instructors; and institutions that could cooperate in the implementation of the training programme.

### **A. Scope of the substance of the training**

The merits of adopting an integrated approach to dispute settlement as proposed by the UNCTAD secretariat were recognized by the experts. Noting that the original proposal for training referred to the settlement of disputes in international trade and investment, it was widely accepted that in order to make the training comprehensive, intellectual property disputes should also be considered in any future training.

### **B. Existing arrangements for training**

It was also noted that the WTO, WIPO, the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission for International Trade Law (UNCITRAL) offered training on dispute

settlement for subjects within their mandates. The experts recognized that training was limited and fragmented and in this regard, the example of the WTO initiative to create an advisory service on the settlement of disputes was cited as a means to address the problem. Emphasis was also placed on the need to avoid the duplication of available training and advisory services. In that connection, the experts invited the UNCTAD secretariat to cooperate with intergovernmental and non-governmental institutions in order to ensure the complementarity of the different training initiatives.

The representatives of the International Development Law Institute (IDLI) and of WIPO welcomed the training proposal and said it did not duplicate the training offered by their respective institutions.

### C. Dispute settlement bodies, procedures and case law

There was general agreement that the training should focus on the dispute settlement mechanisms of the WTO, WIPO and ICSID. Attention should be further given to alternative dispute settlement mechanisms provided by the rules of UNCITRAL and the rules of the International Chamber of Commerce (ICC). The experts pointed to the need to also consider regional dispute settlement bodies and to consider issues arising from the coexistence of dispute settlement bodies having international as well as regional jurisdiction.

A number of views were expressed which provoked discussion on whether the training should cover procedural as well as substantive case law. Certain experts noted that it was not always possible to separate the procedural and substantive aspects of cases. A study of the mechanisms and procedures could best be undertaken on the basis of an examination of case law which concern the application of substantive rules. Others were of the view that the training should focus rather on the norms and principles applicable to the different dispute settlement mechanisms, the merits of each dispute settlement mechanism and the choice between available mechanisms. Certain experts believed that the training should focus on policy issues.

With respect to the degree of prior knowledge and experience of prospective participants in the training, it was viewed that the training should not be based on the assumption that the participants had an advanced knowledge of the different dispute settlement mechanisms. Rather, the training should provide basic and practical information that would be useful to participants at all professional levels.

### d. Interests of developing countries

The experts agreed that there was an important need for training of government officials, legal practitioners and academics in developing countries. Further, the perspectives and needs of developing countries should be kept in mind in the development of training materials. Noting that the original proposal for training referred to the least developed countries, recommendations were put forward that all developing countries, without distinction should be the beneficiaries of the training to be developed.

The training should assist experts and professionals in developing countries by familiarizing them with the different dispute settlement mechanisms, applicable procedures and case law. A better knowledge of the operation of the available mechanisms should assist governments and private parties in developing countries in enforcing their rights under trade agreements. At present, governments of developing countries are obliged to seek the expertise of international law firms or major domestic law firms which are affiliated with developed country firms for the preparation of submissions to dispute settlement bodies. It was cited as being important to develop more expertise in developing countries.

e. Teaching methods and materials

There was consensus on the need for the training to be practical. Formal lectures should be limited in number. It was emphasized that the training would be more effective if the participants were invited to take an active part in the training and it should therefore be interactive and of a hands-on nature. Simulation exercises and case studies were cited as the most effective methods to provide practical training. In that context, the experts supported the idea to assign the participants specific tasks associated with the drafting of submissions. This method of training would allow participants to obtain experiences in working through a case, in the application of rules and procedures and in formulating arguments in defense of their positions. Such an exercise was intended to resemble to a moot court which replicates actual proceedings in dispute settlement bodies. Participants should learn how to prepare submissions and how to argue them before dispute settlement bodies. They could also be assigned certain tasks before the start of a training course in order that they be prepared to participate fully from the training and to extract maximum benefit from the exercise.

The experts also agreed on the need to distinguish between policy discussions and training. The most appropriate forum for policy discussions would be an international workshop in Geneva. The actual training should be reserved for regional and national workshops.

In addition, the regional training of trainers was cited as another important element of the methodology adopted. In order for the programme to be effective in building national capacity, and to have a long-term effect, trainers would have to be trained at the regional and national levels who could pass on the knowledge and skills acquired. In this regard, collaboration should be sought with national universities and institutions in order to lend some degree of permanence to the training programme and its content.

f. Participants, project advisers and instructors

The experts also felt that it was important to properly define the target audiences. In this regard, a distinction should be made between the participants of policy workshops and those of training workshops.

The experts agreed to advise the UNCTAD secretariat of the names of potential project advisers and resource persons for the future workshops.

g. Cooperating institutions

There was agreement on the importance of establishing a network of cooperating institutions at the international and regional levels. International as well as regional and national institutions in developing countries were recognized as having an important role to play in the formulation and implementation of a training programme.

The experts further agreed that UNCTAD should seek the cooperation of WTO, WIPO and ICSID in the development and implementation of the training activities. Certain experts recommended that ICC and UNCITRAL also be associated with the training project.

It was also recommended that the International Law Institute, Kampala, Uganda, the International Development Law Institute in Rome, Italy, and the Academy of International Economic Law and Dispute Settlement in Geneva, Switzerland should be associated with the training programme. The experts agreed to inform the UNCTAD secretariat of other institutions that could cooperate in the implementation of the project.

#### IV. Consideration of a programme for a first workshop

The experts reviewed a curriculum for a policy workshop prepared by Mr. E.-U. Petersmann, specialist in international trade law, at the request of the UNCTAD secretariat.

The consultant indicated that the proposed training outline was geared toward participants who were already familiar with dispute settlement. He noted that both the main and alternative mechanisms available to developing countries to resolve disputes were limited at best, and underutilized at worst. WTO remained the most frequently used mechanism, having handled over 180 cases during the past 4 years. However, only a small number of these cases had been initiated by developing countries. This situation clearly justified the need for the training proposed by UNCTAD. He recommended that international, regional and national workshops be developed. The clear identification of the target audience was very important.

A recommendation was put forward for the UNCTAD secretariat to organize a policy workshop in Geneva for participants from developing countries. The workshop should be of a short duration and should include the participation of government officials, legal practitioners or academics and researchers.

The workshop could serve as a forum for brainstorming and to consider the design of the dispute settlement process in the existing mechanisms. It could also be a good vehicle to assess the legal and political implications of dispute settlement procedures, mechanisms and the appropriateness of forums. At the end of the workshop, participants should be able to reach some consensus for the need to make greater use of alternative dispute settlement mechanisms. A revised curriculum, taking into account the recommendations of the experts, is contained in annex I to this note. The revised curriculum fully took into account the perspectives of developing countries. The experts were of the view that such a workshop could also serve as a useful first step in the development of a training programme.

It was further recommended that the UNCTAD secretariat prepare a curriculum for a regional training workshop on dispute settlement in international trade, investment and intellectual property. The curriculum should be considered and evaluated by the participants in the workshop. The curriculum should be finalized by the UNCTAD secretariat, taking into account the comments of the participants, before being presented to donors with a request for funding. Proceeding in this manner, the workshop should be considered as a continuation of the expert meeting, in the implementation of the mandate of the General Assembly.

#### V. Recommendations and their implementation

During the course of the discussion, the experts made a number of recommendations which they invited UNCTAD to bear in mind in the formulation of a training programme on the settlement of disputes. During the course of the discussions, the experts made a number of recommendations which they invited UNCTAD to consider in the formulation of a training programme on the settlement of disputes in international trade, investment and intellectual property:

- Training should be provided to all developing countries and in particular to least developed countries and emphasis should be placed on trade, investment and intellectual property. The training should focus on the dispute settlement bodies of WTO, WIPO and the World Bank;
- The training should be specifically targeted to government officials legal practitioners and academics and should include stimulation exercises and case studies, which focus on the substantive as well as procedural questions governing dispute settlement;

- In order to be comprehensive, the training programme should consist of international training workshops in Geneva; one-week training workshops at the regional level; and national training workshops in designated developing countries;
- UNCTAD should promote a network of institutions that are engaged in the field of dispute settlement in international trade, investment and intellectual property.

In conclusion, the experts stressed the importance of training on dispute settlement in international trade, investment and intellectual property for developing countries and they expressed their readiness to cooperate with a training programme established by UNCTAD in cooperation with other international institutions and programmes.

## Annex I

### Revised Programme for a Workshop on International Trade, Investment and Intellectual Property

*Thursday, 20 January 2000*

- 14:15 - 14:30 Welcome and introduction to the training programme
- 14:30 - 15:00 Alternative dispute settlement procedures for international trade and investment disputes: an overview
- Session I: Settlement of international trade disputes
- 15:00 - 15:30 The dispute settlement understanding (DSU) of the WTO: use by developing countries
- 15:30 - 16:00 The WTO appellate review system: use by developing countries
- 16:00 - 16:40 Discussion / Coffee break
- 16:40 - 17:00 The 1999 full review of the WTO dispute settlement understanding: the outcome from the point of view of developing countries
- 17:00 - 18:00 Experiences of developing countries with dispute settlements under the DSU: round table with the participation of Permanent Representatives of Developing Countries to the WTO
- 18:00 - 18:30 Discussion

*Friday, 21 January 2000*

- Session II: Settlement of international investment disputes: use of alternative dispute settlement mechanisms
- 09:00 - 10:00 Case study: An investment dispute in a developing WTO member country: alternative dispute settlement mechanisms available to states and their comparative advantages/disadvantages: The International Court of Justice; the Permanent Court of Arbitration; The WTO.
- 10:00 - 10:30 Discussion
- 10:30 - 11:00 Coffee break
- 11:00 - 12:00 Continuation of the case study: comparative advantages/disadvantages of submitting the same investment dispute to mixed arbitration proceedings: ICSID; UNCITRAL arbitration procedures; ICC arbitration procedures
- 12:30 - 13:00 Discussion
- 13:00 - 15:00 Lunch  
Guest speaker: Developing countries and the WTO legal and dispute settlement system:



a view from the bench.

- 15:00 - 16:00 Case study: investment disputes under ICSD dispute settlement procedures
- 16:00 - 16:30 Discussion/Coffee break
- 16:30 - 17:30 Continuation of the case study: procedural and substantive legal problems in ICSID dispute settlement practice
- 17:30 - 18:00 Discussion

*Saturday, 22 January 2000*

Session III: Settlement of intellectual property disputes

09:00 - 10:00 Settlement of intellectual property disputes under the rules of WIPO: alternative dispute resolution mechanisms

10:00 - 10:45 WTO panel and appellate body reports on TRIPS disputes: experiences and problems of developing countries

10:45 - 11:15 Coffee break

11:15 - 12:30 How to assist developing countries to make the best use of alternative international dispute settlement procedures in the field of trade, investment intellectual property: round table with the participation of the chairs and representatives of developing countries to the WTO. and permanent

## Annex II

### List of participants

Mr. Jacques Bourgeois, Akin, Gump, Strauss, Hauer & Feld, Brussels, Belgium

Mr. Marcel Boisard, Executive Secretary, United Nations Institute for Training and Research, Geneva, Switzerland

Ms. Laurence Boisson de Chazournes, professor of public international law, University of Geneva, Switzerland

Mr. Reinaldo Figueredo, Special Adviser to the Secretary-General of UNCTAD

Mr. Michael Hager, Director, International Development Law Institute (IDLI), Rome, Italy

Mr. Kamal Hossain, Senior Advocate of the Supreme Court of Bangladesh, Dhaka, Bangladesh

Ms. Gabriel Kaufmann-Kohler, professor of private international law, University of Geneva, Switzerland

Mr. Edward Kwakwa, Deputy Legal Counsel, WIPO, Geneva, Switzerland

Mr. Ian MacVay, Solicitor, Rowe & Maw, London, United Kingdom

Ms. Gabrielle Marceau, Counsellor, Legal Affairs Division, WTO, Geneva, Switzerland

Mr. Mohan Kumar, Counsellor, Mission of India to the WTO, Geneva, Switzerland

Mr. Ernst-Ulrich Petersmann, professor of public international law, University of Geneva, Switzerland

Mr. Virachai Plasai, Minister Counsellor, Mission of Thailand to the WTO, Geneva, Switzerland

Mr. M.K. Rao, First Secretary, Legal Officer, Mission of India to the WTO, Geneva, Switzerland

Mr. Philip Ruttle, Partner, Rowe & Maw, London, United Kingdom

Ms. Manuela Tortora, Coordinator, Commercial Diplomacy Programme, DITC/UNCTAD

Mr. Peter Van Den Bossche, Counsellor, Appellate Body Secretariat, WTO, Geneva, Switzerland

Ms. Marina Walter, Programme and Training Officer, UNITAR, Geneva, Switzerland

Mr. Friedl Weiss, professor of public international law, University of Amsterdam, Netherlands

#### EDM/UNCTAD

Mr. Erik Chrispeels, Legal Advisor, UNCTAD  
Coordinator of Expert Meeting

Ms. Marie-Hélène Joseph-Vanderpool  
**Legal Officer, UNCTAD**