



Roundtable on Freedom of Investment 21

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Summary of Roundtable discussions by the
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FREEDOM OF INVESTMENT PROCESS

Freedom of Investment Roundtable 21 – 14 October 2014, OECD, Paris

SUMMARY OF DISCUSSIONS

The “Freedom of Investment” (FOI) Roundtable supports countries’ efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also helps countries to address policy concerns that international investment may raise (e.g. in relation to national security). Policy monitoring by Roundtable participants promotes observance of countries’ international investment policy commitments, including those taken under the OECD investment instruments and in the context of the G20. It also promotes sharing of experiences with investment policy design and implementation.

The present document summarises the views and information contributed by participants at Roundtable 21, held on 14 October 2014. Participants included representatives of the governments of the 34 OECD members, the ten other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia) as well as government representatives from People’s Republic of China, Colombia, Costa Rica, and Indonesia. The European Union also participated in the Roundtable.

The discussions at Roundtable 21 addressed several topics including: (i) comments on the draft Policy Framework for Investment; (ii) continuation of FOI dialogue on ‘investment treaties over time’ with a particular focus on state to state dispute settlement; (iii) future work on investment treaties; and (iv) the regular discussion of recent investment policy developments.

I. Policy Framework for Investment

As part of the update of the Policy Framework for Investment (PFI), FOI participants were provided with an opportunity to comment on some of the draft chapters of the PFI, including chapters on investment policy, investment promotion and infrastructure. The presentation and consultation on the draft chapters is part of a broader process – recorded on a designated web page. It is accordingly not included in this summary of discussions.

II. Investment treaties over time – state-to-state dispute settlement (SSDS)

During the discussion at Freedom of Investment Roundtable 20 in March 2014 about the interpretation of investment treaties, a number of Roundtable participants suggested consideration of the role of State-to-State dispute settlement (SSDS) as a potential method to influence the interpretation of investment treaties. Academic research in this area is growing as part of the broad wave of interest in the role of states under investment treaties. Roundtable 21 accordingly considered SSDS in investment treaties with a focus on its potential role in interpretation.¹

¹ The analysis noted that some governments have agreed to investment chapters in free trade agreements (FTAs) that provide for SSDS but exclude investor-state dispute settlement (ISDS). However, it focused on issues raised by the co-existence of SSDS and ISDS in a treaty.

The Roundtable considered two background papers. The first responds to Roundtable interest in a preliminary survey of treaty provisions in this area. The second addresses the potential role of SSDS in the interpretation of investment treaties.

The survey of treaty provisions on SSDS reviewed a sample of 107 investment treaties concluded by participants in the FOI Roundtable and made a number of preliminary observations based on the sample.

- ***Treaty provisions for SSDS are more common than for ISDS.*** All treaties in the sample contain provisions on state-to-state dispute settlement. Moreover, the vast majority of these treaties – over 90 percent – provide for SSDS in 2 stages. The first stage is consultation. If an amicable settlement is not reached within a specified time period – usually 6 months in a BIT – then the dispute may generally move to arbitration.
- The survey shows treaties may be categorised into two types.
 - ***Most treaties call for light regulation of a two stage SSDS procedure.*** First, BITs usually involve the two stage procedure just described with light regulation of both the consultation phase and the arbitration phase.
 - ***A minority of treaties provide for more intensive state involvement in SSDS by creating special institutions designed to make this possible.*** The second category of SSDS provision – usually involving a broader FTA or other agreement with an investment chapter – involve more detailed regulation of both state to state consultation and of the arbitration process. Given that our theme for this FOI discussion is how governments can influence treaty interpretation, it is particularly interesting to note that the defining characteristics of this type of treaty are that (i) the regulation of state involvement in the amicable settlement process is more detailed (e.g. information to be provided); and (ii) state involvement in the arbitration process is also called for (for example, treaty language that specifically calls for commenting on expert testimony, commenting on draft awards).
 - ***The definition of disputes covered by SSDS procedures is a key consideration.*** The most common subject matter for SSDS disputes by far is interpretation or application of the agreement. These terms appear together in 77 of the 107 treaties. FTAs often involve definitions of SSDS disputes that appear to be heavily influenced by WTO law -- they frequently allow for SSDS claims against measures that allegedly result in the “nullification or impairment of benefits” from the treaty.
 - ***SSDS provisions in FTAs with investment chapters almost always cover disputes relating to both the trade and investment provisions.*** The design of these provisions appears to reflect the concerns and practices of the trade policy community. For example, scheduling of dispute resolution is faster. The consultation phase is often reduced to just a few weeks in these treaties.

The analytical paper first identifies three possible types of SSDS claims under investment treaties.² First, a claim may seek a "pure" interpretation of a provision of the treaty unrelated to a particular claim of

² The typology is drawn from Anthea Roberts, “State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority”, 55 *Harvard International Law Journal* 1 (2014).

As set forth in the background paper, the types of claims are identified for analytical purposes: no view is expressed about whether any of these types of claims are available under any particular treaty.

breach. For example, without regard to a particular dispute, a tribunal could be asked to determine if a treaty provision providing for a mandatory six month cooling-off period between a notice of claim and the filing of an actual claim is jurisdictional in nature so that a failure to comply bars claims.

Second, a treaty party could bring a claim of breach against another treaty party, principally in the form of a claim of diplomatic protection. A treaty party could for example claim against a host state for failure to comply with an ISDS award. The exercise of diplomatic protection for this purpose is contemplated in article 27 of the ICSID Convention. A home state could also bring a claim on behalf of a group of smaller investors affected by a particular measure.

Third, there may be SSDS claims for a declaratory judgment relating to a particular measure or fact situation. Like claims of breach, this type of claim relates to a particular factual situation or measure. However, rather than seek complete resolution of an investor case, it seeks a declaration about certain factual or legal issues in the case. It may leave open future individual ISDS claims.

In light of Roundtable 20 interest in the potential role of SSDS in interpretation, the second part of the paper outlines policy issues relating to SSDS claims for pure interpretation. It identifies reasons why governments might wish to provide for or exclude the power to obtain pure interpretations from SSDS tribunals, or to make it broad or narrow. The policy issues are loosely grouped into three categories; (i) practical uses and risks; (ii) aspects relating to the balance of interests in investment treaties; and (iii) institutional aspects.³

In terms of practical uses and risks, four policy issues were noted: (i) the potential role of SSDS in resolving uncertainties about treaty interpretation and improving predictability; (ii) its potential impact on the likelihood of joint interpretive agreements; (iii) its potential to disrupt and create uncertainty for ISDS claims and awards; and (iv) the risk of excessive exposure of states to SSDS claims.

With regard to aspects relating to the balance of interests in investment treaties, the paper identifies five issues. They relate to the potential role of SSDS in “rebalancing” between investors and states by providing incentives for “balanced” government interpretations; in “rebalancing” between states by giving weaker states additional negotiating power; and in addressing criticism about ISDS arbitrators’ economic incentives in interpreting investment treaties. They also include the potential impact of SSDS in re-politicising investor-state disputes; and in possibly interfering with fairness to investors by giving host states the option to have recourse to a second forum for resolution of a dispute.

The institutional aspects addressed by the paper relate to defining the proper role of courts and tribunals; the complexities of SSDS under multilateral treaties; and issues raised by unwelcome SSDS interpretations.

The final section of the paper examines relevant case law. The three known cases on requests for interpretation under investment treaties involve different circumstances: (i) concurrent SSDS and ISDS proceedings where the respondent government in the ISDS case requested but did not obtain a suspension of the ISDS proceedings to allow the SSDS tribunal to rule (*Peru v. Chile*); (ii) SSDS proceedings commenced to seek an interpretation after an unfavourable ruling in an ISDS case, but where the SSDS tribunal declined jurisdiction (*Ecuador v. United States*); and (iii) a very recent case involving an apparently unilateral request for interpretation to a standing court with advisory jurisdiction which resulted

³ Solely for purposes of organisation, policy issues generally supportive of a role or a broader role for SSDS in interpretation were generally presented first in each category followed by those that generally contest or would limit that role.

in a favourable interpretation for the requesting government (the recent Kyrgyz Republic request to a standing court for interpretation of an investment treaty).

Numerous FOI participants shared views on SSDS. Participants from most jurisdictions generally had little experience with SSDS under their treaties and noted that their SSDS provisions had not been used. Some participants noted that the provisions were very sparse. Other participants noted that their recent treaties regulate the relationship between SSDS and ISDS. Some participants noted intensive ongoing reflection about the proper respective roles of ISDS and SSDS in resolving investment issues, and that available remedies in each system was an important consideration in this regard.

Some participants suggested SSDS could be used for questions of general application such as whether a treaty had been effectively terminated, the geographic scope of application of a treaty or the application of a clause on regional economic integration organisations (REIO). Views differed on whether SSDS claims could be brought as diplomatic protection claims for breach. A participant noted that such claims can be brought where an award has not been complied with, as contemplated notably in art. 27 of the ICSID Convention. Another participant expressed preliminary doubts about whether diplomatic protection claims for breach are possible. A participant noted that its recent treaties regulated the relationship between ISDS and SSDS; diplomatic protection claims are barred if there is an ISDS claim, but in the absence of an ISDS claim, an SSDS claim can be brought against a measure of general application affecting multiple investors. It was suggested that this situation could involve complexities with regard to the remedies to be sought; one investor in the group might have suffered loss while others might be more interested in having the law or regulation changed.

Some participants noted that SSDS has been described as a potential solution to certain concerns with ISDS, but considered that other reforms would be more effective than SSDS. A participant noted his understanding of the recent academic arguments about the potential benefits of SSDS in addressing the apparent conflicts of interest of ISDS arbitrators or suggestions that government submissions in SSDS cases might reflect a better balance of interests than party submissions in ISDS cases. He noted that his jurisdiction's recent treaties reflected a view that other reforms were preferable to SSDS to address these issues. These included government-nominated lists of arbitrators to give the Contracting Parties greater input into the choice of ISDS arbitrators, codes of conduct for ISDS arbitrators or giving non-disputing Parties rights to intervene on issues of interpretation in ISDS cases as is provided in the UNCITRAL Transparency Rules. On the latter point, another participant noted it was considering provisions to mandate early notification to non-disputing treaty Parties of potential cases to allow them to prepare interventions on interpretive issues as appropriate.

Another participant contrasted the right of treaty parties to reach an interpretation of the treaty with so-called tribunal interpretation or clarification of a treaty obligation in the context of resolving a particular ISDS dispute. She noted that this distinction is found at the WTO, where the WTO General Council has the exclusive authority to adopt interpretations. In her view, the distinction explains why an increasing number of investment treaties expressly give treaty parties the power to issue joint interpretations. She considered that there are currently issues with some ISDS tribunals making problematic interpretations of treaties or failing to apply proper legal interpretive principles as set forth in the Vienna Convention of the Interpretation of Treaties (VCLT); there is also an absence of a remedy to address clear errors of treaty interpretation by ISDS tribunals. However, the role of SSDS in addressing these issues was likely to be limited. In addition to joint interpretations, many recent treaties expressly contemplate non-disputing Party submissions to help tribunals make correct interpretations; if taken seriously by tribunals, and tribunals adhere to the VCLT principles, these should help resolve most of these issues with interpretation. Moreover, in her view, most SSDS clauses are likely limited to coverage of claims of breach.

Several participants considered that, regardless of the legal rules, SSDS claims were unlikely to be attractive to many governments. SSDS claims over interpretation could affect the bilateral relationship. SSDS may repoliticise a dispute contrary to the goal of depoliticisation that lies behind ISDS. It was further suggested that it is not clear why governments would want to relinquish their joint control over treaty interpretation to an SSDS tribunal.

A few participants offered varying views about the scope of clauses in their treaties referring to SSDS being available for disputes over the interpretation or application of the treaty. One participant suggested that this language in its treaties does not allow for claims for pure interpretation. A participant from another jurisdiction suggested that such language in its treaties would allow such claims for interpretation including for key clauses such as an MFN or FET clause; although governments might prefer not to make such claims, that was a matter of policy and as a legal matter the claim would be possible. Another participant noted that in some of its treaties other clauses, such as those setting forth the prerequisites for a claim, could affect the scope of SSDS. Another participant stated that his government's treaties excluded use of SSDS for pure interpretation claims without referring to the specific treaty language.

In discussing cases, participants confirmed that SSDS claims under investment treaties have been rare. It was noted that there was limited information about the *Peru v. Chile* case referred to in an ISDS award. Some participants suggested that greater transparency of SSDS or of inter-state discussions about interpretation could be helpful. Participants also raised the of whether and how SSDS proceedings should be coordinated with ISDS proceedings – e.g. whether concurrent SSDS and ISDS claims dealing with related issues should be handled.

Some FOI participants raised the issue of the relative public perceptions of SSDS and ISDS, and described their general impression that in current debates in many jurisdictions SSDS is often seen as preferable to ISDS. One participant noted that where SSDS also uses arbitration as its dispute resolution system, it was difficult to understand the preference for SSDS. It was noted that it is interesting to compare ISDS with the WTO which uses only SSDS but without arbitration. While WTO dispute settlement is also criticised, it is still frequently seen as preferable to ISDS. It was suggested that in some cases, such as under some recent treaties providing for transparent ISDS, ISDS may be more transparent than SSDS and that this might help address the perceptions gap.

III. Future work on investment treaties

FOI participants discussed future work on investment treaties based on a list of possible topics proposed by participants or the Secretariat. The FOI Roundtable requested work on three topics: (i) the benefits and costs of investment treaties; (ii) the balance between investor protection and the right to regulate in investment treaties; and (iii) arbitrators, adjudicators and appointing authorities.

IV. Recent investment policy developments

European Union

The European Union agreed at FOI Roundtable 20 held in March 2014 to present recent developments in EU foreign investment policy. The EU gave the Roundtable an update on developments relating to the EU competence on foreign direct investment. The Commission started by recalling the broad outlines of the inclusion of foreign direct investment as an area of exclusive competence for the European Union under the Treaty on the Functioning of the European Union as a result of the 2007 Lisbon Treaty.

The Commission then continued with a detailed description of the transition arrangements for Member States' investment treaties with third countries. These include grandfathering of existing Member State BITs until they are replaced by the Union's agreements and empowering Member States to negotiate

or re-negotiate and conclude investment treaties provided that certain conditions are met. The details of this presentation are available in a [powerpoint presentation](#).

Indonesia

Indonesia was invited to describe its ongoing policy review of its investment treaties. Indonesia indicated that it has 67 BITs in force at present. Nine date from the 1970s, 23 were signed from 1990-97, 28 from 1997-2004 notwithstanding the economic and financial crisis during that period, and seven since 2004. The treaties cover a broad range of regions: 21 are with Europe including 18 with EU member states, 24 are with Asian and Caribbean countries, nine are with Africa, six with the Middle East and seven with North and Latin America. Some of its 1970s treaties protect only incoming investment and not Indonesian investment abroad although most of its treaties cover both types of investment. Indonesia explained that key problems overall include the lack of a uniform template and outdated treaties.

Three elements were highlighted to explain the need to update treaty policy: (i) cases against Indonesia; (ii) the current economic context in Indonesia; and (iii) developments in partner countries. Indonesia described a case from the 1990s involving the right to regulate in which Indonesia was found liable for very substantial damages and also incurred high legal costs. Indonesia is currently facing a number of treaty arbitration claims, including by shareholders. It has realised that some of its treaties are not beneficial for it.

Indonesia's changed economic context is also a factor. A G20 member, Indonesia's GDP is now USD 1.2 trillion. Indonesians are also increasingly investing abroad. Moreover, incoming investment now mostly comes from Asia which was not taken into account in earlier treaty policy. ASEAN is expected to become an economic community in 2015 and ASEAN countries plus other partners are negotiating a regional comprehensive economic partnership (RCEP).

Indonesia noted that it is engaged in an ongoing scoping exercise for a free trade agreement (FTA) with the EU. It has 18 existing treaties with EU member states. Some of these may lapse during the FTA negotiations with the EU, others may be renegotiated.

At a national level, Indonesia is developing a standard investment treaty drawing on its experience with treaties, on international standards and on debates in different fora. Work on the model treaty started in late 2013; the new government to take office shortly will continue the work and a model should emerge by early in 2015. Indonesia is looking to develop a model that incorporates balance, transparency and fairness. Partner countries that participate in the Roundtable should accordingly expect Indonesia to renegotiate existing treaties.

The Chair thanked Indonesia for its informative presentation and invited the Roundtable to ask questions. A participant engaged in preliminary negotiations with Indonesia inquired whether it could assist Indonesia with the development of its model treaty; it suggested that this could avoid development of a model that could raise barriers in future negotiations. Indonesia noted that different approaches to negotiations were possible including separate treaties for trade and investment or an FTA incorporating investment provisions. Indonesia has experienced some complexities and delays relating to treaties with some partners with complex political systems. Today, BITs need to be updated because the situation has changed; Indonesia will share its model so that partners are aware of its new policy.

Indonesia also responded to a query about whether it has terminated any treaties to date. It emphasised that all 67 treaties are still in force. Indonesia noted the use of the word "terminate" or "denounce" by some has given rise to misinterpretations of Indonesia's policy in some quarters. Suggestions by some that Indonesia will terminate all 67 treaties are incorrect. As outlined by the

Chairman of the Indonesian national investment agency (BKPM), Indonesia intends to negotiate new modern treaties as existing outdated ones reach their term and lapse. Some recent treaties, such as the ASEAN treaty, are quite balanced, and elements from it may be included in the RCEP. But other treaties certainly need to be recalibrated.

The Chair emphasised that the Roundtable was very pleased to have Indonesia's active participation in its discussions and reiterated the Roundtable's invitation to Indonesia to participate regularly in its work.

France

France informed participants of the Roundtable that it had introduced changes to its prior authorisation procedure for foreign investments on 15 May 2014. These changes, published in Decree No. 2014-479, introduce additional sectors –transport, water, energy, electronic communications, public health and activities of vital importance as specified in the *Defence Code* – to the list of sectors in which prior government authorisation is required for foreign investment proposals. France explained that the reform sought to take better account of activities that are essential to safeguarding the interests of France with regard to public order, public security and national defence.