



## **ROUNDTABLE ON FREEDOM OF INVESTMENT 15**

*5 December 2011 – Paris, France*

**Summary of Roundtable discussions by the OECD Secretariat**

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## FREEDOM OF INVESTMENT PROCESS

Freedom of Investment Roundtable 15, 5 December 2011, OECD, Paris

### SUMMARY OF DISCUSSIONS

The “Freedom of Investment” (FOI) Roundtable is a forum for inter-governmental dialogue on international investment policy that brings together the governments of the 34 OECD members, of the 9 adherents to the OECD Declaration on International Investment and Multinational Enterprises,<sup>1</sup> and many other non-OECD countries. The Roundtable supports recipient countries’ efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also addresses concerns that international investment may raise. Monitoring and exchanges at Roundtables contribute to observance of international investment commitments, including those taken under the OECD investment instruments and in the context of the G20.

The present document summarises the views and information contributed by participants at the FOI Roundtable 15, held on 5 December 2011. In addition to OECD members, Argentina, Brazil, China, Estonia, Indonesia, Morocco, Russia, South Africa, Tunisia and the European Commission and the European Free Trade Association (EFTA) participated in this Roundtable. China Investment Corporation (China’s largest sovereign wealth fund by assets) and the International Centre for the Settlement of Investment Disputes (ICSID) also attended the Roundtable.

The discussions at Roundtable 15 included, first, a review of recent developments and, second, an exploratory dialogue on investor state dispute settlement.<sup>2</sup>

#### I. Monitoring of recent policy developments and other investment issues

##### *Austria*

Austria provided preliminary information to participants about measures regarding the ‘business models’ used by Austrian banks operating in Central, Eastern and South-eastern Europe (CESEE) that the Austrian Financial Market Authority (FMA) and the Austrian National Bank (OeNB) had made public on 21 November 2011.<sup>3</sup> The measures include obliging subsidiaries of Austrian banks operating in these markets to ensure that the ratio of new loans to local refinancing (i.e. the loan-to-deposit ratio including local refinancing) does not exceed 110%. Austria reported that the supervisory guidance is expected to be issued in December 2011 with a view to strengthen the Austrian banking groups by increasing the funding

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<sup>1</sup> The adherents to the Declaration include all 34 OECD member countries, and 9 non-member countries: Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

<sup>2</sup> Accounts of discussions at earlier FOI Roundtables are available on the website dedicated to the FOI process [[www.oecd.org/daf/investment/foi](http://www.oecd.org/daf/investment/foi)].

<sup>3</sup> “*FMA and OeNB Devise a Set of Measures to Strengthen Business Model Sustainability for Austrian Banks Operating in CESEE*”, Financial Market Authority (FMA), 21 November 2011.

autonomy of the subsidiaries. Austria announced that it will provide more information on these measures at Roundtable 16 in March 2012.

### ***Brazil***

Brazil informed Roundtable participants about very recent developments in relation to information recorded in the “Inventory of recent investment policy measures”. In particular, Brazil informed participants that it had rolled back some of the financial transactions (IOF) taxes to 0 down from 6%, confirming that these measures were countercyclical transitional measures that sought to address macroeconomic objectives, more specifically to fight against negative impacts on exchange rate and export competitiveness of Brazilian products.

As far as purchase of rural land by foreigners is concerned, Brazil announced more detailed information on the measures adopted by the Brazilian Government. The restrictions of such purchases are closely related to national security concerns; Brazil thus suggested that they be classified as such in the inventory. In substance, the policy recently adopted by the Brazilian government is a re-edition of older legislation passed in the 1970s and 1990s. This legislation determines to what extent foreigners may acquire or lease parcels of agricultural land – units with size ranging from 5 ha and 100 ha depending on the region. It determines specifically how many such parcels foreigners or foreign controlled entities can own or lease without special approval and what use foreign individuals, companies or foreign controlled companies may make of the land.

### ***China***

China was asked whether it could explain in more detail the purpose of its recently introduced National Security review. China announced that it would provide such information for an upcoming Roundtable.

### ***European Commission***

The European Commission informed Roundtable participants on the mandate to negotiate investment protection chapters in free trade agreements with Canada, India and Singapore. The General Affairs Council had approved such mandates – technically updates to an earlier mandate to include investment protection provisions – on 12 September 2011, thus instructing the Commission on the framework for the negotiations. These are the first such mandates since the Lisbon treaty shifted the competence in this area from the EU Member States to the EU. Negotiations between the EU and Canada were underway at the time of the Roundtable.

The European Commission explained that no such updated mandate was given for the ongoing negotiations of an agreement between the European Union and MERCOSUR. According to the Commission, MERCOSUR partners had signalled that they were not interested in including investment protection in this agreement under negotiation.

Germany encouraged Roundtable participants that are not members of the European Union and thus potential future treaty partners to share their views on what future investment agreements with the European Union should contain. Some participants sought more information on the legal consequences for existing bilateral agreements with EU member states of the shifting of the competence to negotiate new IIAs to the EU level. The European Commission informed Roundtable participants that it was preparing a Regulation, expected to be issued soon after the Roundtable. The Regulation will enhance the legal certainty of the existing bilateral agreements and will notably clarify the grandfathering of existing agreements. Such agreements will only be replaced once a decision has been taken to launch negotiations with specific partner countries. According to the European Commission, it is unlikely that further

negotiating mandates for investment protection agreements – beyond the three negotiating mandates with Canada, India and Singapore – will be given in the near future.

The European Commission will provide further information at a future Roundtable once the European Union Regulation has come into effect, and participants in the Roundtable will have the occasion to follow up on this matter.

### ***Germany***

Germany reported on its experience with an investor-state dispute involving a Swedish state-owned energy company, Vattenfall. The case concerned a coal-fired power plant under construction in Hamburg. Vattenfall brought the case to ICSID under the Energy Charter Treaty (ECT) on 2 April 2009.<sup>4</sup> By August 2010, the parties to the dispute had agreed to a final and binding settlement. The settlement agreement was made public in April 2011.

In substance, Vattenfall had brought the claim because it considered that the water use permit issued by Hamburg (which, in order to protect wildlife, limited the amount of cooling water that the plant may take from the river Elbe as a function of its flow-through and its downstream oxygen content) made the investment unprofitable by significantly lowering the potential output of the plant. The settlement involved the issuance of a new water use permit and the release of Vattenfall from certain of its initial undertakings. The parties further agreed that a hybrid cooling technology would be used; this hybrid system – which is already used in other parts of Germany where less water is available for cooling power plants – combines a cooling tower with a cooling system that uses river water.

Germany reported that it considered that the case was exceptional because all other electricity producers operating in Germany are German companies that would be required to bring their claims to local courts rather than to international arbitration. For this dispute, the acting authorities were the City of Hamburg, while the respondent in the case was the Federal Government. Overall, the German government's experience with the international dispute settlement in this case was positive. Germany stressed the benefit of the international arbitration mechanism in creating an environment in which the disputing parties face strong incentives to find constructive solutions of their disputes.

Germany also elaborated on both the impact of the case on its environmental policy and the issue of transparency. It stated that the settlement agreement allowed the environmental policy goals to be achieved and that the company agreed to pay for the cost of the installation of the hybrid cooling system. On transparency, it reported that there was no agreement with Vattenfall to publish the settlement agreement, but that a third party – the Energy Charter Treaty Secretariat – had made the award public. Sweden indicated that the settlement was a matter for Vattenfall rather than for the Swedish government as owner of the company. Based on information received from Vattenfall, it understood that the environmental issues had been resolved. It also noted that the settlement agreement had been published.

### ***Hungary***

Hungary informed Roundtable participants about legislation that came into force on 29 September 2011 and that allows households who have taken on foreign-currency mortgages to convert these loans at a government-set exchange rate (HUF 180/CHF 1 and HUF 250/EUR 1) before end-2011. According to the Hungarian government, this measure seeks to address a macro-financial imbalance and a social burden arising from households' unhedged foreign currency debt, most often denominated in Swiss Franc, which has risen significantly against the Forint since households contracted the debt. The measure follows earlier

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<sup>4</sup> ICSID Case No. ARB/09/6.

steps to address the problem, including measures to prevent the further build-up of foreign currency loans, introduced a quota system on foreclosure, and introduced an exchange rate protection scheme to limit the amount of the monthly instalment in national currency for a temporary period. The Hungarian Government assured that it would not implement further measures without prior consultations with the Hungarian Banking Association. Estimates of the number of eligible loans – and thus the impact on the financial sector in Hungary – vary among Hungary and other Roundtable participants. Other Roundtable participants also consider that the measure touches upon Hungary's obligations under the European Union, the OECD Codes, and international investment agreements. Further information on the measure will be provided to Roundtable participants at one of the upcoming meetings.

### *Korea*

Korea provided information on two recent measures. One of these measures concerns the lowering, effective on 1 June 2011, of the ceiling on banks' foreign exchange forward positions by 20% (the ceiling on the foreign exchange forward position by local branches of foreign banks was cut to 200% of their capital, down from 250%; the ceiling for domestic banks was lowered from 50% to 40%). Korea informed Roundtable participants that the measure aims to tackle the structural mismatch between maturities of foreign exchange loans in Korea's corporate sector. The lowering of the ceiling seeks to further reduce the systemic risk resulting from this mismatch in cases of external shocks. Korea explained that most banks' net foreign forward positions are much lower than even the reduced ceilings, which consequently have very limited impact on the operations of banks.

Korea explained that the bank levy that it had introduced in August 2011 also forms part of the macro-prudential measures seeking to reduce the systemic risk resulting from banks' excessive foreign exchange liabilities. The bank levy also puts to life the decision of G20 leaders at their Toronto summit to make the financial sector contribute in a fair and substantial way to the cost of failings in the financial sector. The Korean levy, more specifically, aims at making provisions for potential failings of financial institutions in the case of a foreign exchange liquidity crisis. The rate of this levy depends on the maturity of the debt: 0.2% for maturities of up to one year, 0.1% for those between one and three years, 0.05% for three to five year debts, and 0.02% for more than 5 year debts. Korea drew a parallel of this levy with banking levies that countries such as the United Kingdom, France and Germany had introduced earlier. Korea suggested that the levies introduced by the mentioned countries be analysed conjointly with the Korean levy and the Roundtable Chair agreed that this should take place at the Roundtable in March 2012.

### *Mexico*

Mexico informed Roundtable participants about its ongoing review of the restrictions for foreign ownership in certain industry sectors. The review, began when the National Commission on Foreign Investment, an inter-ministerial commission composed of the heads of 10 ministries, instructed its Technical Secretariat in July 2011 to identify steps needed to improve Mexico's position in the OECD FDI Regulatory Restrictiveness Index.<sup>5</sup> The current score in the index, which reveals a relatively high degree of restrictiveness compared with OECD peers, results from restrictions that reserve certain industry sectors to the Mexican State, Mexican nationals or that impose equity caps for foreign investment.

The review aims at assessing the economic rationale of the most relevant FDI restrictions set out in the Foreign Investment Law in eight sectors that were considered a priority; these include television broadcasting, fixed line telecommunications, distribution of liquefied petroleum gas, air transport, road transport of freight, passengers and tourism, maritime cabotage, financial services, and gasoline franchises. The assessment is expected to recommend one of three actions – the elimination, relaxation or maintenance

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<sup>5</sup> More information on the Regulatory Restrictiveness Index is available at [www.oecd.org/investment/index](http://www.oecd.org/investment/index).

of the existing restriction on foreign ownership – for each of the sectors covered by the assessment; the final decision lies with the Federal Congress as any change will require an amendment to the Foreign Investment Law. The Mexican government plans to release the outcome of the assessment to the public in the first half of 2012. It estimates that Mexico could attract 50% more FDI, had it the restrictiveness score of the least restrictive country.

Mexico explained that some of the sectors that were covered by the review required regulation – especially where they concern the delivery of services to the public – but that it did not consider that ownership restrictions were the appropriate means to achieve the regulatory objective.

Roundtable participants suggested that Mexico report to the Roundtable on policy changes resulting from the initiative so that investors can be informed about new opportunities resulting from the liberalisation.

### ***Russian Federation***

Russia informed Roundtable participants that the amendment to the “Federal Law on Procedures of Foreign Investment in Entities of Strategic Importance for National Security of and State Defence (“the strategic sectors law”) had been adopted by the Russian Parliament in mid-November 2011 and that it will come in effect on 18 December 2011. The amendment creates more favourable conditions for foreign investors, especially regarding some activities such as extraction of resources of federal importance. Russia clarified that under Russian Law, there are no “strategic sectors” *per se*, but rather that the focus had shifted to activities that raise security concerns. Russia seeks to reduce the number of activities that are considered to raise such concerns.

### ***Other Issues***

Japan drew the attention of Roundtable participants on the importance of their sustained commitment to resisting protectionism and in this respect pointed out the APEC Leaders’ “*Yokohama Vision*” (2010) as one of those commitments.

## **II. Investor-State dispute settlement**

The Roundtable also discussed investor state dispute settlement of investment treaty claims (henceforth, ISDS). The discussions were exploratory and began with a broad overview of ISDS which placed the system in the context of other systems, both national and international, for resolving disputes. The Roundtable also looked at six core issues in ISDS: access to justice; costs and financing; remedies for breach of investment treaties; enforcement and execution of arbitration awards; selection and regulation of arbitrators; and consistency of decision making in ISDS. In the context of the Roundtable’s preliminary dialogue, the focus was principally on identifying issues for discussion.

During the broad overview, FOI Roundtable participants looked at how ISDS fits into the wider landscape of mechanisms for promoting State compliance with international obligations and for providing redress for victims of breaches of these obligations. The scoping paper prepared by the Secretariat in support of discussions suggested that, compared with other international mechanisms, ISDS is unusual in that it provides direct access by private parties to international dispute resolution mechanism and provides for potentially high monetary compensation if the State is found to be in breach of its treaty obligations. The paper also provided a more detailed review of the specific design elements of WTO, European Court of Human Rights (ECHR) and ISDS dispute settlement mechanisms and showed that they vary in many respects (such as access, remedies, selection and status of adjudicators, and timing). There was general

support for continuing with such comparisons both for understanding how ISDS compares with other systems – both in terms of what it seeks to achieve and how it goes about achieving its objectives – and as a source of ideas for improving ISDS. Some delegates, however, cautioned that the comparisons could in their view be akin to comparing “apples and oranges” because of the differences between the systems. It was suggested that international dispute settlement systems should be evaluated using established principles for good practice in public policy making and adjudication.

Relationships between domestic dispute settlement systems and ISDS were looked at from several angles during the discussions. One issue raised was that of standards of protection for foreign investors versus those for domestic investors and their impact on competition. FOI participants also looked, on a very preliminary basis, at whether ISDS supports and reinforces domestic regulatory and dispute resolution processes or, on the contrary, undermines them. This general question – which is an essential one for understanding the development impacts of ISDS – covers the multiple ways that ISDS interacts with domestic systems. Such interactions include treaty provisions’ – and arbitral panels’ – treatment of pre-arbitral recourse to domestic processes and of attempts at amicable settlement. They also include provisional remedies which in some recent cases have involved arbitral panels issuing instructions to host states (including judicial authorities) to do or to refrain from doing a particular thing (e.g. pursuing a domestic court case). Several FOI participants highlighted the importance of this area of discussion, while one questioned whether the question of interaction between domestic and international processes could be effectively dealt with empirically.

In addition to these general discussions, FOI participants also had more in-depth, but still preliminary, discussion of six core issues in ISDS. These included:

### *Access to justice*

Investor access to justice – FOI Roundtable participants took a first look at the issue of access to justice, based on an OECD Secretariat survey of investor claimants in 50 ICSID cases and 45 UNCITRAL cases. The survey, which categorised investor claimants into a typology of size, shows that 22 percent of the claimants were what might be termed “small” investors; that is, individuals, groups of individuals or very small corporations. This suggests, without being conclusive, that small investors are not facing major hurdles in accessing ISDS. The survey also shows that:

- a fairly large proportion of the investor claimants (almost 35 percent) have disclosure practices such that little no public information is available about them, other than the information generated by the case itself. Based on this case-generated information, it would appear that these investors are of two types: 1) investor entities that are so small that most disclosure rules do not apply to them; 2) “mailbox” companies that have been formed around the assets that are the subject of the dispute and that are not subject to disclosure requirements in the countries where they are incorporated.
- Two of the 95 investor claimants were domestic investors in the respondent company who appear to have incorporated abroad so as to qualify for the protections provided for in their country’s investment agreements.

Although this finding (that is, that at least some smaller investors do have access to ISDS) was not controversial, some participants stressed that problems of access to justice may exist that are not revealed by this study and that a fuller look at how different kinds of disputes are resolved by different investors in various host country environments would yield more conclusive information in this area. One FOI participant suggested that the survey should be enlarged to show what portion of the investor-claimants are based in developing countries.

## ***Costs and financing of ISDS***

An OECD survey of the ***costs of ISDS*** shows that legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million, with costs exceeding USD 30 million in some cases. In the recent *Abaclat* decision (which addresses jurisdiction but not the merits) the tribunal noted that the claimants had spent some USD 27 million and Argentina has spent about USD 12 million. In-house counsel of major corporations identified high costs as being one of the two greatest disadvantages of international arbitration in a recent poll. It was noted that high costs preclude "small" claims, even though such claims can loom large for smaller investors. It was also suggested that high costs can be part of the discipline on states not to breach investment treaties (so that they can avoid the high costs of responding to claims). Overall, it was noted that it would be important to identify the sources of high costs and the nature and reasons for their evolution over time.

In this connection, Roundtable participants also discussed the development of ***third party financing of ISDS***, which has been described as ‘a new industry composed of institutional investors who invest in litigation by providing finance in return for a stake in a legal claim and a contingency in the recovery.’ The scoping paper notes that third party funding (TPF) is expanding in jurisdictions where it is permitted or tolerated with a number of hedge funds and institutional investors known to be active in the field. Its proper scope, if any, and the appropriate degree of regulation, if any, are under review in a number of national jurisdictions. It appears that third party financing is expanding rapidly in ISDS, where it is unregulated, but because claimants and funders do not consider that there is any obligation to disclose the existence of funding, its scope is unknown.

On the positive side, TPF can enhance access to justice for claimants who might not otherwise be able to fund litigation and TPF providers can help claimants filter out unmeritorious cases. However, on the negative side, TPF may undermine legitimacy of ISDS (by conveying the idea that claims become ways for third parties to make money and have little to do with resolving a dispute between the parties to the case). Where third-party funding remains secret, arbitrators are unable to determine whether they may have conflicts of interest with the funder.

Delegates also noted that third parties with purely financial interests may have different interests than investors particularly where the investor is interested in maintaining its investments in the host state. Funders may not be interested in or agree to settlements which involve non-monetary remedies for an investor. FOI Roundtable participants agreed that TPF was an important development whose effects on the dynamics of ISDS should be further analysed by the international investment policy community.

## ***Remedies***

***Remedies*** are what investors seek and what governments are compelled to provide in cases where they breach treaty obligations – they are of critical importance to the parties to the case. The nature of remedies can also be of fundamental importance to the overall operation of the ISDS system. In remedies available against governments, a key distinction exists between (i) non-pecuniary remedies, which are also referred to as “primary” or “judicial review” remedies (such as annulling or quashing a government decision or administrative measure, prohibiting or requiring specified government action, or issuing a declaration of rights); and (ii) pecuniary remedies (principally damages and interest), also referred to in some legal systems as “secondary” remedies.

Comparisons of ISDS with the remedies available to investors in advanced national administrative law systems can be instructive because such systems have many functions similar to ISDS (controlling state power, upholding the rule of law and providing remedies to regulated entities and persons for state misconduct) and address similar fact situations such as the arbitrary denial of licences. A preliminary review by the Secretariat suggests that substantial differences exist between the remedies in ISDS and

those in advanced domestic administrative systems in both common law and civil law countries (the UK, the US, Germany and France). For issues other than expropriation, domestic systems favour so-called primary, judicial review remedies which are non-pecuniary (annulling or quashing a government decision or administrative measure, prohibiting or requiring specified government action, or declaratory relief). Domestic administrative law tends to be protective of the public purse and monetary compensation appears to be rarely available for claims by investors (except for expropriation). In contrast, remedies in ISDS cases are heavily if not exclusively weighted towards damages and other pecuniary remedies.

One delegate suggested that damages remedies were generally the most appropriate in ISDS because arbitral tribunals should not interfere in government processes, but that settlement negotiations, especially if required cooling-off periods are respected, could allow for the fashioning of agreed non-pecuniary remedies in lieu of damages. When a government faces a pending case, the spectre of a damages remedy forces the government to find a solution and gives the investor negotiating leverage. Another delegate suggested that additional consideration should be given to the use of primary remedies in ISDS because these could be both economically efficient and legally appropriate in some cases. It was suggested that the current almost exclusive focus on damages could be linked to the high costs of ISDS including arbitrators and counsel. State sovereignty should not be considered as a barrier since precedents exist for such remedies in both international court and arbitral tribunal cases, as well as in systems such as the WTO.

Delegates also discussed additional issues including considering the wishes of the business community in terms of ISDS remedies; the question of enforcement of primary remedies issued by arbitral tribunals and the possible role of domestic tribunals in providing such remedies; and the use of remedies in the context of pre-establishment as opposed to post-establishment protections and how they may differ. Delegates also considered the growing use of provisional remedies in ISDS.

Overall it was noted that, assuming that the preliminary finding that there is a substantial difference in the approach to remedies in domestic law as opposed to ISDS is correct, it would be important to explore the reasons for the differences. It was suggested one reason could be linked to the limited legitimacy of arbitral tribunals as opposed to courts in issuing primary remedies. It was also underlined that the question of remedies was a good example of why both a broad approach to analysis of ISDS and one that includes comparative analysis with other systems is appropriate.

### ***Enforcement and execution of ISDS arbitral awards***

Delegates considered a number of issues relating to the enforcement and execution of ISDS awards. They noted that some aspects of these issues relating to Argentina had been discussed at FOI Roundtables 12 and 13.<sup>6</sup> Argentina requested that its position be more fully reflected in subsequent versions of the scoping paper.

Delegates considered the historical record of compliance with ISDS awards; investor options in the event of non-compliance; the systems for enforcing both ICSID and non-ICSID awards and obstacles to enforcement and execution; and provisional and final non-pecuniary awards and the question of enforcement. State compliance with ISDS arbitration awards was, until recently, not much of a problem; however, issues with compliance have arisen in recent years in relation to a number of ICSID and non-ICSID awards. Not all compliance controversies are publicly known, though efforts to enforce awards in national courts generally become public. Investors' non-compliance with cost awards has also been an issue in a few recent cases. Delegates noted the difficulties in finding assets against which to execute can present challenges for investor in some cases, notably due to state immunity or other immunities.

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<sup>6</sup> See the summary of discussions on [www.oecd.org/daf/investment/foi](http://www.oecd.org/daf/investment/foi).

### *Selection and regulation of arbitrators*

Arbitrators are of critical importance to the functioning of ISDS and to the parties to individual cases. Arbitral panels are among the key determinants of the quality of ISDS awards (especially since the scope for review of awards is quite narrow). Three person panels are the dominant arrangement in ISDS and decisions require a majority of the arbitrators. Arbitrators are selected for each case, either by the party or by a third party institution, in contrast to national judges who are assigned to cases without any party input. Under both ICSID and UNCITRAL rules, each party selects one arbitrator unless the parties agree on another method; few limits are imposed on parties' choice of arbitrator as applicable criteria are couched in general terms.

Investment arbitrators are generally chosen from an elite pool of law professionals. They are often lawyers, professors and judges who have reached senior positions in their respective fields. According to a recent empirical study, 60% of ICSID arbitrators come from private law firms; 40%, including some of private law firm practitioners, are specialists in public international law.<sup>7</sup> Arbitration is normally only one of the professional activities in which arbitrators are involved at any given time.

Delegates considered the repeated interaction of counsel, arbitrators and experts within the arbitration context and their multiple roles as arbitrator, legal counsel and expert, including concurrently in different ISDS cases, and their impact on the dynamics of arbitral decision making in ISDS. In addition to requesting additional analysis with regard to questions of independence and impartiality of arbitrators, delegates raised a number of additional questions for consideration with regard to the selection and regulation of arbitrators including whether there are problems with the professionalism and preparation of arbitrators and whether arbitrators from a commercial background have experience with or sensitivity to the public law issues in ISDS. It was suggested that it is important to foster arbitrators who have the requisite background for ISDS. The relatively low number of ISDS arbitrators with public law experience was noted.

### *Consistency*

The issue of *consistency* involves, broadly, the question of whether adjudicatory bodies are resolving the same or similar questions in the same way in successive cases. In recent years a debate has emerged about alleged inconsistency in ISDS, whether it is a problem and, if so, what should be done about it. In an OECD context, concerns were raised in 2002-2005 and consideration was given to the possibility of developing an appellate body as a way of addressing inconsistency.

One of the main purposes of international rules on trade and investment is to meet the needs of traders and investors for security and predictability. Dispute settlement that generates consistent interpretations helps meet this need. A reasonable degree of consistency also contributes to the legitimacy and perceived fairness of the dispute settlement system. Consistency can also increase the cost-effectiveness of dispute settlement for parties to disputes and potential disputes. Consistency is a matter of degree – a certain amount of inconsistency may need to be tolerated as the systems works out its approach to issues.

The Roundtable's discussion of consistency revealed a range of views and concerns. A substantial number of participants felt that there is a serious problem with regard to consistency. It was suggested that the institutional structure of ISDS with ad hoc panels composed of different arbitrators for each case was not designed to achieve consistency, had not done so and was not likely to do so in the foreseeable future. These participants stressed the costs and risks for investors and for states, which, as a result of perceived inconsistencies, could not be sure how their treaties would be read. This was viewed as a particularly

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<sup>7</sup> Waibel, M. and Wu Y. (2010), Are Arbitrators Political?, ASIL Research Forum, UCLA (5 November 2011).

serious concern as much of the subject matter of investor-state arbitration touches on important public interest issues. Some delegates suggested that the consistency problem should be considered in the broader context of addressing the state of substantive investment law, with its numerous variations of legal language contained in treaties.

Reacting to these concerns, some other delegates suggested that the problem should not be exaggerated. One underlined that there should be a certain tolerance for inconsistency. He noted that he was from a country that has not yet been a respondent, but suggested that FOI participants should have more trust in an arbitration system that has shown its value and is fundamentally sound. It was also suggested that the interest of the arbitration bar in preserving the ISDS system would play a positive role with regard to achieving consistency.

Another participant questioned whether the emphasis on consistency was the right one. Rather, the system should be an “intelligent” one that provides different solutions for different users of the system, including developing countries who need policy space for their development. This more flexible goal would help to encourage developing states to participate in a dialogue on ISDS. It was also suggested that predictability might be a better term than consistency.

Participants noted that a wide variety of tools exist for governments to communicate their views about how treaties should be interpreted, such as restatement-type documents. These could help arbitral panels and other users to understand better States’ intent in crafting various elements of investment treaties, thereby helping to eliminate inconsistencies.

At the conclusion of the overall discussion, the Chair first noted that, in light of the focus during the discussion on possible criticisms of the system, it was important to note that FOI participants generally acknowledged the positive contributions of the ISDS system. At the same time, they also generally recognized that there was room for improvement.

The Chair underlined the pronounced heterogeneity of investment law. The Chair pointed out that to the degree this heterogeneity reflects different policy choices, it is a necessary and important feature of ISDS. However, there may be some heterogeneity that is not necessary. Since heterogeneity creates costs and uncertainties, it may be important to examine whether it can be addressed.

Beyond the heterogeneity of the underlying rules, there were also issues with the ISDS system which interprets and applies the rules, and which was the focus of the present discussion. The broad and comparative approach to the analysis of the ISDS system in the scoping paper was useful because the various components of the system are so closely inter-linked. Further analysis and greater understanding of the general nature of system, including how various aspects interact and how it compares to other systems, was appropriate before consideration of possible steps to address particular issues in the ISDS system. The Chair highlighted the need to create a basis for possible problem solving by continuing to document the fundamental working of the ISDS system and by providing a conceptual basis for understanding what States and the societies they represent want from the system. The Roundtable agreed to continue its work on ISDS.