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# Investor-State Dispute Settlement Scoping Paper: List of issues for discussion

Electronic consultation held 16 May - 23 July 2012

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## Context

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The OECD-hosted Freedom of Investment (FOI) Roundtable helps governments design better policies to reconcile openness to international investment with legitimate regulation in the public interest. Governments from all regions of the world participate in the Roundtable.

The Roundtable is conducting ongoing work on assessing the dispute settlement system applicable to investor-state disputes under investment treaties (ISDS). From May to July 2012 the Roundtable sought input on this issue. The scoping paper placed ISDS in comparative context, analyses key issues in ISDS and sets out 46 issues for discussion.

This present document lists the 46 key issues for discussion on which the FOI Roundtable invited comments from experts, business and civil society representatives, international organisations, FOI participants and the general public during the consultation period.

The scoping paper and a compilation of comments received during the consultation can be found at: <http://www.oecd.org/daf/inv/investment-policy/publicconsultationisds.htm>.

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## Issues for discussion from the ISDS Scoping Paper<sup>1</sup>

### 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?

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<sup>1</sup> 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](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?