



Investor-State Dispute Settlement

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Thomas Johnson, Member of Iran-United States Claims Tribunal, Adjunct Professor of International Investment Law, Columbia University School of Law, former partner at Covington & Burling LLP, Washington D.C.

Comment submitted 22 June 2012

I will begin with two general observations. First, and most important, the paper could more broadly reflect the origins of ISDS. It grew out of diplomatic disputes that arose under customary international law. These were disputes between States, although individual investors were the immediate victims. ISDS substitutes the “victim” for the victim’s State in the dispute-resolution process and thus “de-politicizes” the dispute. This is the fundamental contribution of ISDS. Whether it serves actually to encourage investment is hard to demonstrate with any data.

Second, the difficulties States have with ISDS, I believe, in fact relate more to the substantive investment protections found in typical treaties than to the application of those protections through ISDS. The paper should, I think, try to elicit from state representatives indications of where they think tribunals have gone too far in finding state liability, and then think about how treaty standards might be modified to address the problem. The paper implicitly assumes that answers are to be found in changes to the ISDS process, rather than in the substantive protections that the process enforces. Some changes to the process might well be beneficial (requiring exhaustion of local remedies in some circumstances comes to mind), but more often the best answer to State concerns will be to modify substantive protections, which we are beginning to see – the NAFTA agreed interpretation on fair-and-equitable treatment being only one of the most obvious examples.

All that said, this is quite a contribution to the communal thought process, and I would be happy to be involved going forward.

Following are some more specific reactions to particular parts of the paper.

Question 2. The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.

a) What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?

The ISDS regime grew from a consensus among at least those countries that now are members of the OECD countries that customary international law, as opposed to treaty-based law, prohibits both uncompensated expropriations of alien-owned property and the denial of justice through improper enforcement of laws. Bilateral Investment Treaties (“BITs”) are – in large measure – efforts to embody this consensus in treaties between developed countries that participate in the consensus and less-developed countries that do not necessarily share this view of customary international law.

There is no customary international law that addresses the matter of trade relations between or among countries. Moreover, the "victim" of a WTO violation is, if not a national economy, at least an industry. That generally is not the case with investment disputes. It is, therefore, reasonable for States to want to keep for themselves the decision whether to begin a WTO action. In general, States affirmatively do not want to play this role in investment disputes because that would eliminate the key advantage of BITs from the State's perspective, which is that the availability of ISDS removes the dispute from the list of diplomatic disputes between the involved governments.

Question 3. In many areas of international law, focus is placed on enhancing the performance of domestic systems. a) Why has this same approach not been adopted in the context of international investment law

BITs and ISDS serve little or no purpose if the treaty parties are both countries with mature, well-functioning legal systems in which the rule of law prevails. But countries without these attributes do not develop them quickly. BITs and ISDS serve a purpose while that development is in progress. Assisting in that development is not a substitute for a BIT, and a BIT is not a substitute for assisting in that development.

a) What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?

I doubt that the effect is significant one way or the other, which is not to say that foreign investment – or at least the prospect of it – does not affect domestic legal systems. This is because, with or without an investment treaty, investors would prefer to put their money in a country governed by the rule of law than one that is not. A BIT with an ISDS provision is a very poor substitute for a well-functioning domestic justice system.

b) Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?

No, because the effects are too modest.

Question 5. The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement (e.g. Attempts at amicable dispute settlement) are among the most common general subject areas dealt with in the treaty sample.

a) What are your views and experiences on the use of these provisions?

They border on irrelevant. Disputes settle more often after the arbitration has commenced. Moreover, parties do not need a mandatory period of negotiation in order to negotiate, if negotiation makes sense.

Question 9. Should investment treaties give greater consideration to remedies? Should expanded use of primary remedies in ISDS be considered?

Exhaustion requirements should no doubt be reconsidered, at least in cases other than expropriation, and perhaps even there. That would deal with the level playing field concerns to a great extent, although they would negate the effectiveness of the ISDS remedy in immature legal systems. This is a hard question.

Article 64 of the ICSID Convention provides for ICJ jurisdiction over “[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention”.

The possibility that this language in the ICSID Convention might confer jurisdiction on the ICJ in enforcement disputes is worth some serious discussion and study. Most States no doubt would oppose an interpretation that subjected them to ICJ jurisdiction in such matters.

Question 14. The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?

Yes, and you have demonstrated as much. But it is easy to overstate it, because States still comply with these awards, with relatively few non-Argentine exceptions.

Question 24. Some senior arbitration specialists have criticised party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?

[Answer to question] States can change this system any time they want. Apparently, States like being able to appoint one of the arbitrators, and they like having something to say about who chairs the panel. I hear academics, and a few practitioners, complain about this system; I hear very few State representatives complain.

Question 26. Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?

No. States hire the same sorts of lawyers as investors do.

Question 28. As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators’ “dual hats” as arbitrator and counsel) has been criticised. What are your views on this question?

So long as there is disclosure, I see no problem. Parties know who they are getting, and that person's views on issues and his/her past and current representations.

Question 33. Why would countries wish to deny to third party investors benefits that they offer to the investors of their treaty partner(s)?

Lack of reciprocity. E.g., assume that your country has a BIT with The Netherlands but not with country A. Why extend treaty benefits to investors from country A who have invested through a Dutch subsidiary if your country's investors in country A cannot get the same treatment? This could soon become an issue for companies based in Australia, given Australia's new policy on ISDS.

Consistency of decision-making in ISDS

Over time, I think that the system produces consistent results. Outlier decisions are criticized and, ultimately, not followed. The real problem is not inconsistent decisions but wrong decisions. A permanent appellate body can make a wrong decision and the world is stuck with it. An ad hoc tribunal makes a wrong decision and, in time, it is recognized as such and not followed.

Question 41. ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?

I think the most important contribution this paper could make on this issue is to evaluate the extent to which important inconsistencies persist.

The Energy Charter Secretariat¹

Comment submitted 6 July 2012

Question 1. Although ISDS is shown to be an unusual, even unique, system of international dispute settlement, the entire set of international dispute resolution systems is highly disparate – there seems to be no dominant model for international adjudication.

a) Do you agree with this characterisation?

Article 26 of the ECT provides three procedural options for the settlement of ISDS: ICSID Convention (and the ICSID Additional Facility), UNCITRAL Arbitration Rules and Stockholm Chamber of Commerce (SCC) Arbitration Institute.

To the Energy Charter Secretariat's knowledge, there are 33 arbitration cases filed under the ECT, some of them having been settled amicably whereas some of them are yet pending (see Table 1). 20 of the 33 arbitral proceedings have been conducted in accordance with the ICSID Convention. 6 of the 33 arbitral proceedings have been conducted under the UNCITRAL Arbitration Rules on Ad-Hoc basis. 3 of the 6 UNCITRAL proceedings have been administered under the Permanent Court of Arbitration (the PCA). On the other hand 7 of the proceedings have been concluded under the SCC Arbitration Institute.

Thus ICSID Convention remains to be dominant procedural model for international adjudication of ISDS under the ECT.

Table 1. Cases administered under the ECT

ISDS administered under the ECT	Options
AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v. Hungary (2001)	ICSID
Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia (2001)	SCC
Plama Consortium Ltd. (Cyprus) v. Bulgaria (2003)	ICSID
Petrobart Ltd. (Gibraltar) v. Kyrgyzstan	SCC
Alstom Power Italia SpA, Alstom SpA (Italy) v. Mongolia	ICSID
Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation	UNCITRAL Rules (Ad – Hoc) administered by the PCA

¹ This contribution is prepared by experts of the Energy Charter Secretariat and is without prejudice to the positions of Contracting Parties/Signatories or to their rights or obligations under the ECT or international investment agreements.

Hulley Enterprises Ltd. (Cyprus) v. Russian Federation	UNCITRAL Rules (Ad – Hoc) administered by the PCA
Veteran Petroleum Trust (Cyprus) v. Russian Federation	UNCITRAL Rules (Ad – Hoc) administered by the PCA
Ioannis Kardassopoulos (Greece) v. Georgia	ICSID
Amto (Latvia) v. Ukraine	SCC
Hrvatska Elektroprivreda d.d. (HEP) (Croatia) v. Republic of Slovenia	ICSID
Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey	ICSID
Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (the Netherlands) v. Azerbaijan	ICSID
Barmek Holding A.S. (Turkey) v. Azerbaijan	ICSID
Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey	ICSID
Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey	ICSID
Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v. Republic of Kazakhstan	ICSID
Electrabel S.A. (Belgium) v. Republic of Hungary	ICSID
AES Summit Generation Limited and AES-Tisza Erőmű Kft. (UK) v. Republic of Hungary	ICSID
Mohammad Ammar Al-Bahloul (Austria) v. Tajikistan	SCC
Mercuria Energy Group Ltd. (Cyprus) v. Republic of Poland	SCC
Alapli Elektrik B.V. (the Netherlands) v. Republic of Turkey	ICSID
Remington Worldwide Limited (UK) v. Ukraine	SCC
Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v.	ICSID

Federal Republic of Germany	
EDF International S.A. (France) v. Republic of Hungary	UNCITRAL Rules (Ad-hoc)
EVN AG (Austria) v. The Former Yugoslav Republic of Macedonia	ICSID
AES Corporation and Tau Power B.V. (the Netherlands) v. Kazakhstan	ICSID
Ascom S.A. (Moldova) v. Kazakhstan	SCC
The PV Investors v. Spain	UNCITRAL Rules (Ad-hoc)
Khan Resources B.V. (the Netherlands) v. Mongolia	UNCITRAL Rules (Ad-hoc)
Türkiye Petrolleri Anonim Ortaklığı (Turkey) v. Kazakhstan	ICSID
Slovak Gas Holding BV (the Netherlands) et al v. Slovak Republic	ICSID
Vattenfall AB (Sweden) et al v. Germany	ICSID

Question 41. ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizeable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?

The ISDS system involves various options, ranging from ad hoc tribunals to several different institutional frameworks. The latter also diverges within itself. Thus, consistency issue arises almost in all of them in the absence of an effective appellate system unlike the domestic legal systems. The appellate system is made available as a possible remedy in the ICSID system but only in limited circumstances and with certain caveats. In the others awards can be subjected to the scrutiny by domestic courts, but it may be rather tricky since awards can be executed in other jurisdictions than the host country; furthermore, in general, this option is also subject to strict rules under domestic legislations, with a very narrow leeway left for domestic courts to review, revise or in general challenge those awards issued by investment arbitration tribunals.

As a result, diverging awards –sometimes even based on the same factual inputs- present difficulties in achieving at justifiable or arguably legitimate outcomes in certain cases. Obviously this could be more of a concern in cases where the awards are quite voluminous as regards the amounts involved. The more the amounts of such awards are, the more those concerns might arise due to inconsistent awards.

Moreover, the ISDS system is also diverging from the national legal systems, in that, while in the latter the claimant is generally required to post a certain fraction –in proportion - of the claimed amount as court charges or fees, there is no such requirement envisaged in the former. This may induce claimants to

come up with claims with a rather huge amount as there are no binding requirements to pay a fraction of the claimed amount as charges or fees for the case before the tribunals. This may perhaps be viewed as the main leading factor behind huge claims sometimes even reaching at some billions.

Also, often it may be observed that investment arbitration tribunals tend not to require claimants to post security for costs even in cases where there are reasonable questions as to the reliability of claimants to pay awards on costs once issued. This sometimes leaves the host states with an award in their favor through requiring fraudulent claimants to pay the fees and/or legal costs borne by those states, yet with no value in practical terms as such claimants may turn out to be only shell companies with no assets to be followed.

Question 42. What reasons explain the wide preference for inclusion of international arbitration in bilateral investment treaties?

(1) International arbitration provides advantages to both the investor and the host state

(a) Advantage for the investor

For the investor, the advantage is that it gains access to an effective international remedy. If the investor must resort its dispute with the host state to local domestic court, the host state may have immunity. Even if the host state consents to participate in the court proceedings, there could be concerns on the impartiality of the judge(s).

(b) Advantage for the host state

For the host state, one aspect of the advantage is that, by offering an international procedure for dispute settlement, its investment climate would be improved, and thus, more foreign direct investments could be attracted.

The other aspect of the advantage is that the host state could avoid being involved in other processes, notably, diplomatic protection/espousal.² Avoiding diplomatic protection could be beneficial especially in the case of developing states because capital-exporting states might impose pressure through such process.

(2) Arbitration is usually more efficient than litigation at court

(a) Necessary time

Arbitration has only one procedural stage at the end of which the parties can obtain a final and binding award, provided that the parties do not go through annulment or set-aside proceedings. In contrast, litigation at court often requires the parties to go through the appeal process up to the supreme court before the decision becomes final.

Even when the parties do not appeal and the decision becomes final at the first court, court proceedings could still require a considerable amount of time to the extent that it would be reasonable to say that arbitration is a faster remedy.

² Diplomatic protection takes place only when the investor requests its home state to initiate such process. The availability of international arbitration would lead foreign investors to avoid making such request, as it is not a highly effective remedy for them because: (i) even if the investor requests its home state to espouse its claim, there is no guaranty that the home state will do so; (ii) when the home state does espouse the investor's claim, the investor loses its control over the dispute; the home state decides how the claim should be made, what settlement it should or should not accept, and whether any portion of the settlement should be paid to the investor; and (iii) often, diplomatic protection does not end up with an outcome that is meaningful to the investor.

In the cases of the Energy Charter Treaty-based arbitration, the length of time consumed before the arbitrator/tribunal reached the final award is as shown below. As of 28 June 2012, the Energy Charter Secretariat has identified 33 investor-State arbitration cases filed under the Energy Charter Treaty.³ Out of these 33, 15 cases reached the final award, (see Table 2).

Table 2. Investor-State arbitration cases filed under the Energy Charter Treaty

Case name	Registered on:	Award rendered on:	Time consumed
Nykom Synergetics Technology Holding AB v. Latvia	11/12/2001	16/12/2003	2 years
Plama Consortium Ltd. V. Bulgaria	19/08/2003	27/08/2008	5 years
Petrobart Ltd. V. Kyrgyzstan	01/09/2003	29/03/2005	1 year 7 months
Ioannis Kardassopoulos v. Georgia	03/10/2005	03/03/2010	4 years 5 months
Limited Liability Company Amto v. Ukraine	24/11/2005	26/03/2008	2 years 4 months
Libananco Holdings Co. Limited v. Turkey	19/04/2006	02/09/2011	4 years 5 months
Azpetrol International Holdings B.V., Azpetrol Group B.V., and Azpetrol Oil Services Group B.V. v. Azerbaijan	30/08/2006	08/09/2009	3 years
Cementonia "Nowa Huta" S.A. v. Turkey	16/11/2006	17/09/2009	2 years 10 months
Europe Cement Investment and Trade S.A. v. Turkey	06/03/2007	13/08/2009	2 years 5 months
Liman Caspian Oil B.V. and NCL Dutch Investment B.V. v. Kazakhstan	16/07/2007	22/06/2010	2 years 11 months
AES Summit Generation Ltd. And AES-Tisza Eromu Kft. V. Hungary	13/08/2007	23/09/2010	3 years 1 month
Mohammad Ammar Al-Bahloul v. Tajikistan	30/05/2008	08/06/2010	2 years
Mercuria Energy Group Ltd. V. Poland	24/07/2008	12/2011	3 years 5 months
Remington Worldwide Limited v. Ukraine	2008	28/04/2011	Between 2 years 4 months and 3 years 4 months

³ There is no obligation on the disputing parties to notify their cases to the Energy Charter Secretariat, and thus, there could be more (and unknown) cases.

Vattenfall AB, Vattenfall Europe AG, and Vattenfall Europe Generation AG&Co. KG v. Germany	17/04/2009	11/03/2011	1 year 11 months
Average	–	–	Between 2 years 10 months and 2 years 11 months

(b) Competence of adjudicators

In international arbitration, each party can choose one arbitrator, whereas the third and presiding arbitrator is appointed: (i) by agreement of the two party-nominated arbitrators or by the appointing authority (under the UNCITRAL Arbitration Rules); and (ii) by the agreement of the two parties or by the President of the World Bank (under the ICSID Convention). Thus, the parties would be able to believe that the arbitrators have sufficient knowledge and experiences in the relevant areas, namely, international law and investment law, as well as specific industry law and practices. It should be noted that judges at local domestic court would not necessarily possess this particular competence.

The Business and Industry Advisory Committee to the OECD (BIAC)

Comment submitted 19 July 2012

Following the invitation by the OECD Secretariat to contribute to the Freedom of Investment Roundtable's discussions on Investor-State Dispute Settlement (ISDS), the Business and Industry Advisory Committee to the OECD (BIAC) is pleased to submit the following comments on the issues and questions in the scoping paper as well as on other ISDS issues of interest (see Box 1 below).

General Comments

1. The OECD Secretariat's scoping paper is a valuable contribution to the very important issue of ISDS. We realize that the OECD's efforts on ISDS are ongoing and that not every element of that work stream can be included or rehashed in each paper in the overall effort. However, we suggest that such an important document like this scoping paper should not omit important background elements of the overall issue.
2. We would thus like to suggest to start the paper with key background, context, and bigger picture aspects of ISDS, e.g. the history of ISDS, how it came to be a core element in most significant Bilateral Investment Treaties (BITs) or comparable agreements, why a wide range of countries have come to see ISDS as so important, historic experiences/problems of both foreign investors as well as both host and home governments in dealing with investment disputes in the absence of ISDS etc. It would be helpful to lay out the importance of private sector-FDI in driving economic development, employment, competitiveness and growth. This very important basis and context could be addressed in the paper before giving details on specific provisions of ISDS. We also think it is important that a major paper like this addresses directly or by reference, macro- and micro-economic data about the impact of ISDS provisions on FDI flows.
3. For all countries, but especially for developing and transition economies, FDI flows are major determinants of economic performance. FDI transfers advanced technologies to non-OECD countries, which ensure their sustainable development. Hence, almost all countries assign a high priority to attracting FDI. Advanced industrial countries (including most OECD member countries) generally have a competitive advantage in attracting FDI for many reasons. But political and economic stability, rule-of-law, and predictable regulatory and judicial infrastructure are key elements in international investment decisions. It can be hard for developing and transition economies without a long and strong track record of rule-of-law, judicial independence, and public integrity to compete to attract FDI. Investment treaties and international agreements, especially those including strong ISDS provisions, can play a key role economic development strategies for many developing countries but implementation of some BIT commitments may remain problematic in the eyes of some foreign investors.
4. BIAC is aware of the need to balance the public good of an open investment climate and the public good of policy freedom. An important policy question in this respect is whether BITs limit in practice the policy space of host countries. This is contended by certain groups, but sufficient proof of the phenomenon is not provided. Independent research by the OECD on this issue may provide the basis for future policy work in this field. In this respect, it should be recalled that ISDS is not a substantive obligation, it is a procedural one. Therefore, ISDS in no way infringes the policy freedom of a government; it simply outlines the process by which a dispute over the underlining substantive

principles in the investment agreement will be arbitrated. From a private sector perspective, the core investment protections and ISDS found in virtually all treaties is about ensuring the rule of law and baseline protections that all individuals and enterprises should be accorded and do not fundamentally challenge valid government regulation.

5. BIAC believes that independent arbitration is fundamental to investment protection. Without independent ISDS for foreign direct investment (e.g. arbitration in BITs) investment in non-OECD countries could be reduced for the simple reason that a foreign investor, uncertain of the local judicial regime, might be unwilling to make an investment. Access to a third-party neutral arbitrator reduces this perceived risk. There are various developments that favour local dispute settlement over international arbitration. The OECD paper should not be used as an argument to diminish international arbitration in investment matters.
6. The critical point for BIAC and the international business community broadly is that ISDS is an essential element in major international investment decisions. In today's (and even more so, tomorrow's) rapidly-changing and highly competitive global environment, international companies are prepared to deploy great sums of capital in pursuit of international investment opportunities. This is good for global economic growth, efficiency, economic development and overall global economic welfare. But as the volumes of money involved, and the competitive pressures rise, so does risk. Investors need to mitigate those growing risks if potential FDI flows are to be realized. For countries, particularly non-OECD countries, without strong long-established and independent judicial systems, strong ISDS provisions are critical. As well, ISDS provisions are widely viewed by the private sector as a critical backstop in all countries, especially when investors are considering major outlays of capital, long-term and complex projects, and projects involving government participation and/or participation of investors from multiple countries. ISDS provides businesses with a better leverage for proper discussions with host governments to resolve problems. Without ISDS, investors have no resort to protect global investment and business activities from unreasonable exercise of states' authority.
7. Most FDI projects develop into very successful win-win efforts for all relevant parties, the host and home governments, the investor, and its new local partners and suppliers. But unfortunately, too often, well-designed investment projects with strong economic fundamentals run aground on one of more political developments – e.g. expropriation (whether explicit, creeping, or by intimidation/harassment); change in the host government leading to unilateral re-writing of rules, regulations or contracts; imposition of onerous new forced localization dictates; failure to honor commitments on repatriation of the investor's capital and operating funds; or other forms of harassment. Investment capital fears and flees risk, especially risk which cannot be mitigated. The substantive guarantees of investment treaties combined with ISDS offer a proven tool for relatively riskier countries to reduce their risk profile and thus be more competitive in the global race to attract scarce FDI.
8. The scoping paper includes several references and comparisons among international agreements on trade, human rights, multilateral environmental agreements, and investment agreements. Each of these areas and each of these sorts of agreements is very important. But we believe that trying to compare specific legal coverage and provisions, including dispute settlement provisions, in investment agreements with human rights or trade agreements is comparing apples and oranges under a broad category of fruit. In this context, we would like to note one fundamental difference between trade and investment. Trade is certainly closer to investment as an issue than is human rights or environmental protection. When trading, exporting and importing, the parties involved continue to reside and to conduct their business in their home countries, subject to the legal jurisdiction and protections of their home government. Only the goods or services trades cross borders into the partner country with the cross-border payment often assured or insured up-front. Thus, risk to the exporter or importer is quite

limited. Although another form of conducting international commerce, investment or FDI is very different from trade. An investor takes large amounts of capital (money but also often skilled labor, intellectual property, trade secrets, etc.), and moves that capital to a foreign country, a long-term commitment (with all the commensurate risk) to operate under the jurisdiction of another sovereign government. Investment is fundamentally different from trade as investors put significantly more at risk, including the fundamental risk of being subject to a foreign government's legal and regulatory system. Investors have much greater need of strong ISDS protections than traders in their home jurisdictions.

Specific Comments

Chapter I.B. and I.D. [on Bodies of international law without compulsory international dispute settlement and issues for discussion]

BIAC does not see the added value of referring to other bodies of international law, such as Multilateral Environmental Agreements for this paper, especially as those agreements generally do not include provisions for investor-state dispute settlement. Such comparisons can provide interesting intellectual discussions, but their relevance is quite limited.

Question 4. Do you agree that, although ISDS is explicitly used in only a tiny fraction of all international investments, it can nevertheless be assumed to influence the dynamics of other investor-state dispute settlement practices, both formal and informal?

- a) What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?***
- b) Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?***

On balance, ISDS helps over time improve the domestic judicial and regulatory regimes of some nations, those that are and remain serious about attracting FDI. ISDS by itself is not going to deliver transparency, good governance, and rule-of-law if a government is not prepared to do the hard work to establish and enforce those values. But it can help if the parties to an investment agreement share real commitments to those values.

Question 6. The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.

- a) Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?***
- b) If costs are considered to be high, does this raise concerns?***

Question 7. Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being “out-lawyered” rather than on the merits?

Question 8. Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?

Cost is obviously a concern in ISDS as in any other area. But implying that, somehow, high costs alone might make strong ISDS provisions unaffordable is not correct and therefore should not be a reason to avoid or weaken ISDS protections. Fees may be high, but the stakes are high as well. It has to be realized that the economic consequences and damage involved can be very substantial. However, BIAC is open to the possibility of exploring best practices in bringing the cost of arbitration down.

The costs of ISDS should be put in perspective. The cost argument is often used by countries that are not in favour of independent ISDS and that seek to abandon arbitration. It should be realized that investment treaty arbitrations are often (technically) difficult. Material fees also ensure that companies will not enter into arbitration lightly. For the host state these fees should be an incentive to settle the matter as soon as possible. According to 2010 UNCITRAL rules the costs of arbitration should be borne by the unsuccessful party – “high” fees should be an incentive for efficiency.

It should be noted that in general only major cases are being arbitrated. Companies normally do not arbitrate on principle matters or when there are other forums and mechanisms that can adequately be used to prevent and resolve disputes. This could explain the figure of 8 million USD. Not all countries have a good track-record when it comes to respecting rights of foreign investors. If a state violates a treaty, it risks arbitration including the costs for such arbitration.

Page 26 [on remedies for investors in advanced systems of domestic administrative law]

"National systems" cannot necessarily be a suitable alternative for ISDS as an independent judiciary is simply not available in every country. OECD countries should fully support independent arbitration as an alternative vehicle for enforcing host governments' commitments and should not propose domestic systems for foreign investment dispute settlement as a substitute for ISDS. This could lead to non-OECD countries adopting the same approach. This will inevitably lead to a deterioration of the position of investors.

Page 27 [on remedies for investors in advanced systems of domestic administrative law]

National systems tend to focus on remedies that are non-pecuniary (e.g. annulling illegal action) and ISDS on pecuniary. BIAC does not see an issue here. An independent arbitrator could never force a government to annul or adopt a (legislative) measure. As a consequence, pecuniary sanctions are the only sanctions that could be awarded by an independent arbitrator. If a government, however, wishes to annul or revise a measure, it could always do so.

Question 12. Is enforcement of ISDS arbitral awards a growing problem?

Question 13. If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?

Question 14. The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?

Question 15. Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?

Question 16. As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?

Our members are increasingly concerned with the problems (real as well as potential) of enforcement of ISDS awards. While enforcement can be a problem in either direction, we are primarily concerned about the threat of increasing signs of some governments criticizing or even unilaterally annulling investment agreements and ISDS, invoking misguided concepts of sovereignty without any respect for legal obligations and commitments. Recent actions of the Government of

Ecuador, for example, in ignoring clear injunctions from international arbitrators are very troubling and should not be tolerated or ignored.

Question 29. Many States appear to favour allowing investors to forum shop between arbitral fora. At the same time, most States are less tolerant of forum shopping in domestic legal systems. What explains the different approaches?

Question 30. For States that favour allowing investors to forum shop between arbitral fora, has your government publicly articulated its policy rationale in this regard to parliament or elsewhere?

Question 31. What are your views on the relationship between forum shopping and differences in the rules governing the various arbitration fora (e.g. in relation to transparency and review of awards)? Does the diversity of rules and procedures in the various arbitration fora (e.g. ICSID, UNCITRAL) meet the needs of the societies on behalf of whom investment treaties have been signed?

Question 32. Is the fact that domestic investors have tried (and succeeded) in qualifying for protections under their own countries' investment treaties a source of concern? Why would countries wish to deny to their own investors benefits that they offer to foreign investors?

Question 33. Why would countries wish to deny to third party investors benefits that they offer to the investors of their treaty partner(s)?

Question 34. Is treaty shopping a major problem for your country? If so, why?

"Forum Shopping" under competing arbitral bodies is a rather unfortunate description of an investor being able to take advantage of specific commitments in an agreement reached voluntarily between the two relevant governments, given the wide range of potential claims which could emerge years later under various scenarios. The implication that an aggrieved investor is somehow gaming the system or doing something improper is unjustified.

Question 35. How does your government evaluate the consistency of ISDS?

Question 36. Is it important for the ISDS system to produce consistent results?

Question 37. How should consistency as a value be weighed against other considerations (costs, speed, need to work out issues through case law)?

Question 38. Is the current architecture of ISDS suited to promoting consistency?

Question 39. The scoping paper notes that some inconsistency is an unavoidable feature of any dynamic system of adjudication. Inconsistent decisions can be part of the process by legal concepts are analysed and clarified. Is this need for clarification and innovation a feature of ISDS?

Question 40. As noted in the section on remedies, under some advanced systems of administrative law, such as in Germany, claimants seeking damages must first seek judicial review or primary remedies. Multiple proceedings are thus required to obtain damages. In

addition, all domestic systems allow judgments awarding sizable damages against governments to be appealed. Are advanced domestic administrative law systems relevant comparators for evaluating the importance of finality with regard to ISDS arbitration decisions awarding damages?

Question 41. ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?

“Consistency” is an important virtue, but it should not become a straight-jacket. As in domestic judicial and arbitral systems, the role of the arbitrator or judicial authority is to consistently apply the laws and regulations to a wide range of specific and quite different cases and situations. Consistency is important but does not trump other important criteria, most importantly adjudicating the case fairly. Justice and fairness are higher criteria than consistency.

Question 42. What reasons explain the wide preference for inclusion of international arbitration in bilateral investment treaties?

Question 43. Many of the ISDS provisions contain texts requiring attempts at amicable settlement and coordinating recourse to international arbitration relative to domestic judicial procedures. Are these provisions important parts of States’ consent to arbitrate?

Question 44. Why do many States engage in light regulation of ISDS in their bilateral investment treaties?

Question 45. The survey of ISDS provisions in investment treaties shows differences (among treaties and countries) in treaty language with respect to essentially all issues covered. What do you think about this degree of variation in language? Is it useful? If so, for what purpose?

Question 46. Many countries’ older treaties are different than their newer treaties. Is this a source of concern for these countries? Why are investment treaties and, more specifically, their ISDS provisions not updated more frequently?

BITs cannot work without a strong and effective independent arbitration/dispute settlement. There could be issues with arbitration (costs, enforcement etc.), but it is the only system that guarantees impartial dispute settlement. Losing independent dispute settlement would, in practice, mean losing investment protection which would reduce much-needed FDI flows globally and especially flows into developing and transition economies.

As explained above, ISDS serves the interests of both the investor and the host country. The host country wants to attract FDI and sees ISDS as a key element in its investment climate package, a way to compensate and offer some protections for perceived issues in their investment regime or governance package. For the investor, the ability to access ISDS affords promise of a fair, unbiased resolution for disputes outside the potential control of the host government which could be a party, directly or indirectly in such disputes. It is normal, as in trade agreements or other fields, for model texts to evolve over time and/or to be customized to address specific issues with particular negotiating parties.

Box 1. Submission from Business New Zealand

Thank you for giving Business New Zealand the opportunity to comment on the draft prepared by the OECD Secretariat.

Who are we?

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), BusinessNZ is New Zealand's largest business advocacy body. Together with its 80 strong Major Companies Group, and the 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.

Answers to your questions:

Your paper asks 41 questions. Many of these are extremely detailed. Rather than answer these we make some general comments that address many of these issues.

New Zealand is unusual for an OECD member. It is a net importer of capital. The interest of many of our members is therefore to encourage foreign investment into New Zealand rather than to protect foreign investments made offshore. That said many of our members do invest offshore and from time to time do experience government imposed difficulties with these investments.

We are not sure what impact the negotiation of investment treaties containing ISDS has on the decisions of overseas investors in New Zealand. Australia has for many years been the major foreign investor in New Zealand yet, it was only in 2011 that an investment agreement was negotiated between Australia and New Zealand.

New Zealand is by many measures seen as the world's least corrupt country. We also have an excellent legal system. Foreign investors know that if seeking recourse to our system they will receive an impartial hearing and equal treatment to local investors. We suspect that this is a much more important factor for investors in New Zealand than ISDS in treaty arrangements.

New Zealand investors offshore are not always investing in economies that have good functioning, unbiased domestic dispute settlement arrangement and policy-making processes. This is why New Zealand has encouraged the negotiation of treaties including ISDS with such countries.

Business New Zealand welcomes the negotiation of treaties containing ISDS with countries of this type. It sees no compelling need to negotiate treaties containing ISDS with countries of similar type to New Zealand.

ISDS has been a controversial issue in New Zealand over the past 13 years or so. The controversy began with the negotiation of the Multilateral Agreement on Investment and has continued since then. It has become particularly controversial with the current negotiation of the Trans Pacific Partnership set against the backdrop of the ISDS cases involving Australia and decisions on the plain packaging of tobacco products. These cases have been very well publicized in New Zealand. With strong pressure coming on the New Zealand Government to follow a similar path to Australia on tobacco, there is concern that ISDS could be used against New Zealand. (Those arguing along these lines conveniently forget that New Zealand's investment agreements allow the Government to regulate for reasons such as protecting public health).

It is unfortunate that Australia is being challenged by companies using two of its Treaty agreements with jurisdictions where the companies are obviously not domiciled. This Treaty gaming does have unfortunate consequences as it plays into the hands of the vocal critics of Investor State Dispute Settlement.

Our membership has no issues with the fees being charged by those representing parties in ISDS cases, nor are there strong views on experts playing different roles in different cases.

Our membership does have views on the different outcomes that are achievable from ISDS from remedies that would be achievable in domestic law. Large monetary settlements would be unlikely in New Zealand domestic law, but could be achievable through recourse to ISDS. A debate on this matter in the OECD context would be welcome. Some of our members do see a case for bringing New Zealand's property rights protection in line with international law.

Thank you again for the opportunity to submit on these important matters.

Catherine Beard, Executive Director, ExportNZ and Manufacturing NZ, On behalf of BusinessNZ

Box 2. Submission from Repsol S.A.

1. Key issues (para 26). We agree with the key issues identified but would add the issue of time and delay, i.e. how long it takes for a dispute to be resolved through ISDS. This is a major concern of claimant investors, and some respondent states as well. This issue is treated in the paper together with costs (see e.g. box 2). However the matter is of fundamental importance in light of increasing delays (with some cases lasting up to ten years) and thus deserves separate and more detailed treatment. The credibility of the system with investors and thus its capacity to help attract investment (which is the concern of the states) depends on a critical analysis of how to control time and cost. We agree with the paper (Box 2) that ICSID internal delays have been controlled (time to register; time to identify arbitrators etc.). However, this is only a small part of the delay factors with the greatest delays occurring as a result of cases being split unnecessarily into different phases (jurisdiction, merits, damages) and awards taking commonly one year or more to be issued. The alleged improvement in time from case initiation to conclusion in Box 2 we suspect is due to termination of some cases early due to successful jurisdictional objections which may distort the figure. Our experience is that cases are not being resolved more promptly.

2. Arbitrator selection. ICSID should consider following the ICC's lead in commercial cases by requiring not only that all arbitrators confirm their availability to dispose of a particular case promptly (human nature will always cause them to say yes) but by disclosing the number of other pending cases as counsel and arbitrator and a statement that they will be in a position to (e.g.) issue an award within a maximum six month time delay following a post hearing brief.

3. Arbitrator case management. Linked to the above comment, the paper could address more specifically the different techniques that may be adopted for arbitrators to manage the case more efficiently to speed up the process and reduce costs (it is only referred to in passing, e.g. in para 35 and box 2). Case management techniques may include: fixing all deadlines (including hearing dates and dates for the issuing of interim decisions and final awards) at the first procedural meeting; ensuring a tight calendar that respects state sovereignty but also recognises that "justice delayed is justice denied".

4. Bifurcation and trifurcation. There seems to be no mention of these matters in the paper. Yet they are of concern to users of the system particularly in relation to the time/cost issue. There should be some discussion in the paper as to when bifurcation (separation of jurisdictional and merits phases) and trifurcation (adding a separate third phase on damages) are advisable and how to prevent them adding to delay. Particularly, tribunals should refuse jurisdictional bifurcation unless the jurisdictional issues have a material chance of success based on existing case law. It can add from 12-18 months additional time to the resolution of a dispute when compared with a case which is not bifurcated.

With regard to the splitting of liability and damages, this should be the exception and raised by the Tribunal contemplating it at the first procedural hearing. If ordered, this early decision would avoid the unnecessary and expensive process of unnecessarily proving damages in a pure liability phase and thus permit faster deadlines. The splitting of liability and damages is often used now by tribunals after hearing both liability and damage issues and then deciding that damages are "too hard" without the assistance of a tribunal appointed expert in a second repetitious damages phase.

5. Tribunal appointed experts. In the same context, once the tribunal has reviewed the parties' pleadings and considers that there is an issue of such complexity that it may need an independent expert (usually a damages expert), such expert should be appointed (subject to comments from the parties) prior to the final hearing. There is a disturbing trend to appoint such experts many months after the close of the final hearing once the tribunal realises it does not feel comfortable reaching a reasoned decision on damages on its own. Due to the late appointment, the expert is unfamiliar with the issues and needs to be educated from zero which adds further time and cost.

6. Arbitrator remuneration linked to issuing of decisions and awards. One of the fundamental problems with the current system (particularly ICSID) is that arbitrators simply inform the Secretariat what their anticipated workload will be for the next six months and the Secretariat asks for advances from the parties accordingly. The advances are not linked to any milestones but simply to time worked. This is to be contrasted with the remuneration mechanism in the ICC where the arbitrators are only paid once specific milestones are reached with most of the remuneration only paid once the final award is issued. This provides a great incentive to the arbitrators to be efficient and issue an award as promptly as possible and could be adopted in the ICSID or other ISDS systems. It is noteworthy that, with this remuneration system, ICC awards are almost twice as fast as ICSID awards with issues that are often equally complex.

7. Formalise a role for ICSID and the World Bank with regard to payment and enforcement of awards (para 69). The non-payment of awards is a major challenge to the system. Although there are legal mechanisms for enforcement, identifying attachable assets can be a long and expensive process. ICSID and the World Bank should consider protecting their ISDS system by establishing a mechanism that would support voluntary payment. This could include a constant review of the payment record of a state in respect of an adverse award and regular meetings with state representatives of those states that have failed to pay voluntarily with formal information about the status of payment and progress towards payment being reported to all other Member States of the World Bank and on the ICSID website. The current system simply washes its hands of the award once issued.

8. Allocation of costs (paras 39-42). Following from the above, another form of penalty against recalcitrant non-complying states could be a more systematic allocation of costs against those states in all cases where the investor claimants were successful. At the moment, there is a high degree of deference to states with costs rarely being awarded against them even where states lose.

9. Forum shopping/treaty shopping (section II.G). This section addresses the possibility of structuring an investment to attract treaty protection. We suggest that the phrase "forum shopping" be replaced by a more neutral expression like "forum selection" or "treaty planning". This is a legitimate use of legal instruments.

10. Annulment proceedings. States are currently routinely using the annulment process in ICSID with unsustainable arguments just to obtain a stay of execution. To limit this abuse, any such stay should be conditioned on payment of security in the amount of the award. This used to be the case but is less and less frequent. If there is no "cost" to seeking annulment, states have a perverse incentive to using the remedy even where there are no chances of success.

11. Consistency (para 162 et seq.) It is a matter of concern that tribunals are reversing the consistent conclusions of a series of earlier cases leading to a lack of legal security. There should be a greater degree of restraint from later tribunals once an established line of case law has been established upon which investors may legitimately be assumed to have relied (similar to the restraint shown by domestic civil law courts in the respect for a ***jurisprudence constante***). Whilst there is no strict doctrine of precedent, each tribunal should carefully consider and distinguish any earlier case dealing with similar issues rather than simply deciding from zero. Consistency will reduce litigation, give greater credibility to the system and maximise settlement opportunities. [This issue is close to our heart in light of the inconsistent case law on the 18 month litigation period before Argentine courts].

12. Injunctive relief. Although it is not expressly mentioned throughout the document, we feel that it would be extremely helpful for investors submitting claims to ICSID to regulate the possibility of requesting as cautionary measure the Court to order the stay of all legal proceedings initiated and existing under local law in relation to the matter under litigation, while the claim before ICSID is still pending.

**Jan Wouters, Professor of International Law and International Organizations,
University of Leuven, President, Flemish Foreign Affairs Council, Of Counsel,
Linklaters De Bandt; Nicolas Hachez, University of Leuven, Belgium**

Comment submitted 19 July 2012

First of all, we would like to thank the OECD for giving us the opportunity to participate in this consultation, the outcome of which may hopefully have a positive influence on the evolution of the international investment legal regime, as OECD countries, which are among the most important capital-exporters, are among the driving forces of this regime. The dispute settlement clause included in a majority of international investment agreements, which allows private investors to sue host states before arbitral tribunals, is one of the most important features of the regime. Investor-state arbitration, mirrored on commercial arbitration (finality, confidentiality, etc.), has indeed been instrumental in adding substance to the often vague provisions of international investment agreements, and has decisively contributed to shaping international investment law. Critics have however argued for some time that the arbitral model was not suited for settling investment disputes, especially in regard of the high profile public interest issues they generally involve.¹ The scoping paper discusses in an excellent manner most of the potential reasons for such criticism, and along its lines, we would like to contribute the following comments.

1. On the *sui generis* character of investor-state dispute settlement

As noted in the scoping paper, there seems to be no dominant model for the settlement of international disputes. There can be non-judicial (diplomatic) and judicial avenues, state-to-state or state-to-individual mechanisms, specialized or general fora, etc. The investor-state arbitral mechanisms are, among all other international dispute settlement mechanisms, rather peculiar. Yet, our view is that their *sui generis* character should not serve as an excuse for watering down standards and principles which are essential to the fair administration of justice, and which are of particular importance when the disputes considered involve issues that impact the situation of individuals, or the public interest. Such standards are notably transparency, independence, impartiality and legal certainty.

While the personal integrity and legal competence of arbitrators is generally recognized and acts as an enabler for the overall high quality of arbitral awards, the arbitral system suffers from a lack of in-built mechanisms that structurally guarantee its independence and impartiality.² Of course, the investor-state dispute settlement mechanism has developed incrementally over the years, and its features, at least in the early days, responded to certain objectives, such as sparing foreign investors the pains of going through the domestic judicial system of the host state or of relying on haphazard diplomatic protection. Also, the arbitral system allowed for a direct application of international law in a final manner, and therefore increased the speed of the proceedings and the reliability of their outcome.

However, the practice of investor-state dispute settlement has been confronted with a range of issues that had arguably not been envisioned when the arbitral solution was inceptioned.³ Domestic judicial systems are

¹ See generally Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds.), *The Backlash against Investment Arbitration – Perceptions and Reality*, Alphen, Kluwer Law International, 2010.

² For a summary of such criticism, see Nicolas Hachez and Jan Wouters, "International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?", forthcoming in F. Baetens (eds.), *The Interaction of International Investment Law with Other Fields of Public International Law*, Cambridge, Cambridge University Press, 2012.

³ Gus Van Harten & Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *European Journal of International Law* 121 (2006), p. 150.

consistently bypassed and privately appointed arbitrators are regularly confronted with issues of crucial interest for local populations, such as water distribution, the phasing out of nuclear energy, of the fight against tobacco. This is arguably not entirely compatible with the commercial, confidential, and *ad hoc* character of the arbitral process. We should therefore recognize that the arbitral model of investor-state dispute settlement has grown out of its clothes and that it is time to reform and equip it with the features that suit the challenges which it faces.

Such reform should in our view account for the specificities of foreign direct investment disputes, involving private investors and host states. While we recognize that reform along the lines we envision would require the adaptation of many instruments of international investment law, such as investment treaties or arbitration rules, let us suggest a number of elements which could be reflected upon:

- *Criteria* should be established for cases in which direct recourse to international arbitration is warranted, without exhaustion of domestic remedies. The absence of recourse to domestic remedies may be justified in some cases, but need not be automatic, as it prevents local judicial institutions from playing their role and disempowers them, especially in developing countries.⁴ It also deprives the host state from a chance to redress the harm it may have been committed. Furthermore, the internationalization of the settlement of local disputes reduces the perceived legitimacy of the decision.⁵ Criteria for resorting to international arbitration could consider the average time necessary to receive a final judgment for a complex matter in the host state or the urgency of the case at hand. Rule of law criteria providing insight as to the independence of the judicial system in the host country could also be envisaged,⁶ although this could prove more sensitive politically.
- The *composition* of the bench of dispute settlement institutions should take into account the fact that investment disputes involve a wealth of issues of e.g. economic, environmental, social, or human rights nature. Contrary to the present situation, in which arbitrators mostly come from the business law world, the expertise of arbitrators should cover all these relevant fields.
- As to the *appointment* of arbitrators, a number of 'incompatibilities' should be set for serving as an arbitrator in an investment dispute. The possibility of being both an arbitrator and a counsel for parties to investment disputes should be closely scrutinized, as there are a number of conflicting elements between the two positions.⁷ For example, lawyer-arbitrators are in such a position that, as arbitrators they have the possibility to adopt decisions affecting the case-law in a way which reinforces the position of the clients whose interests they defend every day as lawyers. Personal ethics and arbitrators' reputations are certainly important elements in maintaining the integrity of the arbitral system. However, considering that investor-state dispute settlement often deals with very high stakes and directly impacts the general interest, values such as the rule of law or democracy would command that the system be designed in a way that structurally guarantees a high standard of justice, without having to rely too much on the personal qualities of its judges.

⁴ Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', 25 *International Review of Law and Economics* 109 (2005), p. 121.

⁵ See William Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration', 35 *Yale Journal of International Law* 283 (2010), pp. 332-333.

⁶ See for example the 'Effective civil justice' component of the World Justice Project's 'Rule of Law Index', available at <http://www.worldjusticeproject.org/?q=rule-of-law-index/dimensions#anchor7>.

⁷ See Jan Paulsson, 'Moral Hazard in International Dispute Resolution', Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law, 29 April 2010, available at http://www.arbitration-icca.org/media/0/1277374999020/paulsson_moral_hazard.pdf

2. On the costs of arbitration

Arbitration is potentially a very costly solution, as evidenced by the scoping paper.⁸ Legal costs (secretariat, travel, experts, etc.) tend to be higher than in regular domestic fora, as proceedings regularly have to be organized from scratch, sometimes with no fixed price for different services, and because arbitration is often not conducted at the place of the dispute, thereby involving much traveling for arbitrators, parties, counsel, administrative staff, witnesses, experts, etc.

Arbitrator fees can also be staggering. As arbitrators acting in investment disputes tend to be very senior lawyers or academics, the price of their services is high and often set by themselves following market prices. While this may be understandable for professionals acting as private practitioners in a commercial context, this is much less so when arbitral tribunals become an administrative instrument having to rule on issues involving the public interest and having an impact on the lives of potentially thousands of people.

This situation may pose the following problems:

- The price of arbitral procedures clearly impacts on the fundamental right of access to justice with regard to investment disputes, notably to the detriment of investors which are not necessarily wealthy multinationals.⁹ This can also impact the host state's sovereign right to regulate in the public interest, and result in what some have called a 'chilling effect' inducing poor host states to renounce implementing certain policies or litigating their rights from fear of the costs involved by the procedure.¹⁰ In light of the foregoing, the wealthier party is put in the comfortable position of being able to use arbitral procedures and their varying costs as weapons to drive their opponent out of court, for example by multiplying claims or procedures (such as citing witnesses or experts).
- The potential gains to be derived from arbitration, and the fact that arbitrators are remunerated by the claim, may arguably be a source of conflicts of interests, as arbitrators may be tempted or induced to overlook potential disqualifying factors or relationships, to rule favorably on objections to jurisdiction, to order additional discovery procedures, etc.

Solutions to those problems may be found in increasing the ability of parties to plan and control the overall cost of a dispute. For example, the costs and the fees that arbitrators can request for each act of procedure may be predefined in a detailed schedule of cost and fees set in advance. Also, measures aiming to reduce costs across the board, such as the location of the procedure at the place of the dispute, limits on expenses, etc., may also be envisaged.

3. On the enforcement of investment awards

The scoping paper rightly notes that, despite the provisions of the ICSID and New York Conventions aiming to expedite the execution of arbitral awards, the latter have at times faced fierce opposition in host states, notably through claims to sovereign immunity.

⁸ OECD, Scoping paper for the Public Consultation on Investor-State Dispute Settlement, 2012, available at <http://www.oecd.org/dataoecd/61/29/50291642.pdf>, pp. 19 ff.

⁹ *Id.*, p. 18.

¹⁰ See Matthew Porterfield and Christopher Byrnes, 'Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?', *Investment Treaty News*, International Institute for Sustainable Development, 12 July 2011, available at <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>.

This may be the sign that the arbitral institution may in some instances be viewed as lacking legitimacy, and as suffering from a number of flaws and excesses, notably on account of its cost. In such situations, host governments may have difficulties to justify the execution of an arbitral award to their public opinion without putting at least one last fight against them. The fact that such resistance occurs irrespective of the fact that it may reflect negatively on the host state's credibility or attractiveness on the investment market, and that it is at times coupled with withdrawals from investment institutions such as ICSID, or with the denunciation of BITs, is perhaps evidence that the current arbitral model is increasingly being questioned as one of the foundations of the international investment legal regime.

4. *On third party financing*

Third party financing has always existed in dispute settlement, and may in some cases have been used by activist funders to advance certain causes. It may happen that associations will help claimants or defendants in a case involving an issue of general interest, in the hope of getting a favorable outcome, and a line of case law helping the funder's conception of the public interest.¹¹ In this regard, the financing of mass claims in an investment context may correspond to such motives. There are however reasons to think that a considerable share of the third party financing that is being witnessed in the framework of investor-state dispute settlement is not of that kind. In light of the sometimes enormous damages that have been awarded to claimant-investors, but also of the uncertainty and length of arbitral procedures for investors, certain third parties see an opportunity for gain in financing a case in return for a significant share of the potential damages that it could yield. Such move is clearly gain-oriented, and this may seriously conflict with the public-oriented character of many investment disputes.

For example, a third party investing significant funds in a contentious case may disfavor a settlement solution, or push for obtaining damages rather than in-kind compensation with a continuation of the activities of the investor, thereby narrowing the window of opportunity for reaching win-win outcomes in consideration of the general interest. Also, the dynamics of third party financing, which favor high financial stakes, may leave out claims having less economic value, though not necessarily being less in the public interest. Altogether, this search for very high damages may end up driving up the costs of arbitration, with lawyers and arbitrators demanding higher fees, or even result in a 'two speeds' arbitration system, with high-stakes cases gathering most of the resources and competences. Finally, investors being able to rely on very favorable BIT terms will be more likely to attract third-party funders than domestic investors or foreign investors falling into the scope of less favorable BITs.

Solutions to such issues are not easy to find, especially considering that third party financing often benefits litigants, in that it reduces the uncertainty entailed by a dispute. However, one must also recognize that the stakes associated with investment disputes should at times take precedence over the purely private and gain-oriented objectives of third party funders. At the very least, disclosure and transparency of the terms of the third party financing agreement may be warranted to inform the public and sensitize investors regarding such transactions, or highlight conflicts of interests which may exist between third party financiers and arbitrators. However, even this may be difficult to put into practice as secret agreements regarding financing may continue to exist.

¹¹ A famous example of this is the NAACP's support (which admittedly went beyond financing) for the claimants in the US Supreme Court *Brown v. Board of Education* case, which put an end to segregation in the US.

Zbysek Kordac, Arbitrator/Senior Lawyer Weinhold Legal, Czech Republic

Comment submitted 23 July 2012

Question 4. Do you agree that, although ISDS is explicitly used in only a tiny fraction of all international investments, it can nevertheless be assumed to influence the dynamics of other investor-state dispute settlement practices, both formal and informal?

a) What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?

b) Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?

a) Over time, ISDS tends to improve judicial and regulatory systems of host states.

b) Negotiators should be. Arbitrators need not be aware as they are called upon to decide particular dispute, not to affect judicial and regulatory systems.

Question 5. The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement (e.g. Attempts at amicable dispute settlement) are among the most common general subject areas dealt with in the treaty sample.

a) What are your views and experiences on the use of these provisions?

b) Are they important components of the ISDS system?

They are an important component of the ISDS system. They are crucial especially for the state to be able to prepare for the dispute.

Question 6. The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.

a) Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?

No.

b) If costs are considered to be high, does this raise concerns?

N/A

Question 7. Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being “out-lawyered” rather than on the merits?

Yes, there is a risk. However, it usually does not happen. Even developing states are used to hire experienced counsel these days.

Question 8. Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?

The discretion which arbitrators usually have allows them to sanction procedural misbehaviour of parties. In my view, it has a positive effect on the system.

Question 10. The text and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).

a) Would FOI participants wish to explain how their countries' laws handle similar claims? What remedies are provided for?

b) Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?

c) Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?

d) Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?

[answer to question d)] Yes, it gives them a competitive advantage. This is the reason why many domestic investors are using foreign SPVs for their domestic investments. It is a source of serious concern because the system, when working like this, does not serve its original purpose, *i.e.*, to attract foreign investment.

Question 11. What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?

It is a positive trend.

Question 12. Is enforcement of ISDS arbitral awards a growing problem?

Yes, but it should not be overestimated.

Question 13. If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?

Yes, it poses a risk but it should not be overstated.

Question 14. The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?

It can become a significant obstacle but it is relatively rare in practice.

Question 15. Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?

Yes. Tribunals may prevent this from happening by ordering security for costs.

Question 16. As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?

Negative inference is the most effective tool.

Question 17. Third party funding appears to be significantly expanding in ISDS.

a) What are the likely consequences of increased third party financing of investor state disputes?

More claims will be brought.

b) Third party financing is frequently associated with mass claims, such as the recent Abaclat case. What are your views on mass claims?

They should remain relatively rare in ISDS.

Question 18. It is often considered that negotiated settlements can provide disputing parties with superior outcomes to adjudicative decisions. Are the dynamics of settlement negotiations in ISDS likely to be affected by third party funding?

Yes. In cases where third party funding is available, state will be more likely to settle and the investor less likely.

Question 19. In your view, would the availability of third party funding in ISDS likely affect the comparative position of domestic and foreign investors?

Yes, it will increase the competitive advantage of foreign investors.

Question 20. Do awards by arbitrators favourable to undisclosed funders with whom they have a business relationship raise concerns for the ISDS system?

Yes, provided that those funders are disclosed to the arbitrators.

Question 21. Domestic courts generally have significant powers to sanction interference with the administration of justice. In contrast, arbitration tribunals do not have any powers of enforcement. Can arbitration tribunals or other institutions adequately police the risk of funder misconduct in ISDS?

No.

Question 22. Should third party funders of unsuccessful cases be potentially liable for costs awards?

Yes.

Question 23. The ISDS system has attracted a pool of elite law professionals that are active as arbitrators, but also as counsel and experts.

a) Does the fact that accomplished law professionals are attracted into the ISDS system contribute to the quality of arbitration available under ISDS?

Yes.

b) Are you generally satisfied with the competence and impartiality of arbitration panels in ISDS?

I am generally satisfied with competence of arbitration panels. Impartiality must be evaluated on case-by-case basis. It has raised concerns in some cases.

Question 24. Some senior arbitration specialists have criticised party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?

[Answer to question] This is a tricky question. I do support party-selection of arbitrators for commercial cases. The situation is different in ISDS. I can see some rational behind the criticism. However, I do not support abandoning the system completely.

Question 25. The ISDS system appears to create a number of economic incentives for arbitrators. How do these affect the ISDS system, if at all? Are ethics rules and reputational interests sufficient to counteract the economic incentives?

One of the effects of the economic incentives is the gradual broadening of the term investment. Especially in cases where the proceedings are bifurcated, the arbitrators do not have an incentive to terminate the proceedings in jurisdictional phase. No, ethics rules and reputational interests are not always sufficient to counteract the economic incentives.

Question 26. Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?

No, but states need time to hire competent counsel who provides an advice on choice of arbitrator. That's why cooling-off period is so important for states.

Question 27. Do you see a need for different ethical requirements for ISDS arbitrators than for commercial arbitrators? Does the fact that ISDS may engage the public interest more directly than commercial arbitration mean that different ethical requirements should apply?

The requirements should be stricter, not different.

Question 28. As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators' "dual hats" as arbitrator and counsel) has been criticised. What are your views on this question?

Yes, there is a risk of issue conflict. It was well described in the text.

Question 29. Many States appear to favour allowing investors to forum shop between arbitral fora. At the same time, most States are less tolerant of forum shopping in domestic legal systems. What explains the different approaches?

Arbitral fora are private methods of dispute resolution. States are more sensitive if the forum shopping concerns jurisdiction of state courts.

Question 30. For States that favour allowing investors to forum shop between arbitral fora, has your government publicly articulated its policy rationale in this regard to parliament or elsewhere?

I don't think so.

Question 31. What are your views on the relationship between forum shopping and differences in the rules governing the various arbitration fora (e.g. in relation to transparency and review of awards)? Does the diversity of rules and procedures in the various arbitration fora (e.g. ICSID,

UNCITRAL) meet the needs of the societies on behalf of whom investment treaties have been signed?

I don't share the view that investment treaties have been signed on behalf of societies. There were signed between sovereign states. First of all, treaty provisions need to meet needs of states, and, potentially, their investors.

Question 32. Is the fact that domestic investors have tried (and succeeded) in qualifying for protections under their own countries' investment treaties a source of concern? Why would countries wish to deny to their own investors benefits that they offer to foreign investors?

Yes. Investment treaties were intended to attract FDI, not to benefit domestic investors.

Question 33. Why would countries wish to deny to third party investors benefits that they offer to the investors of their treaty partner(s)?

Because of lack of reciprocity.

Question 34. Is treaty shopping a major problem for your country? If so, why?

Yes, because my country concluded number of one-sided treaties after the fall of communist regime.

Question 35. How does your government evaluate the consistency of ISDS?

My country has one significant negative experience with inconsistency of arbitral awards, namely in cases *Lauder v. Czech Republic* and *CME v. Czech Republic*.

Nathalie Bernasconi-Osterwalder, International Institute for Sustainable Development (IISD) & Lise Johnson, Vale Columbia Center on Sustainable International Investment

Comment submitted 23 July 2012

Thank you again for the opportunity to comment on the Scoping Paper on Investor-State Dispute Settlement (ISDS). Indeed, there are myriad important issues raised in the Scoping Paper regarding some of the concerns triggered by ISDS.

While we believe that it is crucial to take a fresh and comprehensive approach to reforming ISDS, we wanted to point to two discrete issues that are fundamental for legitimacy and accountability of the system, and for which there are a number of viable solutions that could be adopted in the near-term.

One of these issues is transparency in investor-state dispute settlement, a topic on which IISD has done significant work (http://www.iisd.org/investment/dispute/arbitration_rules.aspx).

Another is the issue of the dual-role of arbitrator and counsel. We wrote a paper in 2010 which describes why the dual-role issue is a problem and discusses the various avenues that can be taken to address it. That paper is available here: <http://www.iisd.org/publications/pub.aspx?id=1442>

US-based global law firm

Comment submitted 23 July 2012

1. **Although ISDS is shown to be an unusual, even unique, system of international dispute settlement, the entire set of international dispute resolution systems is highly disparate – there seems to be no dominant model for international adjudication.**
 - a. **Q: Do you agree with this characterization?** A: Yes. There is currently no dominant model for international dispute settlement.
 - b. **Q. Do they agree that ISDS, like all other international dispute resolution systems, should be evaluated according to principles for effective public policy and legal systems?** A: Yes. ISDS, like all international dispute resolution systems and like all other legal regimes, can appropriately be evaluated according to principles for effective public policy and legal systems.
2. **The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.**
 - a. **Q: What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?** A: Each system for settlement of international disputes arises out of a particular instrument or instruments of international law. These various instruments, including for example investment treaties, the WTO Agreements, and the European Convention on Human Rights, arise out of negotiations between specific international actors at a particular time. The systems have different users (including investors, states, and individuals), and the differences across the systems contribute to the differences in the dispute settlement mechanisms. The various systems reflect the political will and compromises of the parties to the negotiations, which have produced distinct systems with both overlapping and unique elements.
 - b. **Q: Do you agree that, since the various elements of a system of dispute resolution interact, design elements from one system cannot be transplanted into another system and have automatically the same effects?** A: Yes. Each system is unique. Whether one system can appropriately borrow from another system, however, depends upon the circumstances of each case.
3. **In many areas of international law, focus is placed on enhancing the performance of domestic systems.**
 - a. **Q: Why has this same approach not been adopted in the context of international investment law?** A: ISDS provides investors with a neutral forum for resolving disputes. It was created in order to give investors the ability to resolve disputes without needing to turn to local courts, which could be perceived (rightly or wrongly) as potentially being under the control of the state against which the claims were brought, or of being biased against foreign investors. Thus, the focus of ISDS on providing a functioning system outside the domestic courts, rather than working to enhance the performance of the domestic courts, is practically inherent in the ISDS system.

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6. **The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.**
- a. **Q: Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?** A: Although it is important to consider the reasonableness of costs, the costs in ISDS are generally reasonable given the size, nature, and complexity of the average ISDS case. As a point of reference, one study in the United States found that for tort cases, which average US \$37,000 at stake, litigation costs average US \$18,000, almost half of the total amount in dispute.¹ The average amount in question in an ISDS case has been estimated in one empirical analysis to be US \$404 million.² Therefore, an average of US \$8 million in costs (2% of the average amount in controversy) is relatively low.
 - b. **Q: If costs are considered to be high, does this raise concerns?** A: Yes, because if costs are high, this may reduce some incentives for investors to bring cases.
7. **Q: Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being “out-lawyered” rather than on the merits?** A: It is highly unlikely that developing States – or, for that matter, impecunious claimant investors – lose cases primarily because of budgetary constraints. Although lawyers’ advocacy in ISDS cases is important, cases are generally won or lost on the merits of the dispute. Developing States (and poorly funded investors) rarely, if ever, lose meritorious cases because of being “out-lawyered.”
8. **Q: Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?**
A: Uncertainty about cost allocation is an issue for both investors and States. Generally, parties should assume that they will bear their own costs and determine whether those costs are manageable. They must also proceed with the knowledge that there is some risk of being ordered to bear some or all of the other party’s costs as well. These are serious considerations that may help to deter frivolous or excessive litigation strategies. In our experience, however, parties do not meaningfully rely on predictions of a tribunal’s cost allocation in their decision-making process.
9. **Q: Should investment treaties give greater consideration to remedies? Should expended use of primary remedies in ISDS be considered?** A: Although it is generally understood that both pecuniary and non-pecuniary remedies are currently available to investors under international investment treaties, even though such remedies are not specifically enumerated in investment treaties, it might be helpful for negotiators of investment treaties to expressly identify some of the remedies potentially available under a treaty (or to expressly exclude any remedies they wish to see foreclosed).
10. **Q: The test and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).**
- a) ***Would FOI participants wish to explain how their countries’ laws handle similar claims? What remedies are provided for?***
 - b) ***Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?***

¹ See Than N. Luu, “Reducing the Costs of Civil Litigation,” Public Law Research Institute, *available at* <http://www.uchastings.edu/public-law/plri/fal95tex/cstslit.html#4>.

² Susan Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, North Carolina Law Review Vol. 86, p. 60 (2007).

- c) *Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?*
- d) *Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?*

A: N/A

11. **Q: What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?** A: In general, we do not see cause for concern in the use of provisional remedies in investor-state proceedings. Whether it will be appropriate to order provisional remedies – including injunctions against either the investor or the state – in any particular case, however, will depend upon the facts of each case.
12. **Q: Is enforcement of ISDS arbitral awards a growing problem?** A: The vast majority of states respect their solemn international law obligations to abide by and comply with ISDS awards. It is still generally true, therefore, that enforcement is not problematic –because it is very rarely necessary. However, the recent advent of one or two non-law-abiding States that have chosen to flout their international obligations does pose serious risks to the ISDS system as a whole.
13. **Q: If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?** A: We do not believe that enforcement problems pose a risk of re-politicizing the dispute resolution system *per se*, but problems with enforcement may increase the risk that enforcement of arbitral awards become re-politicized. If final awards remain unpaid, investors may be forced to turn to diplomatic support from their home state in order to receive the duly awarded compensation to which they are entitled.
14. **Q: The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?** A: Sovereign immunity may be a significant obstacle to enforcement of awards in (the fortunately rare) cases where states are disregarding their clear legal obligations to comply with ISDS awards. This is particularly true where an investor is unable to find attachable assets to enforce an arbitral award when a state's assets are protected by sovereign immunity considerations.
15. **Q: Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?** A: N/A
16. **Q: As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?** A: N/A
17. **Third party funding appears to be significantly expanding in ISDS.**
 - a. **Q: What are the likely consequences of increased third party financing of investor state disputes?** A: An increase in third party financing would allow for a greater number of potentially meritorious cases to go forward where otherwise they would not have been able to do so—such as in cases where the state's conduct has, by destroying the investment, simultaneously deprived the investor of the means to pursue ISDS claims.
 - b. **Q: Third party financing is frequently associated with mass claims, such as the recent Abaclat case. What are your views on mass claims?** A: N/A

18. **Q: It is often considered that negotiated settlements can provide disputing parties with superior outcomes to adjudicative decisions. Are the dynamics of settlement negotiations in ISDS likely to be affected by third party funding?** A: There are multiple dynamics involved in settlement negotiations. The existence of a third party funder may or may not impact those dynamics. In some situations, it may be in the funder's interest to settle a case early on; in other cases, it may be in the funder's interest to pursue the claim. It will depend upon the issues and parties involved in each case.
19. **Q: In your view, would the availability of third party funding in ISDS likely affect the comparative position of domestic and foreign investors?** A: N/A
20. **Q: Do awards by arbitrators favourable to undisclosed funders with whom they have a business relationship raise concerns for the ISDS system?** A: N/A
21. **Q: Domestic courts generally have significant powers to sanction interference with the administration of justice. In contrast, arbitration tribunals do not have any powers of enforcement. Can arbitration tribunals or other institutions adequately police the risk of funder misconduct in ISDS?** A: N/A
22. **Q: Should third party funders of unsuccessful cases be potentially liable for costs awards?** A: N/A
23. **The ISDS system has attracted a pool of elite law professionals that are active as arbitrators, but also as counsel and experts.**
 - a. **Q: Does the fact that accomplished law professionals are attracted into the ISDS system contribute to the quality of arbitration available under ISDS?** A: Yes. The ISDS system attracts the highest caliber of legal professionals, which leads to a high-quality adjudication process.
 - b. **Q: Are you generally satisfied with the competence and impartiality of arbitration panels in ISDS?** A: Yes, we are generally satisfied with the competence and impartiality of arbitration tribunals in investor-state proceedings.
24. **Q: Some senior arbitration specialists have criticized party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?** A: We are generally in favor of party-selected arbitrators. An important element of international arbitration is the opportunity for parties to have a role in the adjudication of the disputes that they have chosen to submit to that system. Party-appointed arbitrators allow a party to have a choice in the system. As such, party-appointed arbitrators are important to the ISDS system.
25. **Q: The ISDS system appears to create a number of economic incentives for arbitrators. How do these affect the ISDS system, if at all? Are ethics rules and reputational interests sufficient to counteract the economic incentives?** A: It is unclear whether the ISDS system in fact creates economic incentives that could affect arbitrators' conduct. This is because compensation for arbitrators is not necessarily greater than compensation that an attorney might receive when serving as counsel in private practice. Even if the alleged economic incentives were to exist, ethical rules and reputational interests are powerful motivators that are sufficient to constrain arbitrator conduct within appropriate bounds.
26. **Q: Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?** A: No. Given today's technology, most of the relevant information about prospective arbitrators is in the public domain. Most prior ISDS decisions, arbitrators' CVs, and arbitrators' publications are easily obtained by all parties to a dispute. If unequal information is ever a problem, it is likely a universal problem for any party in the process of analyzing which prospective arbitrator to select.

27. **Q: Do you see a need for different ethical requirements for ISDS arbitrators than for commercial arbitrators? Does the fact that ISDS may engage in public interest more directly than commercial arbitration mean that different ethical requirements should apply?** A: No. All arbitrators, including commercial and ISDS arbitrators, should meet the highest ethical standards.
28. **Q: As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators' "dual hats" as arbitrator and counsel) has been criticized. What are your views on this question?** A: Arbitrators' "dual hats" are not an issue in the system. Cases are decided on the facts and the merits, and an arbitrator's experience as counsel does not impact the merits of any particular case. This is reinforced by parties' ability to choose arbitrators.
29. **Q: Many States appear to favour allowing investors to forum shop between arbitral for a. At the same time, most States are less tolerant of forum shopping in domestic legal systems. What explains the different approaches?** A: N/A
30. **Q: For States that favour allowing investors to forum shop between arbitral for a, has your government publicly articulated its policy rationale in this regard to parliament or elsewhere?** A: N/A
31. **Q: What are your views on the relationship between forum shopping and differences in the rules governing the various arbitration for a (e.g. in relation to transparency and review of awards)? Does the diversity of rules and procedures in the various arbitration for a (e.g. ICSID, UNCITRAL) meet the needs of the societies on behalf of whom investment treaties have been signed?** A: Individual investors should be allowed to select the forum identified in an investment treaty that allows investors to resolve their disputes with a host state on terms most favorable to the investor.
32. **Q: Is the fact that domestic investors have tried (and succeeded) in qualifying for protections under their own countries' investment treaties a source of concern? Why would countries wish to deny to their own investors benefits that they offer to foreign investors?** A: If an individual or company meets the definition of "investor" under an applicable investment treaty, that party should have access to its full rights under the treaty. These rights include the opportunity to bring an ISDS case against a State party to the treaty. States are free to craft the texts of their investment treaties to narrow the definition of "investor" as they deem appropriate.
33. **Q: Why would countries wish to deny to their party investors benefits that they offer to the investors of their treaty partner(s)?** A: A country may wish to deny to a third party investor benefits that it has negotiated with the investor's home state but that it has not negotiated with the home state of the third party investor. This is because the language in each treaty reflects the interests of each state *vis-a-vis* the other contracting party. The interests between a host state and the state of the investor may be different than the host state's interests with the home state of the third party investor.
34. **Q: Is treaty shopping a major problem for your country? If so, why?** A: N/A
35. **Q: How does your government evaluate the consistency of ISDS?** A: N/A
36. **Q: Is it important for the ISDS system to produce consistent results?** Q: It is not necessarily important for the ISDS system to produce consistent results. Results in any case are driven by the facts of that case. Consistency is merely one goal of the system, which should be weighed against other goals including fairness, finality, correctness, and efficiency.
37. **Q: How should consistency as a value be weighed against other considerations (costs, speed, need to work out issues through case law)?** A: As noted above, consistency is one goal of the system. The fairness of the proceedings and the need for decisions to be based on the facts

of each case, however, are some of the most significant elements of an investor-state dispute settlement system.

38. **Q: Is the current architecture of ISDS suited to promoting consistency?** A: N/A
39. **Q: The scoping paper notes that some inconsistency is an unavoidable feature of any dynamic system of adjudication. Inconsistent decisions can be part of the process by legal concepts are analyzed and clarified. Is this need for clarification and innovation a feature of ISDS?** A: Yes. The ISDS is a very new system in both actual and relative terms. It is evolving, and dispute settlement systems often take some time to grow and adjust.
40. **Q: As noted in the section on remedies, under some advanced systems of administrative law, such as in Germany, claimants seeking damages must first seek judicial review or primary remedies. Multiple proceedings are thus required to obtain damages. In addition, all domestic systems allow judgments awarding sizable damages against governments to be appealed. Are advanced domestic administrative law systems relevant comparators for evaluating the importance of finality with regard to ISDS arbitration decisions awarding damages?** A: N/A
41. **Q: ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?** A: No, it is not more important to have consistent outcomes in cases that involve high monetary compensation. Decisions should be based on the legal issues before a tribunal, and a tribunal's decision should not be influenced by the size of the claims at issue.
42. **Q: What reasons explain the wide preference for inclusion of international arbitration in bilateral investment treaties?** A: International arbitration is a preferable forum for disputes under bilateral investment treaties for a number of reasons. First, international arbitration provides an effective, flexible, neutral forum that usually produces fair, enforceable awards. Second, parties have some choice in their tribunal members, which allows them to select arbitrators with a high level of expertise and knowledge of the relevant subject matter and law. Finally, investors need not involve their home State in attempting to receive just compensation for harms to their foreign investments.
43. **Q: Many of the ISDS provisions contain texts requiring attempts at amicable settlement and coordinating recourse to international arbitration relative to domestic judicial procedures. Are these provisions important parts of States' consent to arbitrate?** A: Yes, investment treaty provisions that encourage amicable settlement and coordinating recourse to international arbitration are important parts of a state's consent to arbitration. Settlement, for example, is generally a favorable outcome to a dispute, because it represents an agreement between the parties that avoids uncertain expenses and outcomes.
44. **Q: Why do many States engage in light regulation of ISDS in their bilateral investment treaties and countries) in treaty language with respect to essentially all issues covered. What do you think about this degree of variation in language? Is it useful? If so, for what purpose?** A: States are generally not heavily involved in regulating ISDS as ISDS is intended to be independent of state control. This allows for most of the decision making about ISDS to be in the hands of the parties to a specific dispute, which is an important element of international arbitration.
45. **Q: The survey of ISDS provisions in investment treaties shows differences (among treaties and countries) in treaty language with respect to essentially all issues covered. What do you think about this degree of variation in language? Is it useful? If so, for what purpose?** A: Differences in treaty language regarding issues covered by investment treaties are presumably reflections of the treaty negotiation process. It is up to each state to negotiate language that reflects each state's own interests.

46. **Q: Many countries' older treaties are different than their newer treaties. Is this a source of concern for these countries? Why are investment treaties and, more specifically, their ISDS provisions not updated more frequently?** A: We do not believe that it is a source of concern that many countries' older treaties are different than their newer treaties. If states had a high level of concern regarding their older treaties, they would presumably renegotiate those treaties in order to address any issues of concern.

Professor Christoph Schreuer, Of Counsel at Wolf Theiss, Vienna; Professor Rudolf Dolzer, Director of Institute for International Law, University of Bonn, Germany.

Comment submitted 23 July 2012

Thank you for giving us the opportunity to comment on the OECD scoping paper. Our comments are broadly centered on several of the main issues raised in the scoping paper. They draw on our forthcoming book *Principles of International Investment Law*, 2d ed. (OUP, 2012).

The relationship between international arbitration and domestic courts

In the absence of an agreement to the contrary an investment dispute between a State and a foreign investor would normally have to be settled by the host State's courts. Conflict of laws rules will normally point to these courts since the dispute is likely to have the closest connection to the State in which the investment is made.

From the investor's perspective, this is not an attractive solution. Rightly or wrongly, the investor will fear a lack of impartiality from the courts of the State against whom it wishes to pursue its claim. In many countries an independent judiciary cannot be taken for granted and executive interventions in court proceedings or a sense of judicial loyalty to the forum State are likely to influence the outcome of proceedings. This is particularly so where large amounts of money are involved.

Not infrequently, legislation is the cause of complaints by investors. Domestic courts will often be bound to apply the local law even if it is at odds with international legal rules protecting the rights of investors. In fact, in some countries the relevant treaties may not even be part of the domestic legal order. At times, domestic courts may be the perpetrators of the alleged violation of investor rights.¹ Even where courts decide in the investor's favour, the executive may ignore their decisions.² In all these situations domestic courts cannot offer an effective remedy to foreign investors.

The courts of the investor's home country and of third States are usually not a viable alternative. In most cases they lack territorial jurisdiction over investments taking place in another State. An agreement on forum selection for investment disputes in a State other than the host State is unlikely to be accepted by the latter. The only exception is loan contracts which are often subject to the jurisdiction and the law of a major financial centre.

An additional obstacle to using domestic courts outside the host State would be rules of State immunity. Host States dealing with foreign investors will frequently act in the exercise of sovereign powers (*jure imperii*) rather than in a commercial capacity (*jure gestionis*). Therefore, even in countries which follow a doctrine of restrictive immunity, lawsuits against foreign States arising from investment disputes are likely to fail.³ An explicit waiver of immunity is possible but will be difficult to obtain.

In addition to sovereign immunity, other judicial doctrines are likely to stand in the way of lawsuits in domestic courts. The act-of-State doctrine enjoins courts from examining the legality of official acts of foreign States in their own territory. For instance, the U.S. Supreme Court has stated that it would not examine the validity of a taking of property by a foreign government in its territory even if its illegality

¹ *Saipem v Bangladesh*, Award, 30 June 2009.

² *Siag v Egypt*, Award, 1 June 2009, paras. 436, 448, 453-456.

³ See *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, paras. 20-25 for a description of proceedings before the courts of Switzerland.

under international law is alleged.⁴ Further obstacles to lawsuits against host States in domestic courts of other States would be related doctrines of non-justiciability, political questions and lack of a close connection to the local legal system.⁵

It is mainly for these reasons that alternative methods have been created for the settlement of disputes between States and foreign investors. They consist primarily of granting the foreign investor direct access to arbitration with the host State.

The effects of international arbitration on the behaviour of parties and on other forms of dispute settlement

The existence of an effective system of dispute settlement is likely to have an effect even without its actual use. The mere availability of an effective remedy will influence the behaviour of parties to potential disputes. It is likely to have a restraining influence on investors as well as on host States. Both sides will try to avoid actions that might involve them in arbitration that they are likely to lose. In addition, the parties' willingness to settle a dispute amicably will be strengthened by the existence of an arbitration clause.

Investment arbitration uses a mechanism originally developed for the settlement of commercial disputes between private parties. The main characteristics of commercial disputes are often also present in investor-state arbitrations. But the application of international law rules governing the conduct of the state means that investor-state arbitration has its own distinctive features. In some respects investment arbitration performs the function of judicial review of administrative acts. This situation finds expression in the fact that states have negotiated the ICSID Convention as a distinct set of rules for investment disputes. At the same time mechanisms that have been devised primarily for classical commercial disputes between two private entities are also used for the settlement of investment disputes.

Treaty requirements on attempts at amicable settlement, waiting periods: arbitrators' reactions

A common condition in treaties providing for investor-State arbitration is that an amicable settlement must first be attempted through consultations or negotiations. This requirement is subject to certain time limits ranging from three to twelve months. If no settlement is reached within that period the claimant may proceed to arbitration. A typical waiting period under BITs would be 6 months. The NAFTA (Articles 1118 to 1120) also prescribes a waiting period of six months since the events giving rise to the claim.⁶ Article 26(2) of the ECT offers consent to arbitration if the dispute cannot be settled within three months from the date on which either party requested amicable settlement.⁷ National legislation offering consent to arbitration may similarly provide for waiting periods.⁸

The reaction of tribunals to these provisions requiring an attempt at amicable settlement before the institution of arbitration has not been uniform.⁹ In the majority of cases the tribunals found that the claimants had complied with these waiting periods before proceeding to arbitration.¹⁰ In other cases the tribunals found that non-compliance with the waiting periods did not affect their jurisdiction.¹¹

⁴ *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398, 3 ILM 381 (1964).

⁵ *Chilean Copper Case*, Landgericht Hamburg, 22 January 1973, 13 March 1974.

⁶ *Metalclad v Mexico*, Award, 30 August 2000, paras. 64-69.

⁷ *Petrobart v The Kyrgyz Republic*, Award, 29 March 2005, sec. VIII. 7.

⁸ *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports pp. 47, 60-61.

⁹ For practice of the International Court of Justice see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (Jurisdiction and Admissibility), 26 November 1984, [1984] ICJ Reports 427-429 and *Case Concerning Application of the International Convention on the Elimination of all forms of Racial Discrimination (Georgia v Russia)*, Judgment, 1 April 2011, paras. 115-184.

¹⁰ *Salini v Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 15-23; *CMS v Argentina*, Decision on Jurisdiction, 17 July 2003, paras. 121-123; *Generation Ukraine v Ukraine*, Award, 16 September 2003, paras. 14.1-14.6; *Azurix v Argentina*, Decision on Jurisdiction, 8 December 2003, para. 55; *Tokios Tokelés v Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 101-107; *LG&E v Argentina*, Decision on Jurisdiction, 30 April 2004, para. 80; *MTD v Chile*, Award, 25 May 2004, para. 96; *Occidental v Ecuador*, Award, 1 July 2004, para. 7; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 163-173; *L.E.S.I. –*

In *Biwater Gauff v Tanzania*, the UK-Tanzania BIT provided for a 6 months period for settlement. There had been attempts to resolve the dispute but the 6 month period had not yet elapsed when the Request for Arbitration was filed. The Tribunal held that this did not preclude it from proceeding. It said:

... this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
- forcing the claimant to recommence an arbitration started too soon, even if the six month period has elapsed by the time the Arbitral Tribunal considers the matter.¹²

Other Tribunals have reached the opposite conclusion.¹³ In *Burlington Resources v Ecuador*, the BIT between Ecuador and the United States provided for consultation and negotiation in case of a dispute. ICSID arbitration would become available six months after the dispute had arisen. The Tribunal found that the Claimant had only informed the Respondent of the dispute with its submission of the dispute to ICSID arbitration. It followed that the claim was inadmissible:

...by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.¹⁴

It would seem that the decisive question is whether or not there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile. Even if the institution of arbitration was premature, the waiting period will often have expired by the time the tribunal is ready to make a decision on jurisdiction. Under these circumstances, declining jurisdiction and compelling the claimant to start the proceedings anew would be uneconomical. An alternative way to deal with non-compliance with a waiting period is a suspension of proceedings to allow additional time for negotiations if these appear promising.

DIPENTA c/ Algérie, Award, 10 January 2005, paras. 32, 33; *AES Corp. v Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 62-71; *Continental Casualty v Argentina*, Decision on Jurisdiction, 22 February 2006, at para. 6; *Berschader v Russia*, Award, 21 April 2006, paras. 98-104; *El Paso v Argentina*, Decision on Jurisdiction, 27 April 2006, para. 38; *Pan American v Argentina*, Decision on Preliminary Objections, 27 July 2006, paras. 39, 41; *AMTO v Ukraine*, Award, 26 March 2008, paras. 50, 53, 57-58; *Occidental v Ecuador*, Decision on Jurisdiction, 9 September 2008, paras. 90-95; *AFT v Slovakia*, Award, 5 March 2011, paras. 200-212.

¹¹ In *Ethyl Corp. v Canada*, Decision on Jurisdiction, 24 June 1998, Decision on Jurisdiction, paras. 76-88, the Tribunal dismissed the objection based on the six-month provision since further negotiations would have been pointless. In *Ronald S. Lauder v The Czech Republic*, Final Award, 3 September 2001, para. 187 the Tribunal found that the waiting period of six months was not a jurisdictional provision. In *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 184, the Tribunal found that the waiting period was procedural rather than jurisdictional and that negotiations would have been futile. Similarly in *Bayindir v Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 88-103, the Tribunal found that a requirement to give notice of the dispute for the purpose of reaching a negotiated settlement was not a precondition to jurisdiction.

¹² *Biwater Gauff v Tanzania*, Award, 24 July 2008, paras. 338-350 at 343.

¹³ *Goetz v Burundi*, Award, 10 February 1999, paras. 90-93; *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004, para. 88; *Wintershall v Argentina*, Award, 8 December 2008, paras. 133-157; *Murphy v Ecuador*, Award, 15 December 2010, paras. 90-157.

¹⁴ *Burlington Resources v Ecuador*, Decision on Jurisdiction, 2 June 2010, paras. 312-318, 332-340 at para. 315. Italics original.

Costs of arbitration

The costs of major investment arbitrations may run into millions of US\$ for complex cases.¹⁵ The costs consist of three elements: the charges for the use of the facilities and expenses of ICSID¹⁶ or any other arbitration institution, the fees and expenses of the arbitrators and the expenses incurred by the parties in connection with the proceedings. Of these three categories, the third, consisting mainly of the costs for legal representation, is typically by far the largest.

The ICSID Convention in Article 61(2) leaves it to the tribunal's discretion by whom these costs are to be paid, unless the parties agree otherwise. Other arbitration rules may provide differently. For instance, the UNCITRAL Arbitration Rules state that the costs of arbitration shall in principle be borne by the unsuccessful party.¹⁷ But in a particular case, both parties may be partly successful.

The practice of tribunals on the attribution of costs is far from uniform. In many cases the tribunals found that the fees and expenses of the Centre and of the arbitrators were to be shared equally and that each party had to bear its own expenses.¹⁸ In some cases the tribunals awarded costs as a sanction for improper conduct of one of the parties. This was the case where they found that the claim had been frivolous or fraudulent or that there had been dilatory or otherwise improper conduct.¹⁹ In *LETCO v Liberia* the Tribunal awarded the full costs of the arbitration to the claimants including their own expenses. The Tribunal said:

This decision is based largely on Liberia's procedural bad faith. Not only did Liberia fail to partake in these arbitral proceedings, contrary to its contractual agreement, but it has also undertaken judicial proceedings in Liberia in order to nullify the results of this arbitration.²⁰

More recently tribunals have shown a growing inclination to adopt the principle that costs follow the event. An award of costs against the losing party may be total or, more frequently, may cover a certain proportion of the overall costs.²¹ In *ADC v Hungary* the Claimant prevailed with its claim for illegal expropriation and other BIT violations. On the issue of costs, the Tribunal said:

¹⁵ For instance, in *PSEG v Turkey*, the total amount of costs claimed was US\$ 20,851,636.62. See Award, 19 January 2007, at para. 352. The Award in *Libananco v Turkey*, 2 September 2011, paras. 558-559, seems to have set a record with combined costs for both parties at US\$60m.

¹⁶ The details are set out in ICSID's Administrative and Financial Regulations <http://www.worldbank.org/icsid/basicdoc/partC.htm> as well as in a Schedule of Fees, <http://www.worldbank.org/icsid/schedule/fees.pdf> see

¹⁷ Article 42 (1).

¹⁸ See e.g. *Adriano Gardella v Ivory Coast*, Award, 29 August 1977, para. 4.12; *Klöckner v Cameroon*, Award, 21 October 1983, 2 ICSID Reports 9 at p. 77; *Atlantic Triton v Guinea*, Award, 21 April 1986, 3 ICSID Reports 17 at pp. 42, 44; *SOABI v Senegal*, Award, 25 February 1988, para. 12.05; *Amco v Indonesia*, Resubmitted Case: Award, 5 June 1990, paras. 285-291; *Vacuum Salt v Ghana*, Award, 16 February 1994, paras. 56-60; *Cable TV v St. Kitts and Nevis*, Award, 13 January 1997, paras. 8.04-8.06; *Tradex v Albania*, Award, 29 April 1999, paras. 206-207; *Robert Azinian and others v Mexico*, Award, 1 November 1999, paras 125-127; *CDSE v Costa Rica*, Award, 17 February 2000, para. 109; *Maffezini v Spain*, Award, 13 November 2000, paras. 98-99; *Middle East Cement v Egypt*, Award, 12 April 2002, para. 176; *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v Argentina*, Decision on Annulment, 3 July 2002, paras. 117-118; *Autopista v Venezuela*, Award, 23 September 2003, para. 425; *MTD v Chile*, Award, 25 May 2004, para. 252; *Salini v Jordan*, Award, 31 January 2006, paras. 101-104; *World Duty Free v Kenya*, Award, 4 October 2006, paras. 189-191; *Mitchell v Congo*, Decision on Annulment, 1 November 2006, para. 67; *Enron v Argentina*, Award, 22 May, 2007, para. 453; *Duke Energy v Peru*, Award, 18 August 2008, paras. 494-500; *RSM Production v Grenada*, Award, 13 March 2009, paras. 487-499; *RosInvest v Russia*, Final Award, 12 September 2010, para. 701; *AES Summit v Hungary*, Award, 23 September 2010, para. 15.3.3; *Grand River Enterprises v United States*, Award, 12 January 2011, paras. 239-247; *Brandes v Venezuela*, Award, 2 August 2011, para. 120.

¹⁹ *Benvenuti & Bonfant v Congo*, Award, 15 August 1980, paras. 4.127-4.129; *MINE v Guinea*, Award, 6 January 1988, 4 ICSID Reports 61, at p. 77; *Generation Ukraine, Inc. v Ukraine*, Award, 16 September 2003, para. 24.2; *Azurix v Argentina*, Award, 14 July 2006, para. 441; *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v Argentina*, Award, 20 August 2007, paras. 10.2.2.-10.2.6.; *Plama v Bulgaria*, Award, 27 August 2008, paras. 321-322; *Phoenix v Czech Republic*, Award, 15 April 2009, paras. 151-152; *Europe Cement v Turkey*, Award, 13 August 2009, paras. 185-186; *Cementownia v Turkey*, Award, 17 September 2009, paras. 177-178; *Fakes v Turkey*, Award, 14 July 2010, paras. 153-154.

²⁰ *LETCO v Liberia*, Award, 31 March 1986, 2 ICSID Reports 370, at p. 378.

²¹ *AGIP v Congo*, Award, 30 November 1979, 1 ICSID Reports 309, at p. 329; *AAPL v Sri Lanka*, Award, 27 June 1990, para. 116; *SPP v Egypt*, Award, 20 May 1992, paras. 205-211; *Scimitar v Bangladesh*, Award, 5 April 1994, paras. 30-32; *Wena Hotels v Egypt*, Award, 8 December 2000, para. 130; *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v Argentine Republic*, Decision on Supplementation and Rectification of Annulment Decision, 28 May 2003, paras. 43-44; *Generation Ukraine, Inc. v*

... it can be seen from previous awards that ICSID arbitrators do in practice award costs in favour of the successful party and sometimes in large sums ... In the present case, the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. ... Were the Claimants not to be reimbursed their costs ... it could not be said that they were being made whole.²²

Remedies (restitution and satisfaction)

Under the international law of State responsibility reparation for a wrongful act takes the forms of restitution, compensation or satisfaction.²³ In investment arbitration the remedy nearly always consists of monetary compensation. Satisfaction plays a subordinate role in investment law.²⁴ Restitution in kind or specific performance is ordered infrequently.²⁵ This is not due to any inherent limitation upon tribunals but the consequence of the situations in which most disputes arise and the way the claims are put forward. In a number of cases tribunals did in fact order restitution²⁶ or affirmed their power to do so.²⁷

In *Enron v Argentina* the Claimants requested that the tribunal declare certain taxes unlawful and issue a permanent injunction against their collection.²⁸ Argentina argued that the Tribunal did not have the power to order injunctive relief. In Argentina's view, the Tribunal could only establish whether there had been an illegal expropriation and determine the corresponding compensation.²⁹ The Tribunal found that it had the power to order specific performance:

An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available.³⁰

Execution of awards and state immunity from execution

State immunity from execution is merely a procedural bar to the award's enforcement but does not affect the obligation of the State to comply with it. Therefore, a successful reliance on State immunity does not

Ukraine, Award, 16 September 2003, para. 24.1; *CDC v Seychelles*, Award, 17 December 2003, para. 63; *Soufraki v United Arab Emirates*, Award, 7 July 2004, para. 85; *CDC v Seychelles*, Decision on Annulment, 29 June 2005, paras. 88-90; *Eureko v Poland*, Partial Award, 19 August 2005, para. 261; *Thunderbird v Mexico*, Award, 26 January 2006, paras. 210-221; *Inceysa v El Salvador*, Award, 2 August 2006, para. 338; *Telenor v Hungary*, Award, 13 September 2006, paras 104-108; *ADC v Hungary*, Award, 2 October 2006, paras.525-542; *Champion Trading v Egypt*, Award, 27 October 2006, paras. 165-178; *PSEG v Turkey*, Award, 19 January 2007, paras. 352-353; *OKO Pankki v Estonia*, Award, 19 November 2007, paras.368-375; *BG Group v Argentina*, Final Award, 24 December 2007, paras. 458-466; *Rumeli Telekom v Kazakhstan*, Award, 29 July 2008, para. 819; *National Grid v Argentina*, Award, 3 November 2008, para. 295; *Funnekotter v Zimbabwe*, Award, 22 April 2009, para. 147; *Siag v Egypt*, Award, 1 June 2009, paras. 599-630; *EDF v Romania*, Award, 8 October 2009, paras. 321-329; *Chemtura v Canada*, Award, 2 August 2010, paras. 272-273; *Alpha v Ukraine*, Award, 8 November 2010, para. 516; *RSM Production v Grenada*, Award, 10 December 2010, paras. 8.3.4-8.3.6; *AFT v Slovakia*, Award, 5 March 2011, paras. 260-270.

²² *ADC v Hungary*, Award, 2 October 2006, paras. 531, 533.

²³ Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001, Article 34. *J. Crawford*, The International Law Commission's Articles on State Responsibility 211 (2002).

²⁴ *Biwater Gauff v Tanzania*, Award, 24 July 2008, paras. 465-467, 807; *Europe Cement v Turkey*, Award, 13 August 2009, paras. 146-148, 176, 181.

²⁵ See *C Schreuer*, Non-Pecuniary Remedies in ICSID Arbitration, 20 *Arbitration International* 325 (2004).

²⁶ *Martini Case (Italy v Venezuela)*, Award, 3 May 1930, 25 *AJIL* 554 (1931), at p. 585; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 53 *ILR* 389, at pp. 497-511; *Antoine Goetz and others v Republic of Burundi*, Award, 2 September 1998 and 10 February 1999, paras. 132-133; *Semos v Mali*, Award, 25 February 2003, 10 *ICSID Reports* p. 116 at p. 129; *ADC v Hungary*, Award, 2 October 2006, para. 523; *Siemens v Argentina*, Award, 6 February 2007, para. 403(5); *ATA v Jordan*, Award, 18 May 2010, paras. 129-132.

²⁷ *Nycomb v Latvia*, Award, 16 December 2003, sec. 5.1.; *Micula v Romania*, Decision on Jurisdiction and Admissibility, 24 September 2008, paras. 158-168. But see *LG&E v Argentina*, Award, 25 July 2007, paras. 84-87; *Occidental v Ecuador*, Decision on Provisional Measures, 17 August 2007, paras. 66-86.

²⁸ *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004, para. 77.

²⁹ At para. 76.

³⁰ At para. 79.

alter the fact that non-compliance with an award is a breach of the ICSID Convention. The *ad hoc* Committee in *MINE v Guinea* said in this respect:

It should be clearly understood, ..., that State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions.³¹

Under Article 27 of the ICSID Convention the right of diplomatic protection will revive in case of non-compliance with the award. Therefore, diplomatic protection is an alternative and supplement to the judicial enforcement of awards under Article 54. In particular, diplomatic protection will be available if enforcement is unsuccessful because of the award debtor State's immunity from execution. But diplomatic protection may be exercised only by the aggrieved investor's State of nationality.

³¹ *MINE v Guinea*, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, para. 25.

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Comment submitted 23 July 2012

Thank you for giving me an opportunity to comment on your really excellent draft paper. My comments generally track the “Issues for Discussion” in the Scoping Paper. I read also Summary of Roundtable discussions by the OECD Secretariat and the Sample Survey and have included some miscellaneous comments related directly to them at the end.

Question 1: Although ISDS is shown to be an unusual, even unique, system of international dispute settlement, the entire set of international dispute resolution systems is highly disparate – there seems to be no dominant model for international adjudication.

a) Do you agree with this characterisation?

I am not sure I entirely agree that there is no “dominant” model for international adjudication. State-state dispute settlement dominated for years, if not centuries; it might be said that it no longer does, yet I think the spirit of State-State dispute settlement still resonates. The notion that state-state ought still to dominate animates much of the criticism of ISDS.

b) Do you agree that ISDS, like all other international dispute resolution systems, should be evaluated according to principles for effective public policy and legal systems?

Yes, I believe that ISDS should be evaluated according to principles for effective public policy, though I am not a social scientist and am not sure what those are. Based on my experience in the US Government (now somewhat dated, admittedly), there was little assessment of the pros and cons of ISDS before the United States started to be a defendant in ISDS cases; after that happened, suddenly there was a great deal more interest in the pros and cons, and concomitant changes to the US Model BIT, in 2004, to reflect concerns about liability. States continue to negotiate treaties and must be presumed to be acting in their own best interests, though it would be useful to be more certain that states were making good and self-serving policy decisions when they enact investment treaties.

I more skeptical about evaluating ISDS as a “legal system”. One of the difficulties is that ISDS is not really a system. The dispersed nature of the treaties and sometimes variable nature of the procedures and rights under the treaties, along with the ad hoc nature of tribunals and the limited authority of ICSID annulment bodies (and the fact that not all cases are ICSID cases) means that there is inevitable a lack of consistence and systematization about ISDS. Thus I think it will inevitably fall short. Yet evaluating the ways it falls short, and why it might be desirable to have a system, would be useful for states seeking to negotiate treaties.

Question 2: The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.

a) What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?

The reason that remedies are different in the WTO is partly historic and partly that the goal is very different. In the WTO the focus is on redressing systemic distortion rather than on compensating an individual claimant. Claimants certainly get benefits when the distortion is removed, but they do not get retrospective relief. As I explain more below, I believe that the goal of investment protection was to protect foreign investors and to increase foreign investment; investment treaties were not (at least not initially) intended to serve as any kind of global governance mechanism to achieve universal rules that do not distort investment incentives or to provide a level playing field. As for human rights law, it is meant to operate as a global governance mechanism, and to inculcate protections domestically to protect natives as well as foreigners. The goal behind human rights law is to require all states to live up to certain standards. In order to facilitate that inculcation, it makes sense to let the courts try to correct matters themselves. Investment treaties were not entered negotiated to instantiate those protections domestically; they were negotiated to give an alternate forum in case the local forum was inadequate. Investment law may have evolved to the point where it is now operating somehow as a global governance mechanism, and to the extent that it is it might be desirable to re-introduce the local remedies rule.

b) Do you agree that, since the various elements of a system of dispute resolution interact, design elements from one system cannot be transplanted into another system and have automatically the same effects?

Yes, I agree.

Question 3: In many areas of international law, focus is placed on enhancing the performance of domestic systems.

a) Why has this same approach not been adopted in the context of international investment law?

Here I think it is important to distinguish between dispute settlement and the other provisions of investment treaties and the changes to domestic laws regarding investment that often accompany the signing of investment treaties. The dispute settlement portions of investment treaties are not designed to lead to changes in domestic law; the other operative provisions of treaties and the implementation of more open-ness to foreign investment are designed to lead to change, and often have. This still does not answer the question of adding compulsory dispute settlement, and you discuss bodies of international law without compulsory dispute settlement and question investment law has taken a different approach when there is some evidence of progress in efforts made by agencies to enhance domestic court and regulatory systems' ability to uphold countries' international commitments why (Scoping paper, para. 18). You cite one World Bank paper citing perceptions of governance institutions to support this. Perhaps more empirical work could be done and indeed I think that would be very useful, but the existence of this one paper does not dispel my perception that the dispute settlement mechanisms under most international agreements are completely ineffective. In fact, a lot of the criticisms of investment law, and the effects of ISDS, might be described as frustration that it is quite effective, and is in fact more effective than other dispute settlement mechanisms, such as those found in the ECtHR and the WTO.

b) What are the advantages and disadvantages of this choice?

One might ask why those bodies don't emulate investment law. In particular in paragraph 17 of the Scoping Paper, I would not agree that the four areas you mention show much in the way of success, at least not success stemming from their respective dispute settlement mechanisms. Multilateral environmental agreements are frequently violated; compensation for victims of trans-boundary environmental incidents might come via domestic rather than international law (and indeed the paper notes procedural barriers to enforcement of transnational tort laws); the OECD Bribery Convention is a

promising start but has for most of its history (indeed, until the last year to 18 months) focused on supply-side rather than demand-side bribery, thus limiting its effectiveness in those countries where government officials are likely to seek bribes to influence their behavior; and the ILO is not generally regarded as a successful protector of labour rights; that might be changing recently but those changes arguably have more to do with publicity and pressure on offending companies than any sanctions imposed by the ILO.

c) *Should efforts to improve domestic systems become a more important part of international investment dialogue?*

Yes, it would be great to have more efforts to improve domestic systems as part of the investment law dialogue. It would be better if states did not violate their treaties in the first place; it would often be better and more efficient for investors and their investments to get relief in local courts.

Question 4: *Do you agree that, although ISDS is explicitly used in only a tiny fraction of all international investments, it can nevertheless be assumed to influence the dynamics of other investor-state dispute settlement practices, both formal and informal?*

I would imagine that ISDS influences negotiations between investors and host states; indeed, anecdotal evidence suggests that is true and that it is one of the main reasons investors seek ISDS. Actual resort to ISDS is a last resort rather than a first resort.

a) *What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?*

It is not clear to me that ISDS “interacts with domestic judicial and regulatory systems”; it usually seems to operate on a parallel plane. I don’t know that States who lose (or even who win) ISDS cases look at the cases to try to learn how to improve their systems or their methods of decisionmaking. Perhaps I am wrong about this. ISDS tribunals do in fact take into account explanations about domestic and regulatory decision making; indeed, governmental actions that are taken reasonably and to protect important interests are nearly always upheld; those for which there is insufficient explanation or that violate specific promises to an investor or that seem retaliatory or “foreign” directed are the ones that seem problematic.

b) *Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?*

I am not sure I understand this question. Treaty negotiators should certainly be aware of what they are promising to do in treaties; if they cannot live up to those promises they should not make them. This might seem more directed towards developing countries, but any federal country with strong provincial governments should consider whether they can really make promises on behalf of those constituent subdivisions. Arbitrators ought to be (and I think usually are) fairly good at giving reasons for their decisions, and explaining why the regulatory authorities went awry. I do think this is part of the arbitral tribunal’s function given the public interests that usually underlie disputes. Tribunals have not been perfect, and certainly some explanations have been more cursory than others.

Question 5: *The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement (e.g. Attempts at amicable dispute settlement) are among the most common general subject areas dealt with in the treaty sample.*

a) What are your views and experiences on the use of these provisions?

My experience with the pre-arbitration provisions is that insofar as they are designed to facilitate settlement they have not been particularly useful. Some states know ahead of time that they will not settle any case. Some states might be willing to consider settlement but the nature of the act and the policies surrounding it suggest that settlement is unlikely to ensue. Encouraging more formalized dispute resolution procedures, facilitated by trained mediators and conciliators, as proposed by UNCTAD, for example, might help to avert disputes or to encourage early and less costly settlement. It is also possible that if and when investment law becomes more predictable there will be more early settlement and less recourse to ISDS. Of course, settlement numbers are not public, so we don't really know how many potential disputes are settled now.

b) Are they important components of the ISDS system?

Though pre-arbitration provisions might not lead to settlement, including requirements for notices of intent to arbitrate is an important tool to help the arbitration/lawyer part of the host government learn about the case and prepare for it. Usually the alleged violation will stem from another branch of government, and those that have to defend the state will know nothing about it. They need to know about the problem as early as possible so that they can investigate and attempt to head off arbitration if that would be in the State's interests.

Question 6: The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.

a) Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?

The costs certainly seem to be high. Some of the cases are extraordinarily complex and warrant the high fees. Others are badly handled, by investors or states or both, such that fees are incommensurate with the value of the case or the time it ought to take to resolve it. One of the biggest reasons for the high fees are the jurisdictional objections raised by states. It is perhaps inevitable and even right that they should attempt to protect the public fisc and their own reputations by so doing, but the almost inevitable bifurcation of cases adds to the costs.

b) If costs are considered to be high, does this raise concerns?

High fees raise concerns both about access to justice (for investors and for States) and about "value for money" – is the process worth what it costs, either from the point of view of investor's being able to recover, or from that of policing or somehow influencing for the better the behavior of states. Given serious concerns about the latter and some concerns about the former, this does seem a matter of concern.

Question 7: Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being "out-lawyered" rather than on the merits?

There is indeed some risk, though I am not sure how much it happens in practice. The quality of advocacy has gotten a great deal better since the early days of the surge in investment arbitration (ie since the late 1990s). There is also a great deal more information publicly available – awards in cases, but also the memorials and pleadings in all US and Canadian cases. Good attorneys are more readily able to come up to speed than they used to be.

Question 8: *Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?*

There seems to be a trend towards a “loser pays” rule. This should exert some cautionary effect on prospective investors as they assess the merits and demerits of their cases. For states, too, the loser pays rule should encourage some caution in the pursuit of a case, especially if the state thinks it is likely to be found liable. The loser pays rule encourages each side to be cautious as it cannot be sure of winning. For states, though, it might be useful (and this could be part of the preliminary procedure before the case is too far advanced) to assess early on the degree to which they might be exposed.

Question 9: *Should investment treaties give greater consideration to remedies? Should expanded use of primary remedies in ISDS be considered?*

One of the ironies about the criticisms of the remedies offered by ISDS is that at least one of the reasons for the preference for pecuniary remedies (indeed, remedies are limited to the pecuniary in U.S. and Canadian treaties, although for cases of expropriation tribunals may order restitution so long as in the alternative they award money damages) is that they are seen as less intrusive on the regulatory authority of the host state. Thus turning towards primary remedies seems antithetical to that goal (unless, of course, the primary remedies are reserved to domestic courts).

When it comes to remedies, the starting point seems to be whether investment treaties are meant to protect foreign investors, or to act as a governance mechanism monitoring state behavior, or both. If the answer is the former, then it makes sense to have quick ISDS procedures that result in some kind of money damages; if the latter it makes sense to have more thorough, law-developing procedures that focus on changing the state’s wrongful behavior rather than recompensing the foreign investor. This is not necessarily an either/or proposition; investment law seems to have been doing both, although in my view it was designed primarily to serve the former goal – to protect foreign investors whilst increasing the attractiveness of investment. Nonetheless, if one encourages retaliatory measures by the harmed States parties (Scoping, p. 9); there is absolutely no guarantee that the harmed investor would get any recompense. One would also have moved back to a diplomatic protection model. While this might be desirable, it is well to remember all of the reasons for moving away from it, some of which play out at the WTO, including the difficulty less powerful countries have in finding any way to retaliate against more powerful countries. Ecuador, for example, has few ways to “retaliate” against the United States or the EU. Even cross-sectoral limitation is of limited benefit.

There is some suggestion about the desirability of requiring more initial recourse to domestic courts. I can see some advantages to this, but also some disadvantages as well. In addition to concerns about adding time and expense to the ability of an investor to get relief one should at least consider the effect on the likely claims before the investment tribunal. If an investor can only turn to ISDS after going first to local courts, there is some chance that every ISDS proceeding would turn into a denial of justice case. This might not be a bad thing, though to the extent it is useful for ISDS tribunals to opine about the ways that domestic executive, parliamentary, or agency procedures violate international law the State, and other State, might draw useful lessons.

Should the availability of primary remedies depend on the type of wrong? In other words, for a one-off injury to a foreign investor/investment, monetary damages would appear to be the appropriate remedy. If the wrong is systemic and threatens multiple investors and their investments, and even threatens domestic investors and their investments, then a primary remedy that removes the offending measure would seem to be more desirable. The main reason that primary remedies are preferred in the WTO is that the offending measure is usually deemed to be trade distorting and harmful to others besides the

complaining party. That will sometimes, but not necessarily always, be true in the investment regime as well.

Another issue with respect to encouraging or requiring more access to local remedies is the effect on any limitations period. Tolling the applicable limitations period is one way to encourage more access to local courts without imposing an artificial deadline on the date by which the investor must choose to stay local or go to ISDS.

The other big issue I see with respect to primary remedies is enforcement. How does one ensure enforcement of changes in the law? This has been a big issue at the WTO. Though overall compliance with WTO dispute settlement body rulings is good, a close look gives a more nuanced picture. First, often States will tend to alter or amend, rather than remove, offending laws (and this is often done only after a significant delay). This practice entails follow-up from the injured party and from a monitoring tribunal. Second, the cases in which implementation has proved least successful are those that are most politically contentious (e.g. the airlines subsidies cases; EU Beef Hormones; EU Bananas, US FISC/DISC). Third, implementation rests entirely with the national government whose measure is allegedly unlawful. It is virtually impossible for the government to do anything it does not want to do; there is the possibility for retaliation, even across sectors, but this is usually seen as less than desirable and as virtually worthless for the poor state against the rich one. To amend investment law to prefer primary remedies would require implementing some kind of process to have a follow-up tribunal. In addition, the most politically contentious cases would likely be the least likely to lead to implementation. Those caveats aside, giving a country a suitable period to impose a primary remedy, but setting the damages it would have to pay the investor should it fail to do that, might bridge the divide.

In addition, in a federal state it might very difficult, either politically, legally, or both, to require a sub-federal government to implement a primary remedy.

Question 10: The text and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).

a) Would FOI participants wish to explain how their countries' laws handle similar claims? What remedies are provided for?

The United States maintains a judgment fund out of which judgments against the U.S. Government are paid. I do not know how the various states organize payment of damages. Cases against the United States are often brought under the Federal Tort Claims Act (most states have analogous laws). Many cases of government abuse are brought under the Civil Rights Act; some are brought under the U.S. Constitution. Claims of violations of the Administrative Procedures Act (against the federal government) are also possible. Most states have analogous provisions. Both primary and secondary remedies are often available. I fear I am not an expert in U.S. domestic litigation, and thus can provide no more detail.

b) Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?

Multiple cases are brought against various US government agencies that might be described as cases brought by foreign investors. Because they are predicated on domestic law, and sometimes involve breaches of contract, I don't know anywhere they are categorized and collected as "investment" cases; still less foreign investment cases.

- c) Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?**

See the answer to part (a) above.

- d) Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?**

Perhaps. It is not clear to me how much value foreign investors place on the availability of ISDS and the potential for recovery; given the relatively low likelihood of prevailing, the significant sums spent in seeking relief, and potential difficulties enforcing any award, my hypothesis is not that much.

Question 11: What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?

My biggest concern is the difficulty of enforcing those remedies. ISDS tribunals have no way of enforcing injunctions; in non-ICSID Convention cases, when injunctions are sought from ISDS tribunals it is sometimes because local courts (the source of coercive authority) are not cooperative. If ISDS tribunal issue orders they cannot enforce except by the use of adverse inferences and the like, they risk undermining their authority. That being said, perhaps it does not matter; the parties against whom interim measures are adopted risk being found scofflaws. A second concern is the intrusion into sovereignty concern; if the injunction seeks to block the operation of a law or to rescind it, the arbitrators are likely to be criticized for their interference with state regulatory authority.

Question 12: Is enforcement of ISDS arbitral awards a growing problem?

Yes, enforcement of awards is a growing problem. States have to look at Argentina's example and be somewhat influenced by it.

Question 13: If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?

Yes. The United States has now retaliated against Argentina in terms of GSP status. We risk going back to the era when powerful states had more authority than non-powerful ones; and where other political considerations might overcome any desire on the part of a state to espouse a claim.

Question 14: The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?

Yes. I have written two papers on problems regarding enforcement of awards and the potential for "re-politicization". I'd be happy to send them if they would be of interest to you.

Question 15: Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?

Yes, this is a problem as well, though states are not hampered by immunity when they seek redress from investors.

Question 16: As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?

Either adverse inferences with respect to the state's primary conduct or the payment of penalties or damages could be appropriate – not just against states, but against investors as well.

Question 17: Third party funding appears to be significantly expanding in ISDS.

a) What are the likely consequences of increased third party financing of investor state disputes?

The likely consequences of third party funding are both more cases and possibly more “better” cases as third party funders are not likely to commit significant resources to a case unless they are likely to win. This could change if third-party funding somehow makes it more likely for claims to settle; in that case one could see an increase in the number of vexatious claims brought just for the sake of prompting settlement. It seems that investment arbitration is very far from that model as yet.

b) Third party financing is frequently associated with mass claims, such as the recent Abaclar case. What are your views on mass claims?

Mass claims are likely inevitable, but they put a severe strain on ISDS which is not designed to handle them. Mass claims would often be better dealt with as part of a lump-sum settlement agreement, or some kind of claims commission. This is especially true if the purpose of the procedure is to ensure that claimants who deserve some recompense actually get it; the way that mass tort claims are used to deter wrongful behavior and to otherwise act as informal regulation seems particularly undesirable in the investment law realm, especially given the lack of agreement about the overall purpose of investment law (e.g. whether it is investor protective or host-state regulative).

Question 18: It is often considered that negotiated settlements can provide disputing parties with superior outcomes to adjudicative decisions. Are the dynamics of settlement negotiations in ISDS likely to be affected by third party funding?

Yes, I think so. And they might be affected in both good and bad ways. To the extent investors are motivated by principle rather than rational self-interest, the third-party funder might encourage the more logical and surer outcome – settlement – even though the investor would lose the opportunity for vindication. On the other hand, an investor who really wants to settle in order to “clear the books” might be precluded from doing so by the third-party funder who sees a big payoff at the end of the day.

Question 19: In your view, would the availability of third party funding in ISDS likely affect the comparative position of domestic and foreign investors?

I am not quite sure I understand the question. In what context do you seek to make the comparison between domestic and foreign investors? Domestic investors do not have access to ISDS and thus do not have access to third party funding for ISDS. Yet in many states (and apparently more all the time as states rescind their champerty laws) the domestic investor would have access to third party funding to go to local courts (the foreign investor might as well).

Question 20: Do awards by arbitrators favourable to undisclosed funders with whom they have a business relationship raise concerns for the ISDS system?

In the case you describe there is an appearance of impropriety, even if no actual impropriety, which is problematic. This is perhaps the biggest reason for requiring disclosure of a third-party funder; even if an arbitrator knows nothing about the funder it would be problematic for him to have participated in the procedure and handed down an award that went in favour of the funder; the arbitration might have to commence from scratch which seems undesirable.

Question 21: Domestic courts generally have significant powers to sanction interference with the administration of justice. In contrast, arbitration tribunals do not have any powers of enforcement. Can arbitration tribunals or other institutions adequately police the risk of funder misconduct in ISDS?

It depends on what kind of funder misconduct you are referring to. Tribunals would have the option to find against the party being funded, and/or to award costs; the problem here is that the claimant would be penalized, too, even if the claimant had no control over the funder. And this is where it seems the tribunal might not have any authority to police the relationship between the funder and the claimant. A lot of the concerns about third-party funding (including whether the claimant has somehow lost its control of the case and perhaps changed the nationality of the claim) come down to the contract between the third-party funder and the claimant. So much hinges on this yet absent both a requirement of disclosure of the third party funder and acquiescence on the part of the funder to the tribunal's authority over it there seems no way for the investment tribunal to police it, including with respect to the issue of costs.

Question 22: Should third party funders of unsuccessful cases be potentially liable for costs awards?

It depends on the nature of the contract between the third-party funder and the claimant. In the case of a straightforward loan, for example, over which the claimant had full control, it is possible that the third-party funder should not itself be responsible for costs, but that the costs order should be satisfied before the loan is repaid. In most circumstances, however, I would think that third-party funders should be responsible for at least some of the costs imposed against the parties they have funded, and perhaps all of them, again depending on their arrangement.

Question 23: The ISDS system has attracted a pool of elite law professionals that are active as arbitrators, but also as counsel and experts.

a) Does the fact that accomplished law professionals are attracted into the ISDS system contribute to the quality of arbitration available under ISDS?

Yes, the accomplishments of the participants unquestionably leads to high quality arbitrations and often high quality awards in investment cases.

b) Are you generally satisfied with the competence and impartiality of arbitration panels in ISDS?

Generally yes, though this does not mean there are occasional problems. Arbitrators have changed their views of their mandate as the years have elapsed. While some criticize awards as overly long and overly conscious of their contribution to the law of investment (and there might be some truth to this in certain cases), overall the level of professionalism and the quality of awards are both very high.

Question 24: Some senior arbitration specialists have criticised party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?

Some of the criticisms are valid. There are cases in which the party-appointed arbitrators seem very likely to hold pre-formed views, and everything seems to come down to the neutral presiding arbitrator.

One immediate response is to say that one should just have (and pay) the one arbitrator. Yet in particularly complex disputes, having a tribunal, with give and take amongst the arbitrators, very likely sharpens the decision and in cases where the party-appointed arbitrators indeed abide by their duty of impartiality everyone is better off. Another response is to have an arbitral institution appoint the three members of the tribunal. Yet in some ways this seems just to displace the problem. How are the arbitrators to be chosen, and by whom? If it is from a roster, how does one guarantee that the roster will be filled with good and competent people who have the time and energy to devote to the arbitrations. The ICSID roster is known to be problematic as states do not fulfill their duty to appoint qualified people to the roster, and in some instances make no appointments at all. If it is not from a roster, what criteria should be employed? Who will make the selections? Will the criteria guiding that selection vary by the case? Will those selections be subject to any kind of scrutiny? If so, by whom?

Question 25: The ISDS system appears to create a number of economic incentives for arbitrators. How do these affect the ISDS system, if at all? Are ethics rules and reputational interests sufficient to counteract the economic incentives?

This is a good question. The biggest problem seems to be arbitrators taking on more than they can possibly handle, and delaying decisions, and even hearings, in cases by months if not years. Requiring arbitrators to disclose the number of cases in which they are currently sitting when they are appointed, and to block time off their calendar early, are two ways to try to alleviate some of these concerns.

Question 26: Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?

A great deal of information is now publicly available, if people know to look for it. Given that more and more awards are publicized this is more and more true. That is one source of asymmetry; that some participants don't know what information they should seek, so even if it is available they won't know to look to find it. The same might be true of information that should be sought from arbitrators; some might not even know to ask for it, even though it would be forthcoming if they did. In addition, it is quite likely that there is unequal information with respect to selecting arbitrators; repeat "players" will know more than those who don't usually participate in arbitration. It is less clear to me that they have "good" information. They might have reports of different behaviours and decisionmaking tendencies, but those will not necessarily be reliable, nor will the inferences drawn from them.

Question 27: Do you see a need for different ethical requirements for ISDS arbitrators than for commercial arbitrators? Does the fact that ISDS may engage the public interest more directly than commercial arbitration mean that different ethical requirements should apply?

It is not clear to me that investment arbitrators should have different ethical requirements from commercial arbitrators, except possibly with respect to the "issue" conflict. Judges have the same ethical obligations whether they are hearing commercial cases or constitutional law cases. I don't think commercial cases are subject to "lower" standards.

Question 28: As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators' "dual hats" as arbitrator and counsel) has been criticised. What are your views on this question?

Yes, I think the dual hats issue is becoming more and more problematic. I question whether an arbitrator can really completely remove one hat in order to wear another; if he can I am not sure that he is abiding by his ethical obligations as counsel, even if he is doing so as arbitrator. Moreover, the dual hat problem enhances the appearance of impropriety in a way that is problematic.

Question 29: Many States appear to favour allowing investors to forum shop between arbitral fora. At the same time, most States are less tolerant of forum shopping in domestic legal systems. What explains the different approaches?

One reason is to avoid favoring a particular entity; e.g., ICSID over UNCITRAL or ICC. Perhaps a more significant reason is that, to the extent that the alternate forum is ICSID, you have the additional requirement that both contracting states be party to the ICSID Convention (and that at least one of them be a party in order for the Additional Facility Rules to apply). If the only option is ICSID Convention arbitration, you might have a problem should one of the contracting states withdraw from ICSID – the so-called *clause blanche*. In other cases ICSID Convention arbitration is put in as a placeholder for the time when both parties will have ratified the ICSID Convention. Perhaps another reason is that there is no clear “natural” forum, with the possible exception of ICSID, which again might or might not be available.

Question 30: For States that favour allowing investors to forum shop between arbitral fora, has your government publicly articulated its policy rationale in this regard to parliament or elsewhere?

I am not aware of public justification or explanation. I believe the answer I gave to number 29 to be correct, but it is my personal opinion.

Question 31: What are your views on the relationship between forum shopping and differences in the rules governing the various arbitration fora (e.g. in relation to transparency and review of awards)? Does the diversity of rules and procedures in the various arbitration fora (e.g. ICSID, UNCITRAL) meet the needs of the societies on behalf of whom investment treaties have been signed?

My general stance is pro-transparency, and there ICSID has gone further than the other institutions with respect to transparency. That being said, however, any state that wishes to do so can include transparency obligations in its treaties (see for example the US and Canadian treaties, and the NAFTA Free Trade Commission’s Notes of Interpretation), yet most do not. While I think it would be desirable for UNCITRAL to have rules specific to investment arbitration regarding transparency, it is still open to states to put the requirements in the treaties. As far as review of awards is concerned, the ICSID annulment procedure is intentionally very limited. When the Convention was negotiated I think the dominant motive was to provide a neutral forum to settled investment disputes brought under concession contracts; the goal was finality and some celerity of action. To the extent ISDS is now often based on treaties and involves the public interest and perhaps public governance, it might make more sense to change the focus towards accuracy rather than finality. Yet, again, states seem to have little interest in doing this.

Question 32: Is the fact that domestic investors have tried (and succeeded) in qualifying for protections under their own countries’ investment treaties a source of concern? Why would countries wish to deny to their own investors benefits that they offer to foreign investors?

It is interesting that human rights law has gone the other route, with protections extended to nationals as well as foreigners, and indeed those protections are often invoked by nationals. To the extent it is a problem states should be able to respond by drafting more stringent denial of benefits clauses and including better procedures for invoking those clauses. And, indeed, they might well want to do so.

Question 33: Why would countries wish to deny to third party investors benefits that they offer to the investors of their treaty partner(s)?

I suppose it has to do with the idea of reciprocity – of only giving up something in return for getting something; to the extent a third-state national can take advantage of the provision they do so without having given anything up. Yet again this could be dealt with by more stringently drafted denial of benefits

clauses. At present, it is interesting that “treaty shopping”, or “nationality planning”, depending on one’s view, draws such criticism. In the case of tax treaties, an attorney would very likely draw a malpractice claim if she did not suggest structuring an investment to minimize tax obligations (actually doing so would presumably be a business decision), yet structuring an investment to take advantage of an investment treaty is viewed as bad practice by many.

Question 34: Is treaty shopping a major problem for your country? If so, why?

It does not seem so; at least, this is one area where US treaties remain pretty open. The definition of investor is very broad, and the denial of benefits clause has not changed even after the *Loewen* case. (The denial of benefits clause played no role in that case because it only excludes claims by third-state investors, not by domestic investors).

Question 35: How does your government evaluate the consistency of ISDS?

As I have not worked in the government for some time it is hard for me to say. Generally I think U.S. attorneys are more comfortable with inconsistency due to domestic practice. Laws sometimes (often slightly) vary from state to state, and in the federal government laws can vary from one circuit to another, often for years.

Question 36: Is it important for the ISDS system to produce consistent results?

I have written a paper on consistency and harmonization; I’d be happy to send it if it is of interest. Here is a relevant excerpt (with citations removed).

One should be wary of premature convergence. Establishing an appellate body whose decisions are precedential in the absence of a multilateral agreement might be especially risky given the lack of consensus about key issues in investment law. Ralph Waldo Emerson famously remarked that ‘A foolish consistency is the hobgoblin of little minds.’ It is better to be inconsistent but sometimes correct rather than consistent but always wrong. Convergence sought solely for the sake of convergence is a hobgoblin we should avoid. Yet harmonisation of different strands of thought might be achievable and desirable.

Absent global negotiations resulting in universally agreed upon rules, one might strive for harmonic convergence – uniform understandings along different wavelengths. Choosing between two or three or even more options would permit treaty negotiators to choose the level of protection they seek but with some assurance of what that choice means.

Furthermore, one needs to have a realistic assessment of what international investment agreements, and the settlement of disputes arising under them, can achieve. Convergence, or even consistency, will not by itself render international investment agreements legitimate in the eyes of their critics. It would remove one pillar of criticism, but might well erect others.

Attempts to achieve convergence would be likely to sharpen the focus on the lack of agreement about the nature of the rights that investment agreements ought to protect and on the tension between a march towards uniformity and a state’s desire to protect its regulatory space in the manner best suited to it. There is no single right answer to how this balance should be achieved, and there is no magic formula that can answer the question in any of the millions of scenarios that might present themselves.

Question 37: How should consistency as a value be weighed against other considerations (costs, speed, need to work out issues through case law)?

I think the only way consistency can be achieved is by establishing a single appellate body that oversees the operation of a single treaty. Unless and until states agree on the rules that should be included in the treaty, it seems inevitable that they should be worked out through case law. Moreover, to the extent that states wish to bind themselves to different obligations, or to have different procedures govern their ISDS, achieving consistency would be deleterious to sovereign independence.

Question 38: Is the current architecture of ISDS suited to promoting consistency?

No.

Question 39: The scoping paper notes that some inconsistency is an unavoidable feature of any dynamic system of adjudication. Inconsistent decisions can be part of the process by legal concepts are analysed and clarified. Is this need for clarification and innovation a feature of ISDS?

Yes.

Question 40: As noted in the section on remedies, under some advanced systems of administrative law, such as in Germany, claimants seeking damages must first seek judicial review or primary remedies. Multiple proceedings are thus required to obtain damages. In addition, all domestic systems allow judgments awarding sizable damages against governments to be appealed. Are advanced domestic administrative law systems relevant comparators for evaluating the importance of finality with regard to ISDS arbitration decisions awarding damages?

Again I think the goal of ISDS, as initially formulated and certainly as encapsulated in the ICSID Convention, was investor protection. The systems of advanced governments seem an inappropriate comparator. Moreover, even advanced systems, such as the one in the United States, recognize the problems that sometimes come with being an outsider. This is why federal courts in the United States can exercise “diversity” jurisdiction in cases brought between citizens of a state and citizens of a different state, or a foreign nation; the concern is that the local entity will get more favorable treatment, either wittingly or unwittingly.

Question 41: ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?

The important thing is the rule of law; it is just as important to have a correct decision in a case involving \$10 as in one involving \$10,000,000. Mistakes can be made in either case, and the implications of course can be harsher with respect to a larger award, but I would not advocate a system in which “rough” justice was deemed okay for small amounts but not for large ones. Insofar as one is concerned about the interplay between ISDS and domestic courts, such a view would seem to send precisely the wrong message as to what is important in the administration of justice. There could be different procedures that are more streamlined for smaller cases; a “small claims” court, so to speak, but procedures should be in place to ensure that justice is available.

Question 42: What reasons explain the wide preference for inclusion of international arbitration in bilateral investment treaties?

There are several reasons: the concern about the foreign investor not being able to get justice in local courts due to his or its foreign-ness; concern about the availability of justice itself; dissatisfaction with and

the practical unavailability of espousal (governments espouse very few cases; when they do the claimants lose control over the case); and of course dissatisfaction with gunboat diplomacy.

Question 43: *Many of the ISDS provisions contain texts requiring attempts at amicable settlement and coordinating recourse to international arbitration relative to domestic judicial procedures. Are these provisions important parts of States' consent to arbitrate?*

It seems likely that they are important to states. It would seem inconsistent with the purpose of the treaties, though, to let states control access to investment arbitration by placing too great weight on those preliminary procedures.

Question 44: *Why do many States engage in light regulation of ISDS in their bilateral investment treaties?*

I think it is because they are relying on existing rules (ICSID, UNCITRAL, etc.) to fill in lacunae. So far as I know arbitration "works" under the lighter European model as well as it does under the heavier U.S. and Canadian models.

Question 45: *The survey of ISDS provisions in investment treaties shows differences (among treaties and countries) in treaty language with respect to essentially all issues covered. What do you think about this degree of variation in language? Is it useful? If so, for what purpose?*

Having different language permits states to further their own goals. It would perhaps be nice if there were even more variation, with stronger language, so that the intent of states would be clearer. Yet variation for the sake of variation (e.g. to prove something was changed in the course of negotiations) seems undesirable.

Question 46: *Many countries' older treaties are different than their newer treaties. Is this a source of concern for these countries? Why are investment treaties and, more specifically, their ISDS provisions not updated more frequently?*

I think it is a source of concern; if you put new language in, or language that slightly alters existing language, you leave open the argument that the first treaty means something different. Thus, there is some disincentive to clarification.

Miscellaneous Comments

With respect to paragraph 14 of the sample survey, you say that "A secondary category of treaties provides for ISDS through international arbitration exclusively, and does not include any mention of domestic judicial review as a means to settle investment disputes." Isn't it implicit that a State, and/or an investor, could always go to local courts to seek relief under applicable municipal law? There might be state immunity concerns, but most states have waived immunity to some extent. There might not be relief available under the treaty terms, or on the basis of customary (or conventional) international law, but some relief might be forthcoming assuming a functioning judicial system and a valid claim. Indeed, this is the assumption in *Spyridon Roussalis*, in which the counterclaim against the investor would be brought in local court while the investment arbitration will be brought before an arbitral tribunal.

With respect to paragraphs 21 through 24 of the sample survey, I understand your decision not to include arbitral practice, but without some reference to the way tribunals have interpreted most fork-in-the-road clauses the section is misleading. In multiple cases states have sought dismissal of the investment case on the grounds that the investor first sought relief locally, but tribunals have been unanimous (or close to it) that unless the investor sought relief *under the treaty* in local courts their investment claim was not

precluded; in other words, the local cause of action was based on municipal rather than international law and thus did not “count” as seeking local redress.

In the Sample Survey, section 7 deals with Transparency, accountability and quality. I was surprised not to see reference to the practice of Parties issuing “Notes of Interpretation” along the lines of NAFTA Article 1131(2) and found in several other treaties as well.

Also, in section 7(a), although NAFTA itself does not talk about public access to procedures and outcomes, the three NAFTA States have issued Notes of Interpretation (31 July 2001) regarding those matters; there is also a subsequent statement on Access to Hearings and procedures for Amicus Curiae Intervention. Thus it is somewhat misleading to say NAFTA does not address those issues.

As for as section 7(b) is concerned, I think it is a bit misleading to group experts, amici curiae, and non-disputing States. It is certainly true that prior to NAFTA practice and subsequent US and Canadian treaties particularly that there was no expectation of amici curiae or non-disputing State participation. The participation of experts to aid the tribunal, however, is usually dealt with under applicable arbitration rules.

As to section 7(c), while many treaties might not “require” that tribunals give reasons, that is likely because it is somewhat superfluous given the *lex arbitri* will often require that decisions be given (see Article 31 of the UNCITRAL Model Law, requiring that a tribunal give reasons unless the parties expressly agree otherwise), and that the ICSID Convention makes the failure to state reasons a ground for annulment.

Also in the sample survey in the “key findings”, paragraph 119, it is somewhat misleading to say that “Issues that are not regulated in either individual treaties or these frameworks remained [sic] unregulated.” One can readily argue that there is something of a common law of international arbitration, or practice, such that there are expectations found in practice. But you are certainly correct that it is not necessarily predictable or readily ascertainable.

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Thank you for the opportunity to participate in OECD's consultation on investor-State dispute settlement (ISDS). The scoping paper and the survey are valuable contributions to the literature in the field and raise timely and important questions about ISDS and its present and future role in the investment treaty regime.

Both the scoping paper and the survey gather and analyze an impressive amount of information on state treaty-practice and insightfully highlight many key issues for states to consider with respect to ISDS. What is evident from the OECD work, however, is that for all of the information and insight that OECD has been able to provide there remain significant empirical gaps in the universe of information available to government decision-makers in evaluating ISDS and the role that it plays in the international investment treaty regime. I note quickly that these gaps are not the product of any deficiency in the scoping paper or OECD's survey; indeed the scoping paper is all the more useful for highlighting them. Rather the observation reflects simply the degree to which on certain key issues states appear to be groping in the dark when evaluating crucial questions for their international investment policies.

Without attempting to be encyclopedic, two key areas of empirical uncertainty may be highlighted. The first concerns the subject addressed in Part II.D of the scoping paper: 'Enforcement and Execution of ISDS Arbitration Remedies.' The creation of a predictable mechanism for the resolution of disputes between investors and host states has been a principle desideratum of the investment treaty regime. As is evident from Part II.D, however, on the important questions of whether and to what degree respondent states in ISDS are complying with adverse arbitral decisions, the information available is highly anecdotal. It may be, as the scoping paper reports, that the general sense among commentators is that compliance levels with arbitral awards are high. At the same time, however, as the scoping paper also notes, there is information in scattered sources which tends to undercut this assessment. While one might assume that if noncompliance with arbitral awards became routine such a fact would become recognized systemically, given the decentralized nature of the investment treaty regime, this assumption may be doubted. It is an area in which further empirical research would be of considerable value both to states and commentators trying to evaluate the role of ISDS.

A second area of empirical opacity is the influence of ISDS on domestic dispute resolution and policy-making processes (Part I.C). The observation has been made that states with developed legal and political systems generally have not entered into investment treaties with one another precisely because their levels of political and legal development largely obviate the concerns that give rise to the need for such treaties. Moreover, even where developed states have entered into treaties establishing substantive standards of protection, ISDS has not been seen as essential for the guarantee of those protections, as the Australia-United States Free Trade Agreement famously illustrates. Investment treaties and ISDS are in this respect a stop-gap, addressing concerns that may in principle be addressed in the course of time outside of international treaties through domestic political and legal development. If this is so, then the effect of investment treaty provisions on this development, and particularly ISDS, must be a question for states designing their features. As the scoping paper indicates, however, there has been little empirical study of the effect of investment treaties on domestic political and legal development.

Relatedly, as the scoping paper observes (p. 15), there is a question about the effect of investment treaties and ISDS on the policy-making processes of states. Here, again, there is an empirical deficit in the information upon which states and commentators may draw. A rational-actor approach to the issue might assume that international treaty obligations and the possibility of international arbitration influence state regulatory behavior both prospectively and retrospectively. That is, states might be expected to seek to avoid undertaking actions likely to lead to treaty violations and arbitration and to avoid repeating actions previously held to have been in violation. Conversely, however, one observes, anecdotally, the institutional and governance difficulties that states face in coordinating policy-making and implementation, whether due to size, resources or development. Only states themselves, perhaps, are in a position to shed light on how ISDS and the investment treaty regime are influencing state action in this regard. It is to be hoped OECD members will use the opportunity given by this consultation to engage in critical self-inquiry and to share these experiences in order to build an empirical base on which to base conclusions about ISDS and its present and future role.

Burford Group Limited

Comment submitted 26 July 2012

Burford Group Limited is pleased to present the following comments in connection with the OECD's public consultation on Investor-State Dispute Settlement.

Burford Group Limited is the investment adviser to Burford Capital Limited. Burford Capital is an investment fund, publicly traded on the AIM market of the London Stock Exchange, and the world's largest provider of investment capital and risk solutions for litigation. Burford is made up of experienced professionals from major law firms, corporations and financial services firms. More information about Burford can be found at www.burfordfinance.com.

Burford regularly provides investment capital in connection with the adjudication of investor-state disputes and is routinely approached to do so by both investors and states, and by lawyers representing them. Burford has active relationships with virtually every major law firm with a significant investor-state practice.

Burford's comments will focus principally on the "Third Party Financing" section of the consultation paper, but they are set against a backdrop that permeates other aspects of the paper – namely, that investor-state arbitration is unduly expensive and frequently inefficient, even when compared to litigation and arbitration generally, and that its deficiencies interfere with its ability to deliver justice.¹

As a preliminary matter, let's be clear that financing of litigation and arbitration claims by third parties is neither new nor capable of being characterized in the rather black and white manner suggested by paragraphs 91-101 of the consultation paper. While it's true that some press and academic writing tends to simplify the practice as set forth in paragraph 91, the reality is much more complex and multi-faceted.

Indeed, litigation finance is really just specialty corporate finance that is focused on litigation and arbitration claims as assets. Virtually every corporate activity, from buying photocopiers to constructing skyscrapers, has specialty corporate finance available to it, and businesses elect to make use of such finance in a variety of ways and for a variety of reasons. In some cases, financing is necessary for a claim to proceed at all and for justice to be obtained, as in the case of an impecunious claimant or one facing liquidity or budgetary challenges. In others, the use of external capital is a choice motivated by accounting issues, risk tolerances or financial analysis.

Moreover, there are a vast number of structures in use by businesses to meet their litigation financing needs, including recourse financing of a claim (from banks or specialty providers); non-recourse financing of a claim; derivatives; senior, subordinated, mezzanine or equity financing of a business that owns a claim; the use of special purpose vehicles into which a claim is assigned or indeed that become the parent of the claim owner; and many others. As just one example, a Canadian court has recently approved the provision of \$36 million of debtor-in-possession financing to enable a Canadian public company to pursue a BIT claim against Venezuela; that financing came about after the company had tried, along with a major international investment bank, to raise pre-insolvency financing for the claim using a structure that tried to sell to investors a bond stapled to a contingent value right (on the

¹ As just one example, the cost of simply adjudicating jurisdiction is vastly higher in investor-state arbitration than in any other type of proceeding of which we are aware.

arbitration's outcome).² In another example, a UK public company has used a pending BIT claim as collateral to obtain financing for its business operations; that financing is not related to providing for the costs of the arbitration proceeding.³

Thus, we caution against over-simplification in this complex financial area.

We now turn to the specific issues raised and questions posed in the consultation paper.

Disclosure

The question of the disclosure of any non-party's financial interest in an arbitration matter is raised by paragraphs 95 and 106-107 and question 20 of the consultation paper.

It cannot be stressed too strongly that this is not a "litigation funding" issue at all. There is absolutely no legal, logical or equitable basis for requiring the disclosure of "litigation funding" (if indeed it could even be defined) without also requiring the disclosure of other parties with economic interests in the outcome of a matter.

In many national courts, this issue is settled and clearly defined – and the courts have decided which financial interests are to be disclosed, and which need not be. For example, the Supreme Court of the United States requires the identification of a party's parent corporations and any public shareholder owning more than 10% of the party's stock.⁴ Providers of financing – whether litigation funders, banks or insurers – to a party or a case are not required to be disclosed.

The question is the same for arbitral tribunals: what corporate interests should be disclosed? All equity interests? All debt interests? All derivative interests? All contingent interests? The answer, at least pursuant to the IBA's Guidelines⁵, has already been provided: only a "significant financial interest" in the outcome of an arbitration is the basis for an arbitrator to have a financial conflict. While that is a less clear standard than the laudably clear Supreme Court rule cited above, it is still clear that litigation funding to a party would not create such an interest unless the arbitrator were also the funder.

Finally, the consultation paper raises the specter of a conflict arising if a funder is funding (i) the action before the arbitrator and (ii) a separate matter in which the arbitrator's firm is counsel. This is clearly not a conflict. Under the IBA Guidelines, only parties and their affiliates can create such conflicts. Providers of financing are by definition not affiliates under prevailing law in any common law country of which we are aware.

If the OECD wishes to join the ever-present discussion about arbitral conflicts, that would doubtless be a worthy addition. But let us not have such a discussion couched in terms of litigation funding or any other single type of capital or investment transaction.

² See generally www.crystallex.com and specifically <http://www.crystallex.com/News/PressReleases/PressReleaseDetails/2012/CrystallexAnnounces-Court-Approval-of-DIP-Financing1129104/default.aspx>.

³ See <http://www.rurelec.com/news-and-publications/226-rurelec-completes-15-45-million-fund-raising>.

⁴ See Rule 29(6) of the Rules of the Supreme Court of the United States.

⁵ International Bar Association's Guidelines on Conflicts of Interest in International

General impact of the availability of litigation finance

Question 17 asks about the likely impact of litigation finance on investor-state disputes.⁶ The answer, from our perspective, is simple. It is well documented that repeat litigants, such as states, have different levels of risk tolerance in litigated matters than do claimants who are likely to have only a single – and often a critically important – matter.⁷

When differing risk tolerances are combined with differing resource levels (and notwithstanding the commentary in the consultation paper, the vast majority of states have greater litigation resources than most claimants), an unequal playing field results, and the goal of fair and even-handed arbitral justice is often thwarted by cost, process and risk.

Thus, anything that levels the playing field and enhances the ability of the adjudicative system to fulfill its goal of providing justice is desirable. Given the high cost of investor-state arbitration and the need for specialized counsel and expensive experts, the absence of adequate financial resources (whether from inability to pay or other causes, such as corporate budgets) can seriously hamper the achievement of that goal. Litigation finance is one tool in appropriate cases to assist in reaching that goal – and given that a competent arbitral tribunal will only award damages if an illegal act has been committed, it is difficult to understand the argument that states should be permitted to get away with illegal acts if the victims need (or want) to use financing to seek redress. Surely we do not live in a world where only rich claimants are entitled to justice for illegal state action.

The consultation paper (in paragraph 100 and footnote 111) refers to the kinds of arguments that opponents of litigation finance advance from time to time. Those positions are hardly surprising, as they are being advanced by parties who routinely take advantage of their risk tolerance as repeat litigants and seek unfairly low resolutions of claims because of that imbalance in risk tolerances. They are not, however, grounded in anything but rhetoric and they have been routinely dismissed by the bodies who have considered them, including the American Bar Association, the New York City Bar Association and the UK Ministry of Justice.

Impact on settlement

Leaving litigation finance aside, it is the rare piece of significant litigation indeed that has only a single stakeholder. That is more the stuff of academic oversimplification than reality. Major claims and their settlement are – and always have been – impacted by the views, positions and entitlements of multiple parties, including debt holders, equity holders, and all the other stakeholders who make up the modern business.

Litigation finance does not change that paradigm. To be sure, a claimant that takes capital from a provider of litigation finance now has to consider the economic implications of that transaction when it comes to settlement, but a properly negotiated and understood transaction does not make settlement more difficult. There is no evidence to suggest that claimants hold out for higher settlements because they need to pay the funder something, any more than there is evidence of claimants wanting higher settlements to cover the bank interest they have had to pay to borrow for their legal fees.

⁶ Question 17(b) asks about mass claims. That is not Burford's field of expertise and we don't take a position on the issue. There are serious access to justice issues that need to be addressed in this context, however.

⁷ See, e.g., Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L. J. 65, 66, 69-70 (2010); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 385 n. 34 (2009).

There is ready proof of this by analogy. Plaintiffs in the United States commence litigation actions every day with lawyers who offer contingency fees. Those plaintiffs know that by entering into a contingent fee arrangement, they will be giving up part of their eventual settlement. But they accept that from the outset as the price of the arrangement: there is no suggestion that plaintiffs in contingent fee actions don't settle at the proper settlement value of their cases because of the presence of the contingent fee. Litigation finance is no different. The consultation paper makes this very point in paragraph 99.

Paragraphs 102-104 of the consultation paper also postulate that litigation finance could interfere with the use of non-monetary remedies as a means to resolve investor-state disputes. We disagree, both with the consultation paper and with the various commentators cited therein. Burford regularly provides investment capital in situations where a non-monetary outcome is a very real possibility from a claim, and indeed one of our largest successes has been in a matter where there was no monetary payment at all and where we continue to have a partial interest in a desirable asset. If an investment fund has sufficient scale and confidence in the assets underlying the dispute, there is no reason at all not to be perfectly happy with non-cash resolutions.

Adverse costs

Providers of litigation finance are entering into a contractual relationship with a claimant, just as a bank does when it lends a claimant money. No one would suggest that the bank should be liable for adverse costs if the claimant uses the bank's money to pursue an arbitration claim, and the same result should obtain for litigation funders. The funder is not a party to the action and is not controlling it; the party is the proper obligor for any costs award.

If, of course, the funder becomes a party – perhaps by purchasing the claim outright – then the situation may be different, but simply because the general rule of parties bearing adverse costs would now catch the party – the funder-owner. But Burford is not in that business.

In paragraph 110 of the consultation paper, reference is made to the English domestic situation. That, however, cannot be considered out of context. In England, there is a robust after-the-event insurance market, unique in the world as far as we know. It is common for a plaintiff in a domestic English matter to take out an after-the-event insurance policy at the time of commencing litigation; such a policy agrees to pay an adverse costs award if one is rendered, and can often be used as security for costs if required. (There is typically no premium for such a policy; the premium is paid from the ultimate case result.) We believe that every major litigation funder in England requires plaintiffs in English cases to have such insurance cover. Thus, if a funder and plaintiff together elect to “go naked” and pursue a case without the usual insurance, they are essentially gambling that the case is so strong that they can forego the cost of the insurance and thereby save the cost of the conditional premium, and the courts have held that if their gamble fails, they are proportionately liable for adverse costs.

Without the protection of this unique insurance solution, we believe strongly that attempting to impose liability for adverse costs on funders, or requiring security for costs, in investor-state claims will further chill an already unbalanced system to the detriment of claimants.

Funder misconduct

As we noted above, complex claims already come with multiple stakeholders. There is no effective mechanism to hold any of them responsible for anything other than by punishing the party. If an e-discovery vendor engages in misconduct, there is no suggestion that a court or a tribunal can reach the vendor directly and regulate or punish it. This is nothing more than classic agent/principal theory. Instead, depending on the degree of misconduct, a court or tribunal can and will punish the party. Funders are no different, and there is no basis for contemplating differential treatment of them. Moreover, to the extent the consultation paper is discussing misconduct in the context of a funder's potentially bad behavior to a claimant, that is of course a matter for the contract between funder and claimant, to be resolved in accordance with its terms. If Citibank calls a claimant's loan in the middle of an arbitration proceeding, that will doubtless impact the claimant's ability to continue and the proceeding itself, but surely there is no suggestion that Citibank is subject to the tribunal's authority in any way. Funders are no different. We are simply specialized Citibanks.

Conclusion

Providers of litigation finance are just one more way for claimants to pursue meritorious claims. There is nothing particularly unique about the specialty finance services we offer, beyond our deep industry knowledge and experience. And there is no basis for singling out dedicated litigation finance providers, as opposed to the many other capital providers in the market, for increased regulation or scrutiny.

We are grateful for the interest in this topic shown in the consultation paper, and we would be delighted to participate further in this process.

Stichting Onderzoek Multinationale Ondernemingen (SOMO)

Centre for Research on Multinational Corporations

Comment submitted 27 July 2012

SOMO is an independent, non-profit research and network organisation working on social, ecological and economic issues related to sustainable development. Since 1973, the organisation investigates multinational corporations and the consequences of their activities for people and the environment around the world.

General introduction

Of late, the international investment regime has come under increasing criticism because of its one-sided focus on investment protection. In this contribution to the debate, we will focus primarily and in general terms on the existing imbalance between investor rights and investor obligations, also in the context of investor-state dispute settlement (ISDS). Some of the more technical issues relating to the need for enhanced transparency in arbitrations and more detailed provisions on investor-state dispute settlement in order to ensure more legally oriented, predictable and orderly proceedings at different stages of the arbitration process have already been extensively highlighted by others.¹ This should at the very least include greater transparency in terms of proceedings and the disclosure of information, a roster of permanent arbitrators, and rules to avoid conflicts of interest, as well as an appeals mechanism. For more on these issues, we would refer you to, among others, the alternative investment model of the International Institute for Sustainable Development² and the analysis of critical academics.³ Not to forget UNCTAD's recently published Investment Policy Framework for Sustainable Development.⁴

It falls outside the scope of this discussion paper to expand in detail on all the controversial issues relating to sustainable development in the current ISDS (e.g. the costly international arbitration and awards, posing high risks for many countries; possible regulatory chill in order to prevent claims; lack of access for civil society to dispute resolution), let alone that we might address in detail the over 2500 international investment treaties currently in place. That is not to say that these do not warrant critical attention.

1 In its (confidential) draft proposals for dispute settlement in the EU's future common investment policy, the European Commission also appears to take a more institutionalised legal framework as its starting point. This approach, that shows a clear objective to ensure greater objectivity, breaks away from the standard dispute settlement provisions in current Member States' BITs and is likely instigated by concerns that were raised about the liability of states in their regulatory capacity and who – the EU or the member states – would be responsible for any damages awarded.

2 IISD's model agreement on investment for sustainable development and negotiators' handbook, 2005<www.iisd.org/investment/capacity/model.aspx>

3 Public Statement from Academics on the International Investment Regime, < http://www.osgoode.yorku.ca/public_statement> 30 September 2010

4 UNCTAD launches Investment Policy Framework for Sustainable Development (2012) http://unctad.org/en/Pages/newsdetails.aspx?OriginalVersionID=130&Sitemap_x0020_Taxonomy=Investment%20and%20Enterprise

PART I. ISDS IN CONTEXT: The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.

Corporate globalisation has so far been a process that has mainly secured and legalized the rights and privileges of transnational enterprises: at times beneficial, but often with unequal outcomes and detrimental impacts on (global) public goods and the wider public interest. Most foreign investments are made by multinational enterprises (MNEs). Current International Investment Agreements (IIAs, including Bilateral Investment Treaties - BITs) are based on the premise that all investments are beneficial to development and that foreign investment will be attracted by agreements that guarantee the protection of foreign investors. Such agreements do not or insufficiently take into account the potential adverse impact of foreign investors on societies, local communities, workers, consumers and the environment. Also, BITs do not have co-operation mechanisms to allow home and host governments to ensure responsible business conduct among their investing companies.⁵ While not providing a direct answer to the questions posed in scoping paper, the following paragraphs look into this serious omission by exploring some relevant aspects of the relation between the current corporate accountability framework and international investment law.

Where potential positive impacts of FDI may exist, at the same time various multinational enterprise (MNE) practices give cause to believe that the impact of FDI in developing countries is often limited or even negative as a consequence of crowding out, enclave production characterized by limited forward and backward linkages, and 'race to the bottom' effects particularly related to labour and environmental aspects. This underscores that much, if not all, depends whether the right or the wrong flanking policies are in place.

Bilateral Investment Treaties (BITs) are among the most striking examples of the existing bias in favour of foreign investors that characterises the current international economic architecture. These agreements offer far-reaching one-sided protection to investors against government measures that might potentially damage their interests, including by providing investors with (direct) recourse to international arbitration.

One of the many, but essential, routes governments must take to counter this imbalance is to further the promotion and implementation of responsible business conduct in the international investment regime, in a set-up that is more enforceable in nature than the current plethora of largely voluntary Corporate Social Responsibility (CSR) initiatives.

While in many OECD member states BITs typically do not include clauses regarding responsible business conduct, the European Parliament has recently called for the inclusion of a CSR clause in every future FTA investment chapter concluded by the EU. Some BITs do state that foreign investors are subject to national laws, and to national courts, however no link is ever established between this obligation and the rights provided by BITs. In other words, the rights and privileges granted to companies under BITs are not linked to the compliance of those same companies with national laws. BITs do not compel investors to grant "fair and equitable treatment" to the government and citizens of the countries in which they operate.

When the labour, consumer and environmental laws, or the enforcement thereof, in a host country fall below the standards of international treaties, foreign investors are currently under no obligation to live up to these international treaties. While foreign investors can choose to implement the Guidelines on Multinational Enterprises of the Organization for Economic Co-operation and Development (OECD MNE Guidelines), or commit to other CSR initiatives, this always remains a voluntary affair, with little or no independent verification and enforcement mechanisms. There is thus no balance between the

⁵ Myriam Vander Stichele (SOMO) and Sander van Bennekom (NOVIB/Oxfam the Netherlands) SOMO Discussion paper for the debate 'not my cup of tea' (2005)

responsible business conduct of foreign investors and the rights they receive under a BIT. BITS do not even require foreign investors to report about the social and environmental impact of their investment, which is an essential precondition for effective CSR initiatives.

There is longstanding recognition of the need for (multinational) enterprises to take greater responsibility to support and complement, through their responsible business policies and practices, domestic regulation of their activities. This is all the more urgent in developing countries where regulatory frameworks are often weak and/or tend to fall short of internationally recognised standards and principles. But to date, where investment negotiations have addressed investor responsibilities at all, they have done so in a non-binding way only. On the whole, BITs, by disciplining governmental rights and authorities, regulations and policy space, are restricting governments' capacity to deal with issues related to corporate accountability. While some recent BITs have begun to refer to the value of having companies behave responsibly and in accordance with the OECD MNE Guidelines, their approach has been strictly 'soft-law'. This means for example that non-compliance with these principles does not impact investors' rights to initiate arbitration actions. However, the fact that they are being referred to in an investment treaty could potentially influence tribunals' assessments of claims from TNCs acting in breach of them.

Policy coherence is, next to transparency and accountability, and regular evaluation of policies, one of the main challenges in the current international investment regime. The OECD defines policy coherence as the 'systematic promotion of mutually reinforcing policy actions across government departments and agencies creating synergies towards achieving the agreed objectives.' Multilateral organizations and individual countries should, as UNCTAD recommends, ensure coherence between the host of policy areas geared towards overall development objectives.⁶

Such policy coherence should begin with the establishment of appropriate policy frameworks at home, including to monitor and address multinational enterprises' business conduct in third countries effectively. In June 2011, the UN Human Rights Council (HRC), following up on the earlier adoption of the 'Protect, Respect and Remedy Framework' in 2008, endorsed the United Nations Guiding Principles on Business and Human Rights. One of the pillars of the UN Guiding Principles for Business and Human Rights is the State's 'duty to protect' against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication. We are faced with a context in which "investor protections have expanded with little regard to States' duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration."⁷ At the same time, BITs lack the instruments to allow host and home governments to co-operate on these issues. This is a 'governance gap' that urgently needs to be addressed. The State duty to protect as outlined by the Guiding Principles requires it, inter alia, to deepen its understanding of the relationship between investment law and policy and the impact of companies located in its jurisdiction abroad. There is an increasing realisation among the main actors in this field, including governments, that in order to effectuate the duty to respect, some degree of control over private activities beyond their borders is necessary. However, more recognition on the part of governments is required for the fact that extensive investor protections enable easy circumvention of economic, social or environmental conditions and thereby have negative impacts on the rights to food, education, water, health care, a reasonable standard of life, work and development.

⁶ UNCTAD launches Investment Policy Framework for Sustainable Development (2012)
http://unctad.org/en/Pages/newsdetails.aspx?OriginalVersionID=130&Sitemap_x0020_Taxonomy=Investment%20and%20Enterprise

⁷ J. Ruggie, Promotion of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the Right to Development. Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, report to the UN Human Rights Council, May 2009, A/HRC/11/13. p.28-37

The HRC also calls on states to ensure that they retain adequate policy and regulatory ability to protect human rights. In line with their duty to protect, many governments claim to support companies in fulfilling their responsibility to respect human rights. Yet at the same time, the standard provisions in investment treaties hinder the fulfilment of this professed objective. Not only do international investment treaties inherently limit the domestic policy space of states, there is also insufficient recognition that investor–state dispute settlement based on broad-based BIT definitions can pose a danger to policy space and the safeguarding of human rights, public goods and interests. We would argue that there are ample opportunities to make a swift change for the better, even without impinging on the main benefits that help create an attractive business environment for foreign investments.

Clauses that foster responsible business conduct

As a start, both states and multilateral organizations such as the EU and the OECD should at the very least begin to seriously advocate the inclusion of minimum legal obligations into the body text of investment agreements, to be supplemented with a responsible business conduct approach. Enforceable sustainability clauses incorporated into the body of BIT texts should refer to the body of internationally recognized standards, including, among others, the International Bill of Human Rights, the UN Business and Human Rights Framework, the OECD Guidelines, and the ILO Core Conventions. Also, while the immediate impact of social and environmental clauses on conditions “on the ground” may be limited and difficult to effectively assess, incorporation of such clauses into investment agreements will at least serve to flag the importance of responsible business conduct in investor–State relations, which may have the beneficial side effect of influencing the interpretation of IIA clauses by tribunals in investor–State dispute settlement cases, and creating linkages between IIAs and internationally recognised standards for responsible business conduct.

Exhausting local remedies and access to international arbitration

In addition, an obligation to exhaust local legal remedies as a precondition for reverting to international arbitration should be included. This would force enterprises to observe local laws and regulations, and would have the additional benefit of helping to reinforce the rule of law, in particular in developing countries. With regard to investor to state dispute settlement, obligations on foreign investors to respect the environment and human rights would need to form a pre-condition for access to dispute settlement. Treaty protection might be denied to non-complying investors for grave violations.

Access to remedies

The institutional misalignment between the impact of foreign investors and societies’ ability to deal with adverse consequences is clearly visible in the remedy mechanisms under BITs (trade and investment agreements). The investment dispute settlement mechanisms under BITs are in stark contrast with human rights law, where exhaustion of local remedies is the rule. Investment agreements should have mechanisms that allow victims of human rights abuses by foreign (transnational) corporations, as well as the defenders of those affected, to have access to remedy. Dispute settlement mechanisms should allow amicus curiae letters from civil society organizations or other defenders of affected stakeholders and/or be open to the public. In addition, dispute settlement mechanisms should ensure that the panellists or judges include human rights and environmental experts. Arbitrators should interpret provisions in BITs in relation to international human rights law, for example as *lex specialis* or as subject to the supremacy of human rights law.

Implementation of domestic policies

Many countries and multilateral institutions have programmes in place to foster domestic investment facilitation and liberalisation. It ought to be a core task of the global community to safeguard against such policies impacting negatively on wider social, economic and cultural rights and sustainable development.

Impact assessments

A requirement to conduct human rights impact assessments and the inclusion of effectively functioning sustainability clauses can, in this regard, be a first positive step. The integration of standards for responsible business conduct in BITs could promote investment for development by decreasing the potential negative effects of the activities of MNEs, particularly in countries without effective regulatory regimes. In addition a special committee under the treaty should be created that reviews the human rights impact of the treaty. The committee could have mediation functions and/or function like National Contact Points of the OECD MNE Guidelines. The Committee should be able to refer the cases to a dispute settlement mechanisms agreed by the Treaty.

PART II. KEY ISSUES IN ISDS II.G. Forum shopping and treaty shopping⁸

Treaty shopping is a controversial issue. The theory and corporate practices of treaty shopping [...] so popular with transnational industry have gained increasing critical attention.⁹ With the exponential growth of international trade and investment over the last 30 years, the broad definitions used in BITs are extending far-reaching protections to assets and economic actors beyond the original intentions of the signatories to these agreements. With unwanted and unforeseen consequences increasingly coming to the fore in the wake of globalisation, some countries have recently begun to place limits on the opportunities for “shell companies” to benefit from investment protection.

Increasingly, the governance gap between existing extra-territorial operations of MNCs and the absence of any effective global regulatory oversight is perceived as undesirable, especially in light of issues related to sustainable development and states’ policy space to regulate.¹⁰ The European Parliament recently adopted a resolution which calls for a survey to investigate whether overly wide definitions of BITs in relation to investors/ investment have led to abusive practices in European countries, and has urged that this assessment be used to clarify and narrow down the legal definition of the terms “investor” and “investment” used in these treaties, in order to bring about a much needed rebalancing of investor rights and obligations.¹¹

According to many observers, investment treaties are founded on the principle that host states deliberately trade away some of their sovereignty in exchange for opportunities to attract investment

⁸ Largely derived from Roos van Os and Roeline Knottnerus, Dutch Bilateral Investment Treaties: A Gateway to treaty Shopping’ for Investment Protection by Multinational Companies, SOMO, Amsterdam (Oct. 2011).

⁹ See: M. Skinner, C.A. Miles and S. Luttrell, “Access and advantage in investor-state arbitration: The law and practice of treaty shopping” (2010) 3 JWELB 260; J.P. Blyschak, “Access and advantage expanded: Mobil Corporation v. Venezuela and other recent arbitration awards on treaty shopping” (2011) 1 JWELB 32; UNCTAD, “Scope and Definition”, (2011) UNCTAD Series on Issues in International Investment Agreements II, < http://www.unctad.org/en/docs/diaeia20102_en.pdf> accessed 25 June 2011

¹⁰ Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2011 A/HRC/8/5 at 3, online: <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> accessed 24 June 2011

¹¹ European Parliament resolution: “Recalls that the standard EU Member State BIT uses a broad definition of “foreign investor”; asks the Commission to assess where this has led to abusive practices; asks the Commission to provide a clear definition of a foreign investor based on this assessment and drawing on the latest OECD benchmark definition of FDI” European Parliament resolution of 6 April 2011 on the future European international investment policy (2010) 2010/2203(INI))

flows.¹² In this view, it should not matter to host states where investment capital originates, nor what relations corporate investors maintain with the states of their incorporation.¹³ Countries negotiate treaties on the basis that an IIA achieves its purpose as long as it attracts foreign capital, and that the country of the capital's origin is of little importance. This line of reasoning makes treaty shopping a perfectly legal and acceptable practice under the current regime

However, an article with the provocative title "Why LDCs Sign Treaties that Hurt Them"¹⁴ shows that not all capital-importing countries' negotiators fully grasped all implications of IIAs at the time of signing. That past governments were in many cases not fully, if at all, aware of the future consequences of the BITs they were concluding is confirmed by the recent critical reactions to treaty shopping from countries in Latin America and southern Africa, who have recently begun to adopt a much more cautious approach to international investment treaties.¹⁵

A conventional argument against treaty shopping is that it violates the principle of reciprocity. Investment treaties, like most bilateral treaties, establish reciprocal rights and obligations between the contracting states.¹⁶ Treaty shopping runs counter to this principle, in that an entity with no substantial ties to a contracting state could avail itself of the treaty protections that its own state may not be willing to reciprocate to investors from the host state. Conditions related to human rights should be included in a reciprocal deal around investment protection, and therefore could be undermined by investors who shop around for the most attractive jurisdiction to invest from.

More wide-ranging is the argument that treaty shopping is highly undesirable from the perspective of sustainable development.¹⁷ What is beneficial for companies (gaining access to investment protection) is not necessarily beneficial to a host state, in terms of welfare or sustainable development. Treaty shopping can expose a host country to claims by companies to which it would not otherwise allow entry. Also, in various cases local MNCs have structured investment through other states in order to access investment protection not available to local competitors. A better balance between investor rights and obligations in IIAs is required (see the previous section) .

Such problems are compounded by the governance gap between the extra-territorial operations of MNCs and the (binding) regulatory oversight of governments, which is still mainly national or regional, though global non-binding and corporate social responsibility norms have taken a giant leap forward in the last decade. The practice of treaty shopping increases the possibilities to take advantage of gaps in effective governance of multinational companies. Treaty havens are often effectively incapable of, as well as morally averse to, taking control, and taking seriously its home-country responsibility for outward investment and investors, especially as these investors are often located only administratively in these countries

Countries and multilateral agencies such as the OECD should devise models for socially responsible investing which fully takes into account and effectively prevent the potential adverse human rights, social and environmental impacts of (foreign) investments. In addition to the elements mentioned under part 1: This would require the following: (1) narrow the overly broad definitions of "investor" and "investment"

¹² R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford Univ. Press, Oxford 2008) ; C. Schreuer at the conference 50 years of BITs, (2009) Frankfurt, Germany,

¹³ UNCTAD, "Scope and Definition", (2011) UNCTAD Series on Issues in International Investment Agreements II, <http://www.unctad.org/en/docs/diaei20102_en.pdf> accessed 25 June 2011;

¹⁴ A. T. Guzman, *Why LDCs Sign Treaties That Hurt them Explaining the Popularity of Bilateral Investment Treaties* (1998) 38 VA J. INT'L L. p.639-688

¹⁵ L.T. Wells, *The Emerging Global Regime for Investment: A Response*, (2010) 52 Harv. Int'l L.J. Online p. P.46-48

¹⁶ Ian, L. Shore, M. Weiniger, *International Investment Arbitration* (Oxford. University Press 2007)

¹⁷ P. Muchlinski, "Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order" (2011). *Oñati Socio-Legal Series*, Vol. 1, No. 4, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832562> accessed 24 June 2011

used in the text. Legal wording that extends protections to indirectly controlled investors and speculative forms of investment should be avoided. This would limit the possibilities to take advantage of gaps in effective governance of multinational companies (2) Incorporate clauses explicitly safeguarding host states' policy space to regulate (and offer scope for expansion if and when needed) in the interest of protecting public goods and interests.

Sophie Nappert, Barrister, Bar of Quebec, Canada and Solicitor of the Supreme Court of England and Wales, Chris Campbell, Assistant Director, Center for International Legal Studies; Luke Nottage, Professor of Comparative and Transnational Business Law, University of Sydney; Director, Japanese Law Links Pty Ltd, Australia, and 11 other signatories

Joint submission in the form of an open letter dated 28 July 2012

Some are concerned about treaty-based Investor-State Dispute Settlement (ISDS), especially binding Investor-State Arbitration procedures in investment treaties and Free Trade Agreements. One response includes public calls for states to eschew such procedures completely in future treaties, for example in the expanded Trans-Pacific Partnership Agreement presently under negotiation.¹ This approach would essentially leave foreign investors to approach local courts if host states illegally interfere with their investments, or to encourage their home states to activate an inter-state dispute resolution process, or to try to negotiate individualised arbitration agreements with host states.

An alternative approach is to identify and address more specific concerns with treaty-based ISDS. An example is the scoping paper and Public Consultation on ISDS generated by the Organisation for Economic Cooperation and Development, over 16 May – 23 July.²

As a constructive contribution to this debate, we created an online form asking for views on whether ISDS should be left as is, abandoned completely, or adapted in various listed ways.³ On 13 June we circulated the hyperlink to the form among members of an e-mail listserv comprising individuals familiar with international investment dispute resolution (OGEMID⁴). That is a subscription-based service, so we also widened the pool of potential respondents by notifying others interested in the issues. These included alumni groups associated with the FDI International Arbitration Moot,⁵ and contributors to Vivienne Bath and Luke Nottage (eds) *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011).⁶

By 19 July we had received 25 valid responses: 22 believed treaty-based ISDS could be usefully changed in some ways, three considered it should remain unchanged, and none believed it should be abandoned altogether. Thirteen individuals consented to disclosing their identities (listed on the next page): 12 favoured various changes to ISDS, as summarised in Appendix A. Appendix B summarises the views of the 22 respondents who suggested changes, to varying degrees. Appendix C adds the specific answers and/or general comments provided by consenting respondents⁷. These preliminary results do not profess to comprise a representative sample of contemporary views on this important topic. But we hope they provide a helpful and nuanced indication, from a variety of reasonably well-informed commentators, about how to conceptualise and address significant current issues in treaty-based ISDS.

¹ Open letter dated 8 May 2012: at <http://canadians.org/trade/documents/TPP-Jurists-letter-0512.pdf>

² http://www.oecd.org/document/1/0,3746,en_2649_33783766_50173761_1_1_1_1,00.html

³ <https://docs.google.com/spreadsheet/viewform?formkey=dFh5cGN3UEJDdU1FUUd6VDJtVzRaV3c6MA#gid=0>

⁴ <http://www.transnational-dispute-management.com/ogemid/>

⁵ <http://www.fdimoot.org/>

⁶ http://blogs.usyd.edu.au/japaneselaw/2012/03/book_launch_foreign_investment.html

⁷ Appendices can be found in the full version of the open letter, at:
<http://sydney.edu.au/law/about/staff/LukeNottage/OpenLetterOnChangingISDS28072012.pdf>

Chris Campbell (Salzburg), Sophie Nappert (London) & Luke Nottage (Sydney)

13 non-anonymous signatories

- Suggesting various changes to ISDS:

Chris Campbell - Assistant Director, Center for International Legal Studies, Austria; Co-Director FDI Moot, Vice-President European Court of Arbitration, Austrian Chapter; Adj. Professor of Law, Suffolk University School of Law

Dr. Luke Nottage - Professor of Comparative and Transnational Business Law, University of Sydney; Director, Japanese Law Links Pty Ltd, Australia

Michael Ostrove - Partner, DLA Piper UK LLP

Tony Cole - Senior Lecturer, Brunel Law School, UK

Velimir Zivkovic - PhD Candidate, Faculty of Law, University of Belgrade, Serbia
Technical Expert, Swiss SECO/OPTIMUS Center for Good Governance

Dr. Ardeshtir Atai - Visiting Lecturer for the LLM (international commercial law and maritime law), University of Hertfordshire School of Law, UK

Dr. Nils Eliasson - Partner, Mannheimer Swartling, Hong Kong

Dr. Gabriel Cavazos - Villanueva - Professor of Law and Associate Dean, School of Business, Social Sciences and Humanities, Tecnológico de Monterrey (ITESM) - Campus Monterrey, Mexico

Baiju Vasani - Partner, Jones Day, USA

Dr. R. Shashi Kumaar - Reader in Economics, Bangalore University, India

Dr. Diego P. Fernandez Arroyo - Professor, Sciences Po Law School, France

Ian Laird - Counsel, Crowell & Moring; Adjunct Professor, Columbia Law School, USA

- Suggesting ISDS should remain as it is:

Geoffrey M. Beresford Hartwell - Independent Practitioner, UK; Former Chairman, CIArb; Former External Professor of Arbitration Law, University of Glamorgan; Former Chartered Engineer, Europa Ingénieur

Joshua Karton, Assistant Professor at Queen's University Law School, Canada

Comment submitted 30 July 2012

Thank you for giving me the opportunity to comment on the scoping paper. I've divided my comments into three categories: general points, assorted specific points, and responses to your issues for discussion.

General points.

- As you know, there's an enormous academic literature out there on a lot of these issues. There's no way to cover it all, but one article I'd recommend to you, especially for the introductory section is Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2012) 106 AJIL __. I'm not sure whether it's come out yet, but you can find it on SSRN.
- In general, I thought the paper could say more about the ethos/culture of the ISDS system. I know that's a pretty fuzzy concept but I think it explains a lot. (Not coincidentally, that's the main theme of the book I'm working on.) Just to give you an example, in footnote 33 on page 19, you discuss the fact that arbitrators tend to give parties' counsel broad latitude to present all of their arguments. You explain this by reference to arbitrators' consciousness of the risk that an award will be overturned if a party is found to have been denied a fair hearing. That incentive is certainly part of it, but I think it's much better explained by the reverence in the international arbitration community for the notion of party autonomy. In arbitration, the parties drive the entire process, and arbitrators are constitutionally inclined to let them do so right through the whole shot.
- I thought it was interesting that you haven't addressed any of the questions of substantive investment law, except where you discuss problems with consistency in decision-making. Was this a deliberate choice, not to wade into debates like the meaning of fair and equitable treatment? It seemed to me that a discussion paper on this issue ought to address such questions, although I can see why you might have left them out. In the same vein, you talk about questions of consistency/predictability in terms of remedies available, but it goes to the existence of liability just as much.
- You briefly mention counterclaims by states on p. 35, but I thought this issue, too, deserves more discussion. My sense is that states will be more likely to accept an ISDS system if it allows states, not just investors, the possibility of recourse within the same system.

Specifics:

- In para. 16, you make the point about institutional design being fundamentally a question of public policy. This is clearly correct and an important point, but I think you punt a bit too much when you say that institutional designs should be measured against the needs of "societies". It makes an enormous difference which stakeholder groups one includes in the analysis. Does society mean the populace of host states? The populace of capital-exporting states? international civil society more broadly? The investor class? Which stakeholders one includes in the public policy analysis and how one weights their differing (and often opposing) interests will be dispositive to the public policy analysis. A good question to ask in consultations is exactly that: which groups' interests ought to be taken into account and how should they be weighed against each other
- In para. 20 you discuss the way the availability of arbitration affects the way parties' act because it forms a benchmark against which options can be gauged. I would add that this is a key point for

the consistency/predictability debate. ISDS can only have the salutary effect of giving parties a benchmark if the outcomes are predictable

- In the bullet points that follow from para 29, you discuss statistics on the nationality of ISDS claimants. Do you have any information on how this has changed over time? I think that would be really useful information.
- In the section where you discuss high costs, especially para 33, I think it would be worth it to discuss how much of the cost structure is related to the institutional design and how much is driven by an arms race mentality by the parties, especially investors. As I think you may have gathered from my tone, I suspect that most of it is the latter. Most arbitrators I know (including the ones I just interviewed for my book) say that they often find themselves in the position of trying to get the parties to adopt more time- and cost-saving procedures, especially with matters like document production.
- In the box in para. 37 you discuss measures for reducing time and costs. One thing you might want to consider or put up for consultation is that some newly-revised arbitral rules of procedure permit reductions in the arbitrators' fees if they take too long to produce the award. See, e.g, appendix III, art 2(2) of the 2012 ICC Rules, which direct the ICC Court to consider the timeliness of submission of the award when setting arbitrators' fees. If this is actually followed with any regularity, I think it could be an excellent way to rein in some of the really egregious delays.
- In para 128, on party selection of arbitrators, all the examples you give are apt but I think you've missed the biggest issue, which is arbitrators' preferences on major procedural matters such as the scope of document production

Issues for discussion

I've only responded to the questions where I feel I can contribute.

Part I.D.

Question 2. The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.

- a) What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?***
- b) Do you agree that, since the various elements of a system of dispute resolution interact, design elements from one system cannot be transplanted into another system and have automatically the same effects?***

I don't think that there is a principled reason for the different institutional design for ISDS and other forms of international dispute resolution, especially WTO procedures. As best I can understand it, the whole thing is a historical accident. Everyone agreed that investment protection ought to be part of the WTO system, but then the negotiations ground down and countries went ahead and started concluding BITs all over the place.

Question 3. In many areas of international law, focus is placed on enhancing the performance of domestic systems.

- a) Why has this same approach not been adopted in the context of international investment law?**
- b) What are the advantages and disadvantages of this choice?**
- c) Should efforts to improve domestic systems become a more important part of international investment dialogue?**

The question assumes that in many areas of international law, focus is placed on enhancing the performance of domestic systems. I'm not actually sure this is the case, but in any event, many of the same gains that could be achieved by an improved ISDS system could also be achieved by improved, harmonized domestic systems of investment protection, much like one can achieve international uniformity by a treaty or by a model law.

Question 5. The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement (e.g. Attempts at amicable dispute settlement) are among the most common general subject areas dealt with in the treaty sample.

- a) What are your views and experiences on the use of these provisions?**
- b) Are they important components of the ISDS system?**

I have no personal experience with pre-arbitration dispute settlement requirements, but I suspect that they are mostly useless, or at least the cooling-off-type provisions are. If the investor wants to consult with the government and try to negotiate a settlement, there is nothing stopping them, including after an arbitration is initiated. On the other hand, provisions requiring exhaustion of local judicial remedies may have a big impact.

Part II.B. Costs of ISDS

Question 6. The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.

- a) Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?**
- b) If costs are considered to be high, does this raise concerns?**

I wouldn't say that the costs of ISDS are unreasonable in themselves, especially given the amounts at stake in many investment disputes. However, they are higher than they need to be and higher than they easily could be.

Question 7. Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being "out-lawyered" rather than on the merits?

Question 8. Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?

I'm not so concerned about the problem of small states being "out-lawyered". This may well have been a problem ten years ago, but I don't think it is any more. My sense is that, in the majority of cases where less developed or smaller states are the defendants, they now hire one of the usual suspects law firms, and so are not put at a disadvantage.

Part II.C. Remedies for breach of investment treaties

Question 9. Should investment treaties give greater consideration to remedies? Should expanded use of primary remedies in ISDS be considered?

Question 10. The text and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).

- a) Would FOI participants wish to explain how their countries' laws handle similar claims? What remedies are provided for?***
- b) Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?***
- c) Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?***
- d) Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?***

Question 11. What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?

You ask whether investment treaties should give more consideration to remedies. Absolutely! Pretty much anything that improves predictability of outcomes is a step in the right direction.

I do think it's a fair concern that domestic investors are increasingly at a disadvantage to foreign investors (although, as you point out, they can easily structure their investments through foreign entities to take advantage of investment treaties). Just another reason why countries will not put up with the current system forever.

Part II.E. Third party financing

Question 17. Third party funding appears to be significantly expanding in ISDS.

- a) What are the likely consequences of increased third party financing of investor state disputes?***
- b) Third party financing is frequently associated with mass claims, such as the recent Abaclat case. What are your views on mass claims?***

Question 18. It is often considered that negotiated settlements can provide disputing parties with superior outcomes to adjudicative decisions. Are the dynamics of settlement negotiations in ISDS likely to be affected by third party funding?

Question 19. In your view, would the availability of third party funding in ISDS likely affect the comparative position of domestic and foreign investors?

Question 20. Do awards by arbitrators favourable to undisclosed funders with whom they have a business relationship raise concerns for the ISDS system?

Question 21. Domestic courts generally have significant powers to sanction interference with the administration of justice. In contrast, arbitration tribunals do not have any powers of enforcement. Can arbitration tribunals or other institutions adequately police the risk of funder misconduct in ISDS?

Question 22. Should third party funders of unsuccessful cases be potentially liable for costs awards?

My basic take on third-party funding is that there is no principled reason to ban it, or even to restrict it by much. I start from the proposition that a legal claim is an asset like any other and therefore should, in general, be freely tradeable. I don't see any fundamental difference between selling a promissory note and selling a claim that can be vindicated in arbitration, which means that there would have to be a very good reason to limit 3rd party funding. You ask what are the likely consequences of permitting wider scope for 3rd party claims. The obvious consequence is more disputes, but I don't necessarily see this as a bad thing, in the same way that the development of the class action led to more lawsuits, but indisputably also more justice. This isn't to say that 3rd party funding (like class actions!) can't be turned to antisocial or merely inefficient ends, but I don't see a way to stop it.

As for the potential for third party misconduct, I don't see it as any greater than the potential for misconduct by claimants themselves.

Finally, you mention the possibility of imposing liability for costs on third party funders. I have no idea where arbitral tribunals would get the jurisdiction to do this, unless the third party funder was itself a party to the arbitration. In any event, I think this sort of issue ought to be taken care of in the contracts between claimants and their funders, and isn't really the business of the tribunal. If the tribunal wants to award costs against the claimant, it should just do so and let the claimant and its funder sort things out.

Part II.F. Arbitrators in ISDS

Question 23. The ISDS system has attracted a pool of elite law professionals that are active as arbitrators, but also as counsel and experts.

- a) Does the fact that accomplished law professionals are attracted into the ISDS system contribute to the quality of arbitration available under ISDS?**
- b) Are you generally satisfied with the competence and impartiality of arbitration panels in ISDS?**

Question 24. Some senior arbitration specialists have criticised party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?

Question 25. The ISDS system appears to create a number of economic incentives for arbitrators. How do these affect the ISDS system, if at all? Are ethics rules and reputational interests sufficient to counteract the economic incentives?

Question 26. Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?

Question 27. Do you see a need for different ethical requirements for ISDS arbitrators than for commercial arbitrators? Does the fact that ISDS may engage the public interest more directly than commercial arbitration mean that different ethical requirements should apply?

Question 28. As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators' "dual hats" as arbitrator and counsel) has been criticised. What are your views on this question?

Unequal information in the selection of arbitrators is no doubt a problem, but much less so than in international commercial arbitration since most ISDS awards are published. The issue conflict problem is pretty inherent in the system, given the fact that so many arbitrators also publish in academic journals. That said, I think most arbitrators are pretty careful about what they write in fora other than their awards.

- 1) ***Although ISDS is shown to be an unusual, even unique, system of international dispute settlement, the entire set of international dispute resolution systems is highly disparate – there seems to be no dominant model for international adjudication.***

- a) ***Do you agree with this characterisation?***

Yes. However, this disparity is a reflection of the unstructured and non-hierarchical nature of international law. Thus, it is hard to imagine an emergence of a 'dominant model for international adjudication'.

- b) ***Do you agree that ISDS, like all other international dispute resolution systems, should be evaluated according to principles for effective public policy and legal systems?***

In case of the host States who struggle to achieve 'effective public policy and legal system' the ISDS should take into account good faith efforts of such States to operate and improve their systems while evaluating the host State's behaviour vis-a-vis the foreign investor.

- 2) ***The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.***

- a) ***What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?***

The reasons are historical and political – these systems developed from different initiatives, span different group of countries and express different motivations and varied scope of agreed principles and mechanisms. One of the explanations of lack of requirement of exhaustion of local remedies may be the perceived need for speed and efficiency in cases of business-related disputes. This explanation is connected with the fact that ISDS stems not only from public international law dispute settlement mechanisms pointed to by the Scoping Paper but also from so called 'internationalised arbitration', based on contractual arbitration clauses under which disputes were resolved by reference to international law. This mechanism did not require exhaustion of local remedies. Some link ISDS to international commercial arbitration, which is generally an alternative to domestic dispute settlement systems and thus also requires no exhaustion of local remedies. Human rights procedures are more akin to constitutional law reviews, and thus require exhaustion of local remedies, as they constitute a 'last instance' possibility of review.

- b) ***Do you agree that, since the various elements of a system of dispute resolution interact, design elements from one system cannot be transplanted into another system and have automatically the same effects?***

Yes, also because the body enforcing these elements will be different, it will apply them differently.

3) *In many areas of international law, focus is placed on enhancing the performance of domestic systems.*

a) *Why has this same approach not been adopted in the context of international investment law?*

Because investment treaties are interpreted as focusing on protection of particular investments – those brought to the attention of a particular investment tribunal. Fragmented enforcement mechanism also does not contribute to a systemic approach to the host State's legal system.

b) *What are the advantages and disadvantages of this choice?*

The advantage is a system which is seemingly more efficient and more protective to foreign investors. However, the tribunals try to balance investor's as well as the host State's interests.

c) *Should efforts to improve domestic systems become a more important part of international investment dialogue?*

Yes.

4) *Do you agree that, although ISDS is explicitly used in only a tiny fraction of all international investments, it can nevertheless be assumed to influence the dynamics of other investor-state dispute settlement practices, both formal and informal?*

Yes

a) *What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?*

No empirical studies have been conducted in this regard. There are arguments both for and against the statement that the ISDS improves domestic judicial and regulatory systems. Given limited toolkit of remedies and relative disconnect with the domestic systems (e.g. by no requirement of exhaustion of local remedies) its contribution to improving these systems seems to be rather limited.

b) *Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?*

Yes, however, the role of arbitrators is more limited than treaty negotiators. If there is no linkage between domestic systems and ISDS the effects will mostly not be relevant to the resolution of a particular dispute.

5) *The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement (e.g. Attempts at amicable dispute settlement) are among the most common general subject areas dealt with in the treaty sample.*

a) *What are your views and experiences on the use of these provisions?*

b) *Are they important components of the ISDS system?*

As long as such provisions are vague, e.g. do not include time-limits and details as to the level of negotiations, they do not have an impact on dispute settlement system. Generally, reference no amicable dispute resolution (mediation, negotiations, conciliation etc.) are dependent on the will of both of the parties and thus practically unenforceable. However, even if there is no will to settle, if the clause has a time limit it may play a function of a cooling-off period.

6) *The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.*

a) *Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?*

No

b) If costs are considered to be high, does this raise concerns?

It does, since it may increase reluctance of the host States to submit to ISDS and limits access to ISDS to smaller investors.

7) Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being “out-lawyered” rather than on the merits?

This risk is not as high as it was in the early years of ISDS. However, it is still not negligible.

8) Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?

The default view seems to be that each party should bear its own costs. However, in case the party causes delay and disruption or brings unmeritorious claims or applications, the arbitrators' powers of cost allocation may be used to penalise such tactics.

9) Should investment treaties give greater consideration to remedies? Should expanded use of primary remedies in ISDS be considered?

Yes

10) The text and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).

a) Would FOI participants wish to explain how their countries' laws handle similar claims? What remedies are provided for?

b) Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?

c) Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?

Yes

d) Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?

Yes, it may give a competitive advantage and it is a source of concern, as this may be one of the reasons why ISDS undermines development of efficient domestic regulatory and remedial mechanisms.

11) What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?

Given that ISDS institutional powers of enforcement of provisional remedies are limited and there is little possibility that they will be increased, such expansion should be treated with caution so that it does contribute to the erosion of the authority of the ISDS institutions.

12) Is enforcement of ISDS arbitral awards a growing problem?

Yes

13) If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?

ISDS is not a 'depoliticised' system in the first place. The diplomatic channels of investor-State dispute settlement were not the only ones and not the most popular ones before ISDS. ISDS does not eliminate diplomatic channels of investor protection (see e.g. recent nationalisation of YPF in

Argentina) but for the duration of arbitral proceedings. The diplomatic channels also did not provide for an effective enforcement mechanism. Thus, perhaps, the problems with enforcement of ISDS awards show the limitation of enforcement of awards against sovereigns in general and do not constitute a 'revolutionary' change, in particular with regard to States that historically were reluctant to honour their obligations, regardless of the system of enforcement?

14) *The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?*

It may be a significant practical obstacle; however, as a consequence of existing public international law and custom followed by the States, it is not an unexpected limitation. It links to the previous question of using the diplomatic channels for enforcement.

15) *Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?*

Yes, in particular with regard to disputes that were obviously unmeritorious.

16) *As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?*

Cost allocation in the final award reflecting such dilatory tactics may be applied.

17) *Third party funding appears to be significantly expanding in ISDS.*

a) *What are the likely consequences of increased third party financing of investor state disputes?*

It may give investors (especially smaller ones) greater access to ISDS.

b) *Third party financing is frequently associated with mass claims, such as the recent Abaclat case. What are your views on mass claims?*

18) *It is often considered that negotiated settlements can provide disputing parties with superior outcomes to adjudicative decisions. Are the dynamics of settlement negotiations in ISDS likely to be affected by third party funding?*

Presence of a third party funding may increase incentives for settlement.

19) *In your view, would the availability of third party funding in ISDS likely affect the comparative position of domestic and foreign investors?*

No. Third party funding is generally available to both types of investors. Domestic investors generally have very limited access to ISDS. Their access to third party funding is not going to increase this access.

20) *Do awards by arbitrators favourable to undisclosed funders with whom they have a business relationship raise concerns for the ISDS system?*

They could. Third party funding should be disclosed (if not to the general public than to the parties and arbitrators).

21) *Domestic courts generally have significant powers to sanction interference with the administration of justice. In contrast, arbitration tribunals do not have any powers of enforcement. Can arbitration tribunals or other institutions adequately police the risk of funder misconduct in ISDS?*

Rules concerning third party funding (e.g. in Australia or England) should serve as a guideline for third party funding in ISDS.

22) *Should third party funders of unsuccessful cases be potentially liable for costs awards?*

Yes

23) *The ISDS system has attracted a pool of elite law professionals that are active as arbitrators, but also as counsel and experts.*

a) *Does the fact that accomplished law professionals are attracted into the ISDS system contribute to the quality of arbitration available under ISDS?*

Yes, if the panel represent a mixture of professional experience in public international law and management of large arbitration proceedings. However, 'quality of arbitration' does not necessarily contribute to greater consistency of the ISDS and international investment law in general.

b) *Are you generally satisfied with the competence and impartiality of arbitration panels in ISDS?*

The assessment of the competence of the panels will depend on the perspective of the user or observer (e.g. investor, State, counsel, expert, civil society, academic). From the systemic perspective the awards may be criticised for lacking comprehensive explanation of the decision taken by the tribunal. In this sense they lack connection with the 'greater picture' of international investment law.

24) *Some senior arbitration specialists have criticised party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?*

So called 'party-selection' is more often a selection by lawyers representing the party. The system is a transplant from commercial arbitration and is perceived as giving the parties more control over the process. There is no equivalent in the public international law systems, which is based on single and permanent dispute settlement body with arbitrators or judges appointed by States for a limited term. There are arguments for and against the current system. However, the so-called 'Paulsson proposal', made in the context of commercial arbitration, that the arbitrators should be selected by arbitral institutions, should not be adopted in ISDS.

25) *The ISDS system appears to create a number of economic incentives for arbitrators. How do these affect the ISDS system, if at all? Are ethics rules and reputational interests sufficient to counteract the economic incentives?*

Arbitration professionals are often criticised for sporting different 'hats' in the systems – the same individual could be an arbitrator, counsel or expert in different ISDS cases. 'Economic incentives' (fees) for arbitrators are a necessary element if we want to see individuals concentrating their legal careers on being only arbitrators. An argument is made that an arbitrator may tend to find for an investor (who is the only party capable of bringing a claim under ISDS) to secure later appointments. This argument may to a large extent be a myth. However, to help dispel it, greater transparency concerning arbitrator's previous appointments is desirable.

26) *Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?*

Yes.

27) *Do you see a need for different ethical requirements for ISDS arbitrators than for commercial arbitrators? Does the fact that ISDS may engage the public interest more directly than commercial arbitration mean that different ethical requirements should apply?*

No. The problem with ethical standards lies in their enforceability.

28) *As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators' "dual hats" as arbitrator and counsel) has been criticised. What are your views on this question?*

See 25 above.

29) *Many States appear to favour allowing investors to forum shop between arbitral fora. At the same time, most States are less tolerant of forum shopping in domestic legal systems. What explains the different approaches?*

Availability of forum-shopping seems to stem from lack of recognition that the different arbitration fora are not equal.

- 30) For States that favour allowing investors to forum shop between arbitral fora, has your government publicly articulated its policy rationale in this regard to parliament or elsewhere?**

We are not aware of any such articulation by the Polish or Australian governments.

- 31) What are your views on the relationship between forum shopping and differences in the rules governing the various arbitration fora (e.g. in relation to transparency and review of awards)? Does the diversity of rules and procedures in the various arbitration fora (e.g. ICSID, UNCITRAL) meet the needs of the societies on behalf of whom investment treaties have been signed?**

The fora which allow the dispute to remain confidential (UNCITRAL, SCC, ICC etc.) may be less beneficial for the societies on behalf of whom investment treaties have been signed as they do not guarantee transparency and access to information.

- 32) Is the fact that domestic investors have tried (and succeeded) in qualifying for protections under their own countries' investment treaties a source of concern? Why would countries wish to deny to their own investors benefits that they offer to foreign investors?**

Yes. The main motivation behind the investment treaties and ISDS is attraction of foreign capital.

- 33) Why would countries wish to deny to third party investors benefits that they offer to the investors of their treaty partner(s)?**

Motivations are different (political, economic, strategic, historical etc.). An investment treaty is an instrument of economic policy and its bilateral character expresses policy towards a particular State and capital (potentially) originating in that State.

- 34) Is treaty shopping a major problem for your country? If so, why?**

No.

- 35) How does your government evaluate the consistency of ISDS?**

- 36) Is it important for the ISDS system to produce consistent results?**

Yes.

- 37) How should consistency as a value be weighed against other considerations (costs, speed, need to work out issues through case law)?**

The ISDS is heavily fact-dependent and, given that cases often engage diverse investment treaties, there is no easy formula for consistency. The procedural as well as drafting techniques employed by arbitrators contribute to cost- and time-efficiency of the process (e.g. bifurcation between jurisdiction and merits or merits and quantum; establishing a list of issues/questions that the parties need to address; leaving out analysis of certain treaty violations if the tribunal finds that another treaty provision has been breached).

- 38) Is the current architecture of ISDS suited to promoting consistency?**

Not to a great extent. However, with growing numbers of quality awards (i.e. those which clearly explain the principles applicable and their application to the facts of the case) the consistency is growing. Of course, it is limited by the architecture of the ISDS and will never be as great as if there were one multilateral investment treaty with consistent substantive principles and one ISDS institution enforcing this treaty.

- 39) The scoping paper notes that some inconsistency is an unavoidable feature of any dynamic system of adjudication. Inconsistent decisions can be part of the process by legal concepts are analysed and clarified. Is this need for clarification and innovation a feature of ISDS?**

There is a need of analysis and clarification but not as a feature of ISDS but as a reaction to its imperfections and dissatisfaction with lack of consistency. It may become a feature when many cases (and, thus, awards) pertain to one treaty (e.g. NAFTA or US-Argentina BIT).

- 40) As noted in the section on remedies, under some advanced systems of administrative law, such as in Germany, claimants seeking damages must first seek judicial review or primary**

remedies. Multiple proceedings are thus required to obtain damages. In addition, all domestic systems allow judgments awarding sizable damages against governments to be appealed. Are advanced domestic administrative law systems relevant comparators for evaluating the importance of finality with regard to ISDS arbitration decisions awarding damages?

Yes.

- 41) ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?**

No, the amount of compensation is derivative. However, some *additional* considerations may be more important when the amount awarded is considerable.

- 42) What reasons explain the wide preference for inclusion of international arbitration in bilateral investment treaties?**

E.g.: Insistence on the clauses by stronger partners. Belief that an investment treaty 'with teeth' will encourage more foreign investment. Unwillingness to deal with requests for diplomatic protection from own investors investing abroad.

- 43) Many of the ISDS provisions contain texts requiring attempts at amicable settlement and coordinating recourse to international arbitration relative to domestic judicial procedures. Are these provisions important parts of States' consent to arbitrate?**

Yes.

- 44) Why do many States engage in light regulation of ISDS in their bilateral investment treaties?**

E.g. because the ISDS is linked with particular dispute settlement rules and the States might see it as sufficient. They may also see the need for tailoring a settlement mechanism to the needs of an individual dispute that will arise under the treaty.

- 45) The survey of ISDS provisions in investment treaties shows differences (among treaties and countries) in treaty language with respect to essentially all issues covered. What do you think about this degree of variation in language? Is it useful? If so, for what purpose?**

The degree of variation in language is not useful if there is not access to *travaux préparatoire*. If the *travaux* is lacking it is almost impossible to decipher the meaning the parties intended for the particular clause.

- 46) Many countries' older treaties are different than their newer treaties. Is this a source of concern for these countries? Why are investment treaties and, more specifically, their ISDS provisions not updated more frequently?**

The differences in wording may be a cause for concern if the temporal relationship between the two versions is not clear. Lack of consistency discussed above makes it difficult to predict how the relationship between the two treaties will be interpreted by the arbitrators. Updates of ISDS or investment treaties in general may be difficult for political reasons as well as because a country that is a weaker economic partner and/or lack appropriate resources and skills to renegotiate the treaty may be reluctant to reopen the existing treaty.

Issues for discussion

1) Although ISDS is shown to be an unusual, even unique, system of international dispute settlement, the entire set of international dispute resolution systems is highly disparate – there seems to be no dominant model for international adjudication.

a) Do you agree with this characterisation?

YES

2) international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.

a) What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?

No one ground accounts for the manifold differences. If there is one, it is less a 'rationale' than the fact that the different dispute settlement mechanisms have emerged separately, often in isolation from each other. (In this respect, the scoping paper rightly notes that 'other institutions are also unusual in their own way'.) Path-dependence is only gradually giving way to comparative assessments.

b) Do you agree that, since the various elements of a system of dispute resolution interact, design elements from one system cannot be transplanted into another system and have automatically the same effects?

I agree in principle; however much depends on the characteristics of the relevant 'design elements'. Specific elements of the sort mentioned in para. 14 the scoping paper (remedies; availability of appeals etc.) produce effects within their specific institutional context and thus cannot simply be transplanted. Still, dispute resolution systems can 'learn' from each other; and design elements tested in one system can usefully be transplanted into another, provided they are adapted to the new context.

3) In many areas of international law, focus is placed on enhancing the performance of domestic systems.

a) Why has this same approach not been adopted in the context of international investment law?

I do not necessarily agree with the characterization that investment law places no focus on enhancing the performance of domestic systems. Investment agreements typically do not address domestic legal systems expressly, as their focus traditionally has been on the 'internationalisation' of dispute resolution. However, the difference to other dispute resolution systems should not be overstated: human rights law, eg, has only recently begun to address rights to (domestic) remedies in depth. And as the scoping paper notes, substantive provisions of investment law such as FET and non-discrimination do target the performance of domestic legal systems. Finally, as the paper notes, 'whether ISDS commitment mechanisms lead to improvements in domestic judicial and regulatory institutions is a complex empirical question' that so far has not been fully addressed.

b) What are the advantages and disadvantages of this choice?

n.a. [see reservations expressed in last reply]

c) Should efforts to improve domestic systems become a more important part of international investment dialogue?

Yes

4) Do you agree that, although ISDS is explicitly used in only a tiny fraction of all international investments, it can nevertheless be assumed to influence the dynamics of other investor-state dispute settlement practices, both formal and informal?

Yes, of course – not the least by contributing to the clarification of legal rules *pro future*.

a) What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?

I share the scoping paper's assessment that this is a complex empirical question requiring further analysis. I cannot provide first-hand evidence. However, I felt that the scoping paper overstated the risk of "supra-national dispute resolution option ... potentially lower[ing] incentives for both host countries and international investors (who are often important political actors in host countries) to work to improve domestic dispute resolution and regulatory institutions".

b) Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?

Treaty negotiators should be mindful of the effects (even though lack of detailed empirical evidence makes it difficult to draw specific conclusions).

5) The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement are among the most common general subject areas dealt with in the treaty sample.

a) What are your views and experiences on the use of these provisions?

I cannot share any first-hand experience.

b) Are they important components of the ISDS system?

They definitely are, and the relative lack of study is a problem.

6) The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.

a) Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?

They are not generally unreasonable, but they may act as a powerful (and problematic) barrier against smaller claims (which is not necessarily the same as claims by small/ medium-size investors, which section II.A. of the survey addresses). They can also create concerns in developing and least developed states.

b) If costs are considered to be high, does this raise concerns?

Yes, see last answer.

7) Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being “out-lawyered” rather than on the merits?

I have no first-hand experience to share; but the problem seems a real one. It is common across international dispute resolution systems, though, and not specific to ISDS. The experience of other dispute resolution mechanisms may yield lessons for ISDS – a prominent example being the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice.

8) Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?

I have no first-hand experience to share.

9) Should investment treaties give greater consideration to remedies? Should expanded use of primary remedies in ISDS be considered?

As noted in the scoping paper, remedies seem to have come into focus in the last decade. It therefore seems likely that they will receive greater considerations by ‘agents of legal development’, whether treaty-makers or arbitrators.

10) The text and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).

a) Would FOI participants wish to explain how their countries’ laws handle similar claims? What remedies are provided for?

No comment.

b) Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?

No comment.

c) Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?

No comment.

d) Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?

Experience with cases like Vattenfall II (in which a foreign investor has a much better chance of obtaining pecuniary redress than its domestic competitors) suggests that it is perceived as

'unusual' even in countries that – like Germany – have traditionally been strong supporters of the modern system of investment arbitration.

11) What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?

No comment.

12) Is enforcement of ISDS arbitral awards a growing problem?

Anecdotal evidence would seem to confirm the points made in paras. 62-66 of the scoping paper: enforcement may become more of a problem. In terms of a comparative assessment of dispute resolution mechanisms, ISDS seems to have much fewer problems than HR or WTO dispute settlement bodies (or indeed the ICJ).

13) If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?

Not necessarily; they may also be signs of a fast expanding system.

14) The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?

Yes; but it is an obstacle deliberately upheld; and it is an obstacle to enforcement in many other systems of dispute resolution as well. The problem is not specific to investment law.

15) Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?

No comment.

16) As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?

No comment.

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Comment submitted 5 August 2012¹

1. Scope of this submission

This submission addresses Issue for Discussion 10, as defined in the OECD Consultation Document. Sections 2 to 5 of this submission deal, respectively, with each of the sub-questions posed by Issue 10 a) to 10 d). The primary contribution of this submission is its comparison of remedies available under Australian law to those ordinarily available for breach of an investment treaty. This submission draws three principal conclusions from this comparison:

- Australian law provides different remedies for different sorts of claims. An important distinction is that between challenges to administrative action and challenges to legislation. Different remedies are associated with each. This contrasts to the situation under investment treaties, where monetary damages are the preferred remedy regardless of the nature of the government conduct Responsible for the breach of the treaty;
- ☐ Notwithstanding differences between the various causes of action available to challenge government conduct under Australian law, Australian law provides very different remedies to those that would be available in claims brought under investment treaties based on similar facts; and
- ☐ There are important differences between different sorts of primary (non-pecuniary) remedies. The function of judicial review of administrative action under Australian law is to ensure that public power is exercised according to law. 'Judicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function' conferred upon an administrative decision maker.² This is reflected in the remedies available in judicial review proceedings. It is important to distinguish such remedies from remedies that would allow a court to substitute its own view about the *merits* of an administrative decision for that of a primary decision maker.

Sections 4 and 5 of this submission explore the policy implications of these three observations.

2. How does Australian law handle claims similar to those that commonly arise under investment treaties? What remedies does Australian law provide for such claims?

Questions about remedies cannot be divorced from questions of substance. The remedy to which an investor is entitled under Australian law depends on the substantive cause of action under which a case is brought. This section reviews the causes of action that could be available in claims similar to those that arise under investment treaties. Even when taken together, these causes of action do not correspond

¹ I gratefully acknowledge the support of the UK Economic and Social Research Council, which funded the research on which this submission draws through a Postdoctoral Fellowship. I would also like to thank Fiona Roughley, who offered helpful and incisive comments on an earlier draft. Any errors that remain are my own

² *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 288 per Gleeson CJ.

precisely with the scope of substantive protection provided by investment treaties. For example, there is no cause of action that would entitle an investor to a remedy of any sort in a case in which legislation causes a nonexpropriatory interference with an investment. This is a marked contrast to the situation under investment treaties.

This section shows that, in general, investors are not entitled to monetary remedies in claims against the Australian government. The one important exception to this conclusion concerns claims based on contract law. If a government authority breaches a valid contract with an investor, the investor would normally be able to recover monetary damages calculated on a basis similar to the basis on which damages would be calculated for breach of an investment treaty.

2.1 Causes of action and remedies under Australian administrative law

Under Australian law, private actors may seek judicial review of administrative decisions that affect their interests. The primary basis for judicial review is the Administrative Decisions (Judicial Review) Act (ADJR Act),³ which largely codifies the common law on the subject. The Australian Constitution also guarantees a 'minimum provision of judicial review',⁴ meaning that the government cannot shield administrative action from judicial oversight.

The grounds of review under the ADJR require a court to consider, among other factors, whether a decision-maker acted within the scope of the power conferred by legislation, whether the decision-maker took into account all the relevant considerations for the making of the decision, and whether affected individuals were afforded procedural fairness.⁵ If a statute confers a discretion on an administrative decision-maker, the court may also review whether that discretion was exercised in good faith and for a proper purpose.⁶ All these factors go to the *lawfulness* of the decision. Judicial review neither requires nor allows a court to reconsider the *merits* of an administrative decision. Australian courts do not have the power to grant pecuniary remedies under the ADJR (or under constitutional proceedings for judicial review). The ADJR does, however, grant courts broad powers to grant declaratory and injunctive remedies, to make orders quashing decision, and to make orders referring decisions for further consideration subject to certain directions.⁷

Over the last two decades, the High Court has consistently invoked the separation of powers in a range of cases charting the boundaries of judicial review. According to this view, the role of judicial review is to ensure that the executive (the administration) acts within the scope of powers conferred by the Constitution and enabling legislation and respects procedural limitations on the exercise of executive power imposed by law. This conception of judicial review was explained by Brennan J in *Quin*:

If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power, the next question immediately arises: what is the law? And that question, of course, must be answered by the court itself. In giving its answer, the court needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or Individuals. The courts are not equipped to evaluate the policy

³ 1977 (Cth).

⁴ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

⁵ ADJR Act ss 5-7.

⁶ *ibid.*

⁷ *ibid* s16.

considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented must often be considered.⁸

This view has significant implications for the way that courts exercise their discretion to grant remedies in cases of judicial review. Although courts have broad powers to make injunctive and declaratory orders in cases of judicial review, these powers are only exercised to ensure that individuals are treated lawfully⁹ - for example, by ordering the release of a person who has been unlawfully detained.¹⁰ Courts will not use these powers to direct primary decision-makers to exercise a statutory discretion in a certain way.¹¹

This limitation in the nature of the non-pecuniary remedies available in judicial review proceedings is clearly illustrated by the doctrine of legitimate expectations under Australian law. Australian law recognises that a specific promise or representation made by a government official may create a legitimate expectation. However: The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law.¹²

The protection to which legitimate expectations are entitled under Australian law is procedural rather than substantive. In other words, an administrative decision maker must take an investor's legitimate expectation into account and give the investor an opportunity to be heard, but it may still reach a decision that entails the disappointment of that expectation. A successful applicant for judicial review would, at most, be entitled to a remedy ordering a decision-maker to reconsider the decision consistently with these procedural rights.¹³

In the interests of completeness, it should also be noted that several tribunals – such as the Administrative Appeals Tribunal – are empowered to conduct full reconsideration of the merits of certain administrative decisions. These tribunals are understood as an internal accountability mechanism within the executive arm of the government, rather than as courts that exercise judicial power. They are created by statute, and they only have jurisdiction to reconsider an administrative decision so far as it is specifically conferred by statute. In practice, they operate as a swift and efficient mechanism to uphold standards of good administration. As is the case in judicial review proceedings, these tribunals do not have the power to award pecuniary remedies.¹⁴ However, in contrast to judicial review, these tribunals have the power to vary an administrative decision, substituting their own view on the merits for that of the primary decisionmaker.¹⁵

2.2 Causes of action and remedies under Australian constitutional law

The Australian Constitution defines the powers of the federal legislature, executive and judiciary. It does not contain a bill of rights and, with only a few exceptions, does not protect the private rights of

⁸ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37 per Brennan J.

⁹ Stephen Gaegler, 'Administrative Law Judicial Remedies' in Matthew Groves and HP Lee (eds) *Australian Administrative Law: Fundamental Principles and Doctrines* (Cambridge University Press 2007) 375.

¹⁰ *Park Oh Ho v Minister for Immigration & Ethnic Affairs* (1989) 167 CLR 637, 644-645 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

¹¹ *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 210 per Gummow J.

¹² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 per Mason CJ and Deane J.

¹³ Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 497.

¹⁴ eg *Administrative Appeals Tribunal Act 1975* (Cth) s43.

¹⁵ *ibid.*

individuals.¹⁶ Legislation may be challenged on the basis that it is unconstitutional. This involves review of whether legislation falls within the scope of power granted by the constitution – for example, whether a given law falls within the constitutional ‘power to make laws ... with respect to ... corporations’.¹⁷ This involves the application of very different principles to those applied in the judicial review of administrative action.

Section s51 xxxi is one of the few constitutional provisions that protects private rights. This section provides that the parliament has power to make laws with respect to:

the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

The High Court has interpreted this provision as an overriding constraint on the legislative power of the Australian parliament.¹⁸ In other words, the parliament may not pass any law that effects an acquisition of property, unless the law provides for compensation on just terms. It follows that the remedy for a successful claim under s51 xxxi is a ruling that the law in question is invalid. Australian courts do not have the power to award monetary remedies in constitutional claims. As such, an investor is not entitled to damages for any loss of value of the property during the course of the legal proceedings, although it may be entitled to an award for the costs incurred in the legal proceedings themselves.¹⁹ The practical consequence of invalidity of the legislation is that the investor’s property rights are restored. (Of course, the parliament may subsequently enact new legislation providing that the property is to be acquired on the payment of compensation on just terms.)

As an aside, it is relevant to note that the substantive protection against the acquisition of property provided by the Australian Constitution is narrower than the protection against direct and indirect expropriation commonly provided by investment treaties. The expropriation provisions of investment treaties are normally understood as requiring compensation whenever property rights are extinguished or taken. In contrast:

s 51(xxxi) is directed to ‘acquisition’ as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an ‘acquisition of property’, there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.²⁰

The Australian Constitution does not protect investors from legislative interference with property rights that does not constitute an ‘acquisition’. There is no provision of the Constitution analogous to the fair and equitable treatment provisions of investment treaties. An investor has no legal recourse against legislation that causes economic loss or that upsets an investor’s expectations.

Although there are some exceptions,²¹ the parliaments of the six Australian states are not generally constrained by the Australian Constitution in ways relevant for the purposes of this submission. As such,

¹⁶ Sir Antony Mason, ‘Procedural Fairness: Its Development and Continuing Role of Legitimate Expectations’ (2005) 12 Australian Journal of Administrative Law 103, 109.

¹⁷ Constitution of the Commonwealth of Australia s 51 xx.

¹⁸ *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51, 9 December 2009 per French CJ, Gummow J and Crennan J [46].

¹⁹ See, for example, the orders made in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, a case in which proclamations made under the National Parks and Wildlife Conservation Act 1975 (Cth) were found to have effected an acquisition of the Newcrest’s mining leases.

²⁰ *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 185 per Deane and Gaudron JJ.

²¹ Such as limitations on a state legislature’s ability to confer non-judicial powers on Chapter III courts. See, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. Section 109 of the Australian Constitution, which provides that federal

a state government may pass laws authorising the expropriation of investors' property, or any form of interference in investors' property falling short of expropriation. An investor would have no legal recourse against such laws. However, in practice, state governments do not expropriate property without providing compensation. Compensation for expropriation is normally provided through statutory schemes.²²

2.3 Causes of action and remedies under Australian tort law

There are several torts in Australian law, including the torts of trespass, nuisance, defamation and negligence, among many others. As in many common law countries, the tort of negligence has expanded over the past century to become the most important tort in practice. It is also the tort that is most similar to the substantive protections conferred on foreign investors by investment treaties. For both reasons, this section deals exclusively with the tort of negligence.

One leading Australian commentator has described the common law of the liability of government authorities in negligence as 'remarkably confused'.²³ In this submission I do not attempt to resolve this confusion. Rather, I aim to show that the tort of negligence under Australian law is likely to cover few, if any, of the factual scenarios that commonly arise in investment treaty claims.

The initial question facing any plaintiff seeking to bring a claim in negligence, including a claim against the government, is whether the defendant owed the plaintiff a duty of care. A duty of care will arise in certain classes of relationship recognised by law, such as the relationship between employer and employee. On this basis, a government authority would owe its employees a duty of care. In situations falling outside such recognised categories, a duty of care may also be recognised. Australian courts have generally been guided by Lord Atkin's famous statement in *Donohue v Stevenson* that a person owes a duty of care to those:

Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.²⁴

Three further qualifications should be added to this rather general proposition. The first is that a duty of care normally exists only in situations where a person risks causing *physical* harm to another person or their property.²⁵ A duty of care to avoid causing 'pure economic loss' is recognised only rarely,²⁶ often in situations involving negligent advice provided by a professional to a client.²⁷ The second qualification is that there is a strong presumption against a government authority owing a duty of care to individual persons in situations in which the authority is directed to exercise its power in the public interest:

when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.²⁸

legislation overrides any inconsistent state legislation, and section 92 of the Australian Constitution, which prohibits the imposition of customs duties on trade between Australian states, also place limits on state legislative powers.
eg Acquisition of Land Act 1967 (Qld).

²² Mark Aronson, 'Government Liability in Negligence' (2008) 32 Melbourne University LawReview 44, 46.

²³ [1932] AC 562 at 580.

²⁴ *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555, 558-559, 592, 598 per Gibbs J, Stephen J, Mason J and Jacobs J.

²⁵ *Perre v Apand* 198 CLR 180, 182 per Gleeson CJ.

²⁶ *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793.

²⁷ *Sullivan v Moody* (2001) 207 CLR 562, 582 per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

A third qualification is that, as a duty of care arises at common law, it can always be displaced or overridden by legislation. For all three reasons, it is difficult to imagine claims of the sort that have been brought under investment treaties being viable under the Australian law of negligence. Perhaps the only overlap between the two would be situations in which a government authority negligently causes physical damage to an investment, or negligently fails to prevent physical damage being caused by third parties.

Notwithstanding the limited substantive overlap between investment treaty protections and the tort of negligence under Australian law, both systems provided for similar remedies. The normal remedy in a successful claim for negligence is damages, determined according to the extent of the loss caused by the negligence of the defendant.

2.4 Causes of action and remedies under Australian contract law

In general, the ordinary rules of contract law apply to contracts between the government and private investors.²⁹ This means that an investor can enforce a contract with a government counter-party before Australian courts without unusual difficulty. The ordinary remedy for breach of contract under Australian law is damages, calculated on an expectation basis. Specific performance is also available as a discretionary remedy but is seldom awarded when the defendant is reluctant to perform, due to the practical difficulties facing a court overseeing compliance.

That said, contracts with government counter-parties do raise two theoretical questions under Australian law that do not arise in private contracts. The first concerns the power of a government authority to enter into contracts. Parliament may expressly grant a government authority the power to enter contracts. However, even in the absence of express statutory authority, Australian courts have held that the executive has an inherent power to enter contracts.³⁰ In contrast, Seddon has argued that:

The Commonwealth's power to enter contracts is not unlimited but, in so far as there are limits, they are of little practical significance, at least in day to day transactions.³¹

If there are limits to the Commonwealth's power to contract, the Australian courts have not been required to determine where they lie. The second issue concerns the power of a government to fetter its future exercise of legislative or executive power through a contract with a private actor. Seddon has argued that contracts that purport to fetter such discretion are void, or perhaps partially void, entailing the conclusion that the government may continue to exercise its power freely and that a counter-party would not be able to recover for the government's failure to perform.³² An emerging doctrine of good faith in Australian contract law may go some way to ameliorate potential hardship arising from the application of rules against fettering, by limiting the ability of a government entity to rely on such rules against a private party that has contracted in good faith.³³ However, the doctrine of contractual good faith is relatively undeveloped and its scope and operation remain unclear.³⁴

²⁹ Nicholas Seddon, *Government Contracts: Federal State and Local* (4th edn) (Federation Press 2009) 6.

³⁰ *New South Wales v Bardolph* (1934) 52 CLR 455, 509 per Dixon J.

³¹ Seddon 56.

³² Seddon 249-254.

³³ *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Limited* 144 CLR 596, 607-608 per Mason J arguing that contractual counter-parties are under 'a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract', although the case did not specifically consider investor-state contracts. In *Renard Constructions* one of the judges in the majority accepted that a contractual power to call a counter-party to show cause why the contract could not be terminated could only be exercised *reasonably* the NSW government, *Renard Constructions (ME) Pty Ltd v Minister for Public Works*, (1992) 26 NSWLR 234, 266 per Priestley JA.

³⁴ James Allsop, 'Good Faith and Australian Contract Law – A Practical Issue and a Question of Theory and Principle' (2010) The 2010 Sir Frank Kitto Lecture [2] http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches#Allsop last accessed 5 August 2012.

In any case, issues relating to fettering tend not to arise in practice. This is for two reasons. First, Australian governments appear to accept that they are bound by the ordinary principles of contract law, as they would apply between private parties.³⁵ Second, if a state or federal government wished it may override a contractual provision, or a contract in its entirety, it could do so through legislation without pleading that the contract was void on account of the rule against fettering in proceedings before a court.

3. Have investors brought cases for substantial damages against the government in Australian courts and, if so, how have they fared?

Investors have not brought cases for substantial damages against the government in Australian courts, save to the extent that those claims can be framed as tort or contract claims. As argued in the previous section, private plaintiffs have succeeded in only a very narrow range of tort claims against the government. I am not aware of any investor that has succeeded in a claim in negligence for substantial damages arising out of economic regulation. On the other hand, contract disputes between investors and government authorities are not uncommon. Investors have recovered substantial damages from government authorities in cases in which the relevant authority was found to have breached an investment contract.

4. Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?

Annex 4 of the OECD Consultation Document helpfully describes some of the policy justifications that have been articulated for limiting the availability of damages remedies in claims against governments in the legal systems of the United Kingdom and the United States. The Australian legal system shares the same common law heritage as these legal systems. These same policy concerns underpin the Australian legal system. They go some way to explaining: why damages are not available in judicial review of administrative action or in constitution review of legislation; why the Administrative Appeals Tribunal and other statutory tribunals have not been empowered to award monetary remedies; and why the Australian courts have taken an exceedingly limited view of government liability for regulatory conduct in tort.³⁶

In my view, these policy considerations are relevant to considering the remedies that are appropriate in ISDS. ISDS, or at least certain types of claims that come before ISDS, also have the potential to place a 'potentially enormous financial burden on government', 'divert scarce resources away from the primary function of public bodies', and encourage 'public bodies and their employees to take an unduly defensive approach to their work'.³⁷ These are serious concerns indeed. It is useful to consider whether greater use of certain types of non-pecuniary remedies would address some of these concerns, or whether changes of some other sort are required.

But the question is not just whether pecuniary or non-pecuniary remedies should be preferred. There are also serious policy questions about the appropriate type of nonpecuniary remedies in claims against governments. In this submission I have shown that concerns about the separation of powers inform the Australian approach to remedies. Australian courts draw a distinction between the *lawfulness* and the *merits* of administrative decision-making. Australian courts have the power to compel administrative

³⁵ Antony Blackshield, 'Constitutional Issues Affecting Public Private Partnerships' (2006) 29 University of New South Wales Law Journal 302.

³⁶ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 557 per Gleeson CJ.

³⁷ OECD Investor-State Dispute Settlement Public Consultation (2012) annex 4 [216], [207] and [207].

decision-makers to perform any action required by law, but they do not have the power to substitute their own views for that those of a primary decision-maker when the decision in question involves the exercise of discretionary powers (as most contentious decision-making does).

There are at least two policy concerns at the heart of the Australian approach. The first is that courts generally lack the *institutional competence* of administrative decision makers. An administrative decision-maker is likely to be more knowledgeable about the issues that it deals with in the daily course of its work; it is in a better position to balance the competing considerations that must be taken into account in making a decision. The second policy concern is one of *legitimacy*. In contrast to the legislature, and to administrative agencies acting within the constraints of a specific delegation of power by the legislature, the courts lack democratic legitimacy.

The policy concerns that underpin the separation powers in the Australian legal system are equally relevant to debate about appropriate remedies in ISDS. As is the case with Australian courts, arbitral tribunals are likely be comprised of learned and highly respected lawyers. As is this case with Australian courts, the personal qualities of the individuals involved do not answer concerns about legitimacy and institutional competence. It would be profoundly undesirable if, in an effort to address some of the policy concerns relating to the award of damages in ISDS, tribunals were to grant remedies that purport to instruct a state to adopt particular economic or social policies on a matter that is the subject of a dispute. In my view, if non-pecuniary remedies are to be used by arbitral tribunals, they should be modelled on the remedies available in judicial review. In other words, such remedies should seek to articulate and enforce certain legal and procedural constraints on government decision-making. Tribunals should not be encouraged to come to a view, still less to impose a view, on what the 'ideal' course of conduct for a government is in a given set of circumstances.

5. Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?

The principle that firms should compete on a level playing field is a foundational and uncontroversial principle of economic theory. A level playing field between competing firms allows more productive firms to expand at the expense of less productive firms. A level playing field also fosters competition, which drives firms to improve their productivity over time. This process of competition drives economy-wide productivity and growth: it creates net economic benefits. This basic principle – that legal systems should establish a level playing field as between competing firms – underpins a range of legal regimes, including: competition (anti-trust) law in Australia, the US and the EU; and WTO law.

The possibility that investment treaties confer a competitive advantage on foreign investors over domestic investors (and over foreign investors from third states that are not entitled to investment treaty protection) is a serious cause for concern. This is true both of competitive advantages conferred by the grant of broader substantive protections to foreign investors and of competitive advantages conferred by the ability to obtain more generous remedies than those available to other firms under domestic law. An investor that obtains, or that would be able to obtain, a monetary award for wrongful government conduct clearly has an advantage over an investor that can only obtain primary remedies. This is not dependant on the assumption that monetary damages are always preferable to a primary remedy from the perspective of an investor. So long as the ISDS route is *sometimes* preferable, the option to choose between the two courses of action (and their corresponding remedies) is an advantage as compared to having only one option.

The extent of the competitive advantage conferred by the possibility of obtaining a monetary remedy depends on assumptions concerning:

- The likelihood of disputes between the investor and the host state;
- The proportion of such disputes in which the investor would prefer a monetary remedy to the remedies available under national law; and
- The strength of investors' preference for monetary remedies to the remedies available under national law.

With respect to the second and third points, it is likely that, in a significant proportion of disputes with government, investors would have a meaningful preference for monetary remedies compared to the remedies otherwise available under Australian law. For example, consider claims arising out of the refusal to award a licence necessary for a business activity. Such claims are common under both investment treaties and Australian administrative law. Under Australian law, a successful claim for judicial review could result in nothing more than an order that the decision-maker reconsider whether to exercise its discretion to grant the licence. The licence might still, ultimately be refused. In such circumstances the ability to obtain a monetary remedy through ISDS would be a significant advantage to an investor, particularly if the business had failed as a result of the original refusal to grant the licence.

Finally, it is worth noting anecdotal evidence which suggests that investors increasingly structure their investments so as to take advantage of investment treaties. If this is true, it implies that investors see investment treaties, and the availability of ISDS under such treaties, as conferring a competitive advantage

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Comment submitted 8 August 2012

The paper successfully and intelligently highlights most of the key issues that have arisen in the ISDS context.

I think the one section that is missing is a discussion of the overarching relationship between ISDS, on the one hand, and national governmental authority, on the other. Especially for someone like me who is working both in the legal and the political science fields a key question is the balance between transnational dispute settlement and the legitimate exercise of national regulatory activities. In other words, what is the legally *as well as* politically appropriate place for ad hoc ISDS in relation to decisions by national governments (especially where democratically elected) that are charged with providing public goods and solving various policy problems. Obviously, the greater democratic accountability of national governments cannot be relied on as a trump against clearly established investor rights, otherwise the concept of dispute settlement based on law would lose its meaning. At the same time, not everything that can be interpreted into frequently vague legal language is necessarily politically legitimate from the vantage point of democratic theory and the separation of powers, and I think that some tribunals have been reaching too far too quickly here, thus triggering some of the legitimacy problems we encounter today. To be a sustainable system, ISDS needs to be seen as legitimate from the vantage point of all involved parties, investors and states alike, and this should be recognized by arbitral tribunals. When the European Court of Human Rights adopted and developed its margin of appreciation doctrine, its judges were quite self-aware of the political function that the recognition of areas of discretion on the part of respondent governments served. As almost always, the question is not a categorical either/or, but rather the extent to which actions by national governments based on good faith interpretations and applications of BITs should receive some deference. Ideally, states themselves should make more explicit in their future BITs the extent to which certain terms and provisions imply a margin of appreciation on their part, as indeed some have already begun to do. Vagueness may of course be the result of an explicit negotiating strategy, but it appears that some states have come to regret it in hindsight. (If I may indulge in self-promotion: you can find a summary of my thinking on this issue in the following brief article: "Deference or No Deference, That is the Question: Legitimacy and Standards of Review in Investor-State Arbitration," *Investment Treaty News* 4:2 (July 2012), available at <http://www.iisd.org/pdf/2012/iisd_itn_july_2012_en.pdf>).

Trade Union Advisory Committee (TUAC) to the OECD

Comment submitted 30 August 2012

1. Introduction

TUAC welcomes this opportunity to respond to the public consultation on investor-

State dispute settlement (ISDS) and provide input to the future work programme of the Freedom of Investment (FOI) Roundtable. TUAC's policy objective is to ensure that international investment policies support sustainable development and inclusive growth, strengthen respect for workers' rights and decent work and safeguard the public interest.

The OECD Secretariat's survey and consultation paper show that the majority (93%) of the 1,600 sample bilateral and other investment treaties include provisions on ISDS. The papers also underline the unique strength of ISDS, which affords investors a level of protection unparalleled in international law. UNCTAD reports that in 2011 the number of known investor-State dispute settlement (ISDS) cases grew to a record level, with some recent cases involving challenges to "*...core public policies that had allegedly negatively affected...business prospects*".¹

While the OECD consultation paper examines a number of public interest issues surrounding ISDS, it does not place the discussion in the context of the widely held (and widely documented²) concern that the rules of international investment are skewed in favour of the protection of international investors and their investments and against the rights of States, their citizens and workers, and that there is a need to re-balance the rights and obligations of States and investors.

Also absent from the paper is any discussion of policy coherence as regards: the State duty to protect human rights at home and abroad, including against human rights abuses by business enterprises; the development agenda, including the Millennium Development Goals (MDGs); commitments made by FOI Roundtable member governments that have signed the OECD Investment Declaration³ to encourage the positive contribution that MNCs make to sustainable development; and the corporate responsibility to respect human rights.⁴⁵

This submission does not respond to the questions posed in the three parts of the consultation paper. Rather, it first addresses the overall context and the need for international investment policies to contribute to sustainable development, before turning to specific recommendations on investor-State dispute settlement and related issues:

- *Section 2: Rebalancing the rights and obligations of States and investors;*
- *Section 3: Alternatives to investor-State dispute settlement;*

¹ World Investment Report 2012, UNCTAD. p.20.

² The IISD Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006, is a key reference in this regard. There is a host of other civil society and trade union material. Most recently, UNCTAD in its 'Investment Policy Framework for Sustainable Development' has identified, and sought to address, the imbalance between the rights and obligations of States and investors.

³ 44 out of 50 FOI Roundtable members have adhered to the OECD Guidelines for Multinational Enterprises: Indonesia, PR China, Russia, Serbia and South Africa have not.

⁴ UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework, 2011.

⁵ OECD Guidelines for Multinational Enterprises, 1976 (updated 2011).

- *Section 4: Reforming investor-State dispute settlement;*
- *Section 5: Other issues.*

2. Re-balancing the rights and obligations of States and investors

TUAC considers that the future work programme of the FOI Roundtable should focus on re-balancing the rights of international investors and their investments with their obligations, and the rights of States, their citizens and workers, so as to ensure that international investment contributes to sustainable development and inclusive growth, and supports workers' rights and decent work. While reforming ISDS is a necessary part of that agenda, it is by no means sufficient. There is an urgent need to overhaul the content of international investment treaties.

UNCTAD's 'Investment Policy Framework for Sustainable Development' represents a significant step forward in this regard. It describes a "new generation" of investment policies, which "*systematically integrate sustainable development and operationalise it in concrete measures and mechanisms at the national and international levels, and at the level of policy making and implementation*", and defines the overarching objective of investment policymaking as sustainable growth and sustainable development.⁶

TUAC urges the FOI Roundtable to take up this agenda:

- **Recommendation:** As a first step the 'Freedom of Investment' Roundtable should change its name to the 'Investment for Sustainable Development' Roundtable. This would signal its intention to support the "new generation" of investment policies.

3. Alternatives to investor-State dispute settlement

There is a number of problems associated with investor-State Dispute Settlement (ISDS): accessible to investors and their investments but not to States Parties; restricts the right to regulate of host States; lack of transparency; conflicts of interest of arbitrators; inconsistent treaty interpretations; high and spiraling costs; increasing timescales for settlements; and high compensation claims.

Additionally, as noted by UNCTAD,⁷ there are overall legitimacy concerns arising from the special nature of ISDS that allows investors and their investments to challenge the public policy acts and measures taken in the public interest by a sovereign State, before an international tribunal, because they impact negatively on the private interests of investors and their investments.

The OECD Secretariat's consultation paper (*paragraph 3*) starts with the statement that it would be useful to draw on the experience of Australia, which has ceased to include ISDS provisions in its international investment treaties, and Brazil, which to date has not agreed to any such clauses, in that the experience of these two countries "*could contribute to international dialogue both by explaining their reservations and by describing their experience using alternative approaches to dispute resolution*". However, this recommendation is not followed up in the main part of the text.

Alternative approaches to ISDS were discussed at the 16th FOI Roundtable (March 2012), including a recent UNCTAD report⁸ that found that alternative dispute resolution (ADR) and dispute prevention policies (DPPs) hold considerable potential to address many of the problems associated with ISDS.

⁶ UNCTAD, Investment Policy Framework for Sustainable Development, 2012.

⁷ UNCTAD, World Investment Report 2012.

⁸ UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration, 2012.

TUAC considers that the multiple disadvantages of ISDS provide strong reason to examine alternatives to, rather than reforms of, ISDS and that this should be the primary avenue of enquiry in the future work programme of the FOI Roundtable:

- **Recommendation:** examine the alternatives to investor-State dispute settlement, including State-to-State dispute resolution, as well as alternative dispute resolution and dispute prevention policies with a view to omitting ISDS from investment treaties.

4. Reforming investor-State dispute settlement

In the event that ISDS is to continue then the FOI Roundtable should focus on identifying reforms to ISDS that would contribute to the objective of re-balancing the rights and obligations of States and investors and their investments. These reforms should include:

- Providing States Parties and non-disputing parties with recourse to ISDS;
- Prioritising alternative means of dispute resolution;
- Exhausting domestic remedies;
- Omitting umbrella clauses;
- Using ISDS to strengthen investor and investment compliance with obligations;
- Maintaining the right to regulate and adequate domestic policy space;
- Selection, qualification and impartiality of arbitrators;
- Strengthening transparency;

4.1 *Providing States Parties and non-disputing parties with recourse to ISDS*

The first imbalance to be addressed is that only investors and investments have recourse to ISDS to file claims against host States. It is not possible for States Parties to file claims against investors or investments that fail to comply with their obligations.

- **Recommendation:** Explore options for enabling States Parties and non-disputing parties to have recourse to ISDS.

4.2 *Alternative Means of Dispute Resolution*

Escalating international arbitration claims combined with legitimacy concerns over investors having the right to challenge measures of sovereign States to protect the public interest before international tribunals, provide strong reason to restrict the ability of investors and their investments to by-pass the domestic legal system and go straight to international arbitration.

TUAC considers that, in the first instance, in line with recommendations made by both the International Institute for Sustainable Development (IISD)⁹ and UNCTAD,¹⁰ investors and their investments should be

⁹ IISD Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.

¹⁰ UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration, 2010.

required to have first attempted alternative, amicable means of dispute settlement before having recourse to ISDS:

- **Recommendation:** Explore the options for requiring investors first to attempt alternative, amicable means of dispute settlement.

4.3 Exhaustion of Domestic Remedies

Where alternative means of dispute resolution fail, then investors and their investments should be required to have exhausted effective and adequate domestic remedies within the host State, before being able to file a claim under ISDS. This would strike an appropriate balance between giving States the right to address claims through their domestic legal systems, and the interests of foreign investors in having recourse to an international forum when they are denied justice in domestic courts.

While UNCTAD does not address this avenue in its report on alternatives to ISDS¹¹, it refers to ‘exhausting local remedies’ as the “*obvious way to sort out a dispute against a State*” and signals that after over fifty years of international arbitration a review may be overdue:

“Finally, it may be worth noting what this study does not do. It does not look into the most obvious way to sort a dispute against a State, i.e. the recourse to national courts of the host country. The requirement to exhaust local remedies before going to arbitration or the exclusive jurisdiction of local courts has given rise to numerous decisions by international courts and to doctrine and has been gradually abandoned in IIAs. The mistrust of investors in national courts and their ability to make a fair and quick decision, and the perception of bias and/or lack of competence in issues of international economic law would, **however, warrant being looked at with a fresh view. This could indeed be done after over 50 years of generalizing international arbitration as the safest avenue for foreigners**¹² ...¹³

- **Recommendation:** Explore the advantages and options for requiring investors to have exhausted domestic remedies before being able to file a claim under ISDS.

4.4 Umbrella Clauses

20. Another major concern is that jurisdiction of ISDS is being expanded through *inter alia* umbrella clauses. An umbrella clause basically provides that: “*Each Contracting Party shall observe any obligation it may have with regard to investments*”.¹⁴ Umbrella clauses impose on the host State a duty to observe all commitments with foreign investors thus having the effect of bringing breach of contract by host States – which would normally fall under the jurisdiction of the domestic forum – under the investment treaty, and therefore subject to ISDS.

- **Recommendation:** Ensure that recourse to ISDS is strictly limited to breaches of the treaty, not breaches of contract, including by omitting umbrella clauses from international investment agreements.

¹¹ UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, 2010.

¹² Emphasis added.

¹³ UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, 2010; p.8.

¹⁴ Weissenfels, A., *Umbrella Clauses*; Seminar on International Investment Protection.

4.5 The Right to Regulate and Domestic Policy Space

A major trade union concern is the impact of international investment treaties and ISDS on the host State's right to regulate to protect the public interest and the need to maintain domestic policy space. The OECD's consultation paper touches on this issue in its introduction, referring to '*important public policy issues*', resulting from ISDS claims including those involving "*health-motivated regulation of cigarette marketing brought against Australia and Uruguay*".

Such cases are by no means the exception. For example, in June 2012 the Swedish company Vattenfall requested the initiation of arbitration proceedings between it and Germany over alleged damages arising from Germany's decision to accelerate its exit from nuclear power.¹⁵ Famously, in 2006, Italian investors, together with their Luxembourg holding company, filed an international arbitration claim against South Africa that its Black Economic Empowerment mining regime violated the terms of BITs concluded with Italy and Luxembourg, and specifically the provisions on expropriation, fair and equitable treatment and national treatment claims.¹⁶ UNCTAD's 2012 World Investment Report confirms that the record number of cases filed in 2011, include cases that challenge the public policy measures of host States.¹⁷

There is also concern that stabilisation clauses, which appear mainly in investment contracts, could become subject to ISDS due to the umbrella clause (as discussed above (*Section 4.4.*)), the fair and equitable treatment clause, or the expropriations clause. Stabilisation clauses, which seek to insulate investors from changes in law or governmental decisions taken after the effective date of the agreement, fall into three categories¹⁸: a *freezing* clause, which freezes the law of the host State for the life of the investment; *economic equilibrium* clause, which provides that the investor comply with new laws but be compensated for doing so; and *hybrid* clauses, which require the investor to be returned to its position prior to the enactment of the new law, and to be exempted from such new laws.

TUAC is concerned that legislation enacted to support workers' rights or strengthens health and safety, for example, could be potential targets of such a clause. While there is no jurisprudence to date, in the past arbitrators have noted that the absence of a stabilisation clause was a relevant factor. Also, TUAC notes that in July 2012, Veolia launched a claim at ICSID against Egypt involving, *inter alia*, labour wage stabilisation promises.¹⁹

The risk posed to the right to regulate by international investment treaties is widely recognised. The UN Guiding Principles on Business and Human Rights Principle 10 instructs States to "*maintain adequate domestic policy space to meet their human rights obligations*".²⁰ The European Parliament has called on the European Commission to ensure that its new international investment policy protects the public capacity to regulate.²¹ UNCTAD has included the right to regulate as one of its ten core principles in its new Investment Policy Framework for Sustainable Development.

TUAC considers that the FOI Roundtable should review investment treaty provisions, including those concerning ISDS, from the perspective of retaining the right to regulate in area of public interest such as labour and the environment:

¹⁵ Wall Street Journal: <http://online.wsj.com/article/BT-CO-20120605-707606.html>.

¹⁶ Food and Water Watch and Institute for Policy Studies: Challenging Corporate Investor Rule, April 2007.

¹⁷ World Investment Report 2012, Towards a New Generation of Investment Policies, UNCTAD, 2012: http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf.

¹⁸ Stabilization Clauses and Human Rights, International Finance Corporation, March 11, 2008.

¹⁹ http://www.iareporter.com/articles/20120627_1. TUAC does not have any further information on the claim.

²⁰ UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework, 2011.

²¹ European Parliament Resolution on the Future European International Investment Policy (2010/2203(INI)), 6 April 2011.

- **Recommendation:** Explore possible avenues including:
 - Diplomatic screen: providing a “screen” that allows States Parties to prevent claims that are inappropriate, without merit, or would cause serious public harm. This mechanism has been used by the US Government in some areas of public policy areas such as tax and financial regulation;
 - Expropriation: ensuring that the definition of indirect expropriation makes it clear that, regulatory measures taken by governments in pursuit of legitimate public policy objectives (labour, health, safety, environment) is not considered indirect expropriation;²²
 - National treatment and most favoured nation clauses: the right to regulate should be included in national treatment and most favoured nation clauses;
 - Guidance for arbitrators: developing interpretation rules for arbitrators so as to underline the right to regulate and reduce arbitrator discretion in this regard.

4.6 Investor and Investment Compliance with Obligations

TUAC considers that the FOI Roundtable should examine how to re-balance the rights and obligations of investors and their investments in investment treaties and to reform ISDS to strengthen compliance with these obligations.

UNCTAD has included balancing rights and obligations of investors (*Core Principle 5*) and promoting best international practices of corporate social responsibility (*Core Principle 10*) in its Investment Policy Framework for Sustainable Development. The European Parliament has highlighted the need for the new EU investment policy to promote investments that respect the environment and encourage good quality working conditions and has called for all future EU investment agreements to make reference to the updated OECD Guidelines for Multinational Enterprises.

- **Recommendation:** the FOI Roundtable should examine the following options:
 - Inclusion of labour and environmental (sustainability) clauses in investment treaties that include reference to key international standards including the ILO Declaration on Fundamental Principles and Rights of Work (1998), the UN Guiding Principles on Business and Human Rights (2011), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977 (updated in 2006), the OECD Guidelines for Multinational Enterprises (1976 (updated 2011));
 - Making sustainability clauses subject to dispute settlement;
 - Denying access to ISDS in the case of breaches of certain obligations (e.g., national law, certain international standards including contributing to significant adverse human rights impacts in line with the UN Guiding Principles on Business and Human Rights (2011));
 - Allowing host States to file counter claims based on breaches of sustainability clauses or failure to conduct adequate social and environmental impacts in dispute settlement;
 - Allowing for the filing and consideration of *amicus curiae* submissions from a non-disputing party (citizens, civil society organisations, experts).

4.7 Selection, Qualification and Impartiality of Arbitrators

The OECD’s consultation paper identifies a series of concerns surrounding arbitrators. TUAC considers that the FOI Roundtable should examine how to ensure that arbitrators make high quality and consistent decision, which are free from conflicts of interest:

²² ISSD, Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.

- **Recommendation:** Explore improvements to the arbitration system including:
 - Selection: identifying alternatives to the practice of parties appointing the arbitrators, including the creation of a standing panel;
 - Qualifications: ensuring that the panellists include arbitrators with expertise in human rights, labour rights and environment;
 - Transparency: providing for greater transparency;
 - Appeals: introducing an appellate panel to help address problems of quality and consistency;
 - Conflicts of interest: introducing rules on independence as suggested by the IISD²³.

4.8 Transparency of ISDS

ISDS is widely criticised for being highly opaque. TUAC considers that the FOI Roundtable should examine how to maximise transparency of the system:

- **Recommendation:** examine options for improving transparency, including of ISDS claims, providing for public access to procedures and outcomes.

5. Other Issues

5.1 Definition of Investment and Investor

The definition of “investment” and “investor” adopted in many investment treaties has become increasingly expansive – including a broad concept of property covering economic interests not contemplated by the laws of many countries. IISD, in its model international investment agreement, refers to the problem of arbitrations that have identified market share or very minimal investment as sufficient to qualify as an investment. There are also concerns over so-called “mailbox” companies, which establish a minimal presence in a third country in order to enjoy protection under investment treaties.

The European Parliament has called on the Commission to review whether the broad definition of foreign investor has led to abusive practices.²⁴ It has also called it to exclude speculative forms of investment from the scope of protection of future investments. UNCTAD has proposed a definition that suggests excluding portfolio investment from the definition. IISD has proposed that the definition of “investment” cover “*investments that are physically present and operating in the host country, not just empty shells or one form or another or minimal level investments...*”²⁵ IISD considers that portfolio investment, intellectual property rights *per se* and market share should be excluded from the definition of “investment”.

- **Recommendation:** Identify past abuses arising from a broad definition of “investment”, with a view to identifying the kind of property and interests that are appropriately protected and define the rules for selecting the home State in order to address the problem of “mailbox” companies.

5.2 Full Protection and Security Standard

²³ IISD, Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.

²⁴ European Parliament Resolution on the Future European International Investment Policy (2010/2203(INI)), 6 April 2011.

²⁵ IISD, Model International Agreement on Investment for Sustainable Development, Negotiators Handbook, Second Edition, April 2006.

A significant number of international investment treaties contain full protection and security standards (FPS). They raise two key concerns.²⁶ First, the boundaries of this obligation are unclear and could be interpreted as imposing a high level of liability on States. According to IISD: *“Investment treaties formulate the standard of full protection and security in a broad manner, and tribunals have taken this at face value, thus interpreting the obligation as imposing a duty upon states to prevent harm to the investment from the acts of government and non-government actors”*.²⁷ Secondly, there is uncertainty over whether the standard extends beyond physical protection to include security from other forms of harassment. Some arbitrators have held that the *“protection and security standard includes not only the physical protection of foreign-owned investments, but also security from other forms of “harassment” which pose no physical threat to assets or threat of violence”* (See BOX 1 below). This requirement can put States in a difficult situation – legally bound to protect foreign investments (to a legally ambiguous degree) *and* respecting the rights of citizens to express rights they enjoy under national and/or international law, on the other. In recent years, investors have sued States, so far unsuccessfully, for failure to provide “full protection and security” for their investments in the event of labour unrest (see BOXES 2 and 3 overleaf).

TUAC is concerned that it would be possible for States to incur liability for citizens and workers exercising their rights under national/international law and that this risk could result in governments limiting or clamping down on, for example, the right to assembly or protest.

- **Recommendation:** Review the options for revising the FPS Standard to make it clear that the standard relates to physical protection only, as suggested by UNCTAD and examine the conditions for omitting the FPS Standard altogether.²⁸

Box 1: Arbitrators extending FPS beyond physical protection

In its report on FPS, IISD cites this example of a tribunal rejecting the argument that the protection and security standard was limited to physical interference (Dolzer & Stevens, 1995, p. 61).

Compañía de Aguas and Vivendi v. Argentina (2007)

“If the parties to the BIT had intended to limit the obligation to “physical interferences,” they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security, providing, in accordance with the Treaty’s specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized. (par. 7.4.12)”¹

²⁶ IISD, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?; November 2011.

²⁷ IISD, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?; November 2011.

²⁸ A recent IISD report on Full Protection and Security states that the Common Market for Eastern and Southern Africa (COMESA, 2007) and Southern African Development Community investment treaties (SADC, 2006) have excluded clauses on Full Protection and Security Standards. IISD, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?, November 2011.

Box 2 : Noble Ventures Inc. v. Romania

In *Noble Ventures Inc. v. Romania* the US foreign investor sued Romania under the US-Romania BIT claiming, *inter alia*, that the government had failed to quell frequent strikes and demonstrations by the employees of the claimant's investment, Combinatul Siderurgic Resita, and thus breached its obligation to provide full protection and security. On this point, the tribunal denied the investor's claim, holding: "[I]t seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State.¹" The tribunal further concluded that the government had not failed to exercise due diligence and, even if it had, the claimant could not prove that its alleged injuries and losses could have been prevented if due diligence had been exercised.

Box 3: Plama Consortium Limited v. Republic of Bulgaria¹

In *Plama Consortium Limited v. Republic of Bulgaria*, the foreign investor argued that workers were incited by the bankruptcy trustee to go on strike and to riot unlawfully at the refinery premises, forcing the factory to close. They further argued that police had failed to adequately protect the refinery or the management. The government of Bulgaria argued, to the contrary, that the demonstrations, which were over the non-payment of wages, were peaceful and did not amount to a riot, that police were present at the refinery, and that in any case the demonstrations were not the cause of the refinery shut-down. The tribunal was eventually unable to determine which of the contradictory set of facts were true and dismissed the claim given that the claimant failed to meet its burden of proof.

Annex I : Issues for discussion from the ISDS Scoping Paper¹

I.C. Influence of ISDS on domestic dispute resolution and policy making processes

- 1) Although ISDS is shown to be an unusual, even unique, system of international dispute settlement, the entire set of international dispute resolution systems is highly disparate – there seems to be no dominant model for international adjudication.
 - a) Do you agree with this characterisation?
 - b) Do you agree that ISDS, like all other international dispute resolution systems, should be evaluated according to principles for effective public policy and legal systems?
- 2) The international dispute settlement mechanisms for investment, trade and human rights have very different institutional designs.
 - a) What is the rationale for such large differences in mechanisms for resolving disputes that involve similar or overlapping issues? For example, why should private parties not be given direct access to the WTO procedure, as they have under ISDS? Why should claimants who suffer violations of property rights be required to exhaust local remedies under human rights procedures, but not under many investment treaties?
 - b) Do you agree that, since the various elements of a system of dispute resolution interact, design elements from one system cannot be transplanted into another system and have automatically the same effects?
- 3) In many areas of international law, focus is placed on enhancing the performance of domestic systems.
 - a) Why has this same approach not been adopted in the context of international investment law?
 - b) What are the advantages and disadvantages of this choice?
 - c) Should efforts to improve domestic systems become a more important part of international investment dialogue?
- 4) Do you agree that, although ISDS is explicitly used in only a tiny fraction of all international investments, it can nevertheless be assumed to influence the dynamics of other investor-state dispute settlement practices, both formal and informal?
 - a) What are your views on the interaction of ISDS with domestic judicial and regulatory systems? Does it on balance improve or undermine these systems?
 - b) Should investment treaty negotiators and arbitrators be mindful of the effects of the ISDS system on domestic judicial and regulatory systems?

¹ These issues for discussion are taken from the ISDS Scoping Paper where they are located after each relevant section. Heading numbers here correspond to those in the scoping paper (http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf).

- 5) The OECD survey of investor-state arbitration provisions in bilateral investment agreements shows that provisions on the pre-arbitration phase of dispute settlement (e.g. attempts at amicable dispute settlement) are among the most common general subject areas dealt with in the treaty sample.

a) What are your views and experiences on the use of these provisions?

b) Are they important components of the ISDS system?

II.B Costs of ISDS

- 6) The OECD survey finds that ISDS cost average about USD 8 million per case and can exceed USD 30 million per case.

a) Do you consider that these total costs are unreasonable, relative to the nature of the problems being solved and the costs of resolving them under other procedures?

b) If costs are considered to be high, does this raise concerns?

- 7) Case costs of USD 8 million may present a major obstacle to justice for developing States. Is there a risk that developing States lose cases primarily as a result of being “out-lawyered” rather than on the merits?

- 8) Because the rules on cost allocation in ISDS are uncertain, parties frequently have little idea of the likely final allocation of the millions of dollars in costs that they incur. What are your experiences and views on cost allocation in ISDS?

II.C. Remedies for breach of investment treaties

- 9) Should investment treaties give greater consideration to remedies? Should expanded use of primary remedies in ISDS be considered?

- 10) The text and Annex 4 note that pecuniary (or monetary) remedies for investors against governments under domestic administrative law in the UK, US, Germany, France and Japan are rare (other than for expropriation).

a) Would FOI participants wish to explain how their countries’ laws handle similar claims? What remedies are provided for?

b) Have investors brought cases for substantial damages against the government in domestic courts and, if so, how have they fared?

c) Are the policy reasons for limiting damages remedies for claimants against governments in some domestic administrative law systems relevant to considering appropriate remedies against governments in ISDS?

d) Could the broader availability of damages remedies for ISDS claimants than for domestic investors give the former a competitive advantage over the latter? Is this a source of concern?

- 11) What are your views on the expanding use by ISDS tribunals of provisional remedies such as injunctions?

II.D. Enforcement and execution of ISDS arbitration remedies

- 12) Is enforcement of ISDS arbitral awards a growing problem?
- 13) If so, do enforcement problems pose the risk of a growing re-politicization of ISDS and a return to diplomatic channels for resolution of investor-state disputes?
- 14) The scoping paper describes foreign state immunity as a significant obstacle to enforcement of awards in some cases. Do you agree with this description?
- 15) Are the difficulties encountered by States in obtaining compliance with costs awards against investors (or enforcement against investors) of concern?
- 16) As noted in the section on remedies, ISDS tribunals are expanding their use of provisional remedies such as injunctions. What should tribunals do if States parties refuse to comply with the injunction? Are liquidated damages or penalties, as suggested by some commentators, an appropriate solution?

II.E. Third party financing

- 17) Third party funding appears to be significantly expanding in ISDS.
- a)** What are the likely consequences of increased third party financing of investor state disputes?
- b)** Third party financing is frequently associated with mass claims, such as the recent Abaclat case. What are your views on mass claims?
- 18) It is often considered that negotiated settlements can provide disputing parties with superior outcomes to adjudicative decisions. Are the dynamics of settlement negotiations in ISDS likely to be affected by third party funding?
- 19) In your view, would the availability of third party funding in ISDS likely affect the comparative position of domestic and foreign investors?
- 20) Do awards by arbitrators favourable to undisclosed funders with whom they have a business relationship raise concerns for the ISDS system?
- 21) Domestic courts generally have significant powers to sanction interference with the administration of justice. In contrast, arbitration tribunals do not have any powers of enforcement. Can arbitration tribunals or other institutions adequately police the risk of funder misconduct in ISDS?
- 22) Should third party funders of unsuccessful cases be potentially liable for costs awards?

II.F. Arbitrators in ISDS

- 23) The ISDS system has attracted a pool of elite law professionals that are active as arbitrators, but also as counsel and experts.
- a)** Does the fact that accomplished law professionals are attracted into the ISDS system contribute to the quality of arbitration available under ISDS?
- b)** Are you generally satisfied with the competence and impartiality of arbitration panels in ISDS?
- 24) Some senior arbitration specialists have criticised party-selection of arbitrators for ISDS cases while many others reject these criticisms. What are your views on this controversy?
- 25) The ISDS system appears to create a number of economic incentives for arbitrators. How do these affect the ISDS system, if at all? Are ethics rules and reputational interests sufficient to counteract the economic incentives?
- 26) Is there in your view a problem of unequal information in the selection of arbitrators in ISDS cases?
- 27) Do you see a need for different ethical requirements for ISDS arbitrators than for commercial arbitrators? Does the fact that ISDS may engage the public interest more directly than commercial arbitration mean that different ethical requirements should apply?
- 28) As noted in the text, the risk of issue conflicts in ISDS (notably due to arbitrators' "dual hats" as arbitrator and counsel) has been criticised. What are your views on this question?

II.G. Forum shopping and treaty shopping

- 29) Many States appear to favour allowing investors to forum shop between arbitral fora. At the same time, most States are less tolerant of forum shopping in domestic legal systems. What explains the different approaches?
- 30) For States that favour allowing investors to forum shop between arbitral fora, has your government publicly articulated its policy rationale in this regard to parliament or elsewhere?
- 31) What are your views on the relationship between forum shopping and differences in the rules governing the various arbitration fora (e.g. in relation to transparency and review of awards)? Does the diversity of rules and procedures in the various arbitration fora (e.g. ICSID, UNCITRAL) meet the needs of the societies on behalf of whom investment treaties have been signed?
- 32) Is the fact that domestic investors have tried (and succeeded) in qualifying for protections under their own countries' investment treaties a source of concern? Why would countries wish to deny to their own investors benefits that they offer to foreign investors?
- 33) Why would countries wish to deny to third party investors benefits that they offer to the investors of their treaty partner(s)?
- 34) Is treaty shopping a major problem for your country? If so, why?

II.H. Consistency of decision-making in ISDS

- 35) How does your government evaluate the consistency of ISDS?
- 36) Is it important for the ISDS system to produce consistent results?
- 37) How should consistency as a value be weighed against other considerations (costs, speed, need to work out issues through case law)?
- 38) Is the current architecture of ISDS suited to promoting consistency?
- 39) The scoping paper notes that some inconsistency is an unavoidable feature of any dynamic system of adjudication. Inconsistent decisions can be part of the process by legal concepts are analysed and clarified. Is this need for clarification and innovation a feature of ISDS?
- 40) As noted in the section on remedies, under some advanced systems of administrative law, such as in Germany, claimants seeking damages must first seek judicial review or primary remedies. Multiple proceedings are thus required to obtain damages. In addition, all domestic systems allow judgments awarding sizable damages against governments to be appealed. Are advanced domestic administrative law systems relevant comparators for evaluating the importance of finality with regard to ISDS arbitration decisions awarding damages?
- 41) ISDS cases frequently involve huge claims. Damages awards are generally far below the claimed amount, but remain sizable in many cases. Is it more important to have consistent outcomes in cases that involve high monetary compensation?

III.B. Key findings of the [OECD statistical survey of bilateral investment treaties]

- 42) What reasons explain the wide preference for inclusion of international arbitration in bilateral investment treaties?
- 43) Many of the ISDS provisions contain texts requiring attempts at amicable settlement and coordinating recourse to international arbitration relative to domestic judicial procedures. Are these provisions important parts of States' consent to arbitrate?
- 44) Why do many States engage in light regulation of ISDS in their bilateral investment treaties?
- 45) The survey of ISDS provisions in investment treaties shows differences (among treaties and countries) in treaty language with respect to essentially all issues covered. What do you think about this degree of variation in language? Is it useful? If so, for what purpose?
- 46) Many countries' older treaties are different than their newer treaties. Is this a source of concern for these countries? Why are investment treaties and, more specifically, their ISDS provisions not updated more frequently?