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## **Settlement of commercial disputes**

### **Investor-State Dispute Settlement Framework**

#### **Comments from International Intergovernmental Organizations**

##### **Addendum**

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## IV. Comments from International Intergovernmental Organizations

This section reproduces comments received by the Secretariat from the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) regarding activities in relation to the investor-State dispute settlement framework.

### 1. Organisation for Economic Cooperation and Development (OECD)

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### **A. Introduction**

1. An OECD-hosted inter-governmental Roundtable that gathers over 55 economies from around the world has engaged in regular analysis and discussion of investment treaties and investor-state dispute settlement (ISDS) since 2011. The vigorous discussions have been enriched by input from business, civil society and NGOs, and experts. The Roundtable has also benefited from presentations of investment treaty policy and/or new model treaties from numerous governments including Brazil, the European Union, India, Indonesia, and South Africa. Summaries of Roundtable discussions and background papers are made public. This document briefly outlines these Roundtable discussions and background analysis.

2. The following economies are invited to participate in the Roundtable: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia,

Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and the European Union. Participation typically varies somewhat depending on the issues being discussed. International organizations including UNCTAD, ICSID, UNCITRAL and the PCA have also participated in Roundtable work on investment treaties. In addition to Roundtable work on investment treaties, governments also identify salient investment treaty issues and chair inter-governmental discussions in a separate regular OECD-hosted Investment Treaty Dialogue. For example, the EU and Canada prepared and chaired a Dialogue on a possible multilateral investment court in 2016.

3. This short outline focuses on work at the OECD directly addressing investment treaties and ISDS, which is centred in the Roundtable. In the field of investment, OECD work also addresses Responsible Business Conduct, the Policy Framework for Investment (helping governments improve the investment climate through a broad range of policies), Investment Policy Reviews, investment statistics and many other areas. More broadly, work on investment treaties and policy at the OECD takes place in the broader context of work with governments across the full range of policy fields at issue in ISDS (e.g. policies on the environment, health, energy, finance, budget, anti-bribery, competition, good regulation, etc.).

## **B. Initial Roundtable work on ISDS (2011-2012) (Roundtables 15, 16, 17; public consultation)<sup>1</sup>**

4. The initial Roundtable work focused on dispute settlement centred on discussion of a wide-ranging scoping paper on ISDS.<sup>2</sup> The goals were to (i) develop a broad picture of the ISDS system including recent developments and emerging issues of interest to governments; (ii) build up the stock of comparative information about dispute resolution under the system; and (iii) invite a broad range of governments to engage over time in a wide ranging, strategic and intergovernmental discussion of investment treaties. This section first summarises some findings about the diversity of government policies, treaty writing practices and experiences with ISDS and then outlines work on key issues in ISDS.

### **1. Findings on the diversity of government policies, treaty writing practices and experiences with investment arbitration**

- *Diverse legal sources.* Investment law differs from other major bodies of international economic law in that it is spread across an extraordinary range of international and domestic sources of law. Rather than being primarily anchored in a compact and broadly-applicable body of instruments (as at the WTO, for example, where key agreements apply to all 164 WTO members), investment law is contained in (i) some 3,000 bilateral or multilateral investment treaties with generally similar but by no means identical provisions; (ii) other international treaties (notably the ICSID Convention and the New York Convention); (iii) various arbitration rules including those primarily developed by governments (ICSID, UNCITRAL) as well as rules developed by business organizations (e.g., ICC, SCC); (iv) customary international law; and (v) the domestic law of many States. The diversity of the applicable procedural rules and substantive law makes it difficult to grasp the issues presented by the system.
- *Wide recognition that comparative analysis between ISDS and other international dispute resolution systems is informative.* Governments in the

<sup>1</sup> See Summaries of discussions [15th Roundtable \(http://oe.cd/1Zm\)](http://oe.cd/1Zm), [16th Roundtable \(http://oe.cd/1Zn\)](http://oe.cd/1Zn), and [17th Roundtable \(http://oe.cd/1Zo\)](http://oe.cd/1Zo) and [Public consultation on ISDS \(http://oe.cd/1Zp\)](http://oe.cd/1Zp).

<sup>2</sup> See Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03. <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

Roundtable considered how ISDS compares with dispute resolution at the WTO and under the European Court of Human Rights (ECHR) system. Although the systems address similar and at times overlapping issues, they vary in many respects (such as the types of parties with access to the system, remedies, selection and status of adjudicators, availability of appeal and timing).

- *A broadly-recognised need for empirical analysis of a fast-evolving system.* Roundtable governments supported sustained government attention to evaluating the system in light of increasing use and greater political debate in parliaments and societies.
- *Diverse bilateral investment treaty practice on regulating dispute settlement.* A large-scale statistical survey of ISDS provisions in bilateral investment treaties<sup>3</sup> showed that, although the vast majority contained ISDS provisions, their content varied markedly. ISDS through investment arbitration had become a common feature, but the 1,660 treaties in the sample contain an estimated 1,200 different rule sets on ISDS. There were differences in approach to many procedural issues (e.g., selection and regulation of arbitrators) as well as small differences in language.
- *Light but growing regulation of ISDS in bilateral investment treaties.* Most investment treaties were either silent or contained little or only sporadic guidance on important aspects of the conduct of ISDS. As a result, key decisions regarding the conduct of the proceedings were largely left to the disputing parties if they could agree, or to arbitral panels. Treaties that permitted covered investors to choose between bringing claims in local courts or ISDS, or to choose between arbitration options could give claimant investors considerable influence over significant issues.
- *Diverse experiences with regard to exposure to investor claims.* The countries represented at the Roundtable had had diverse experiences with ISDS. Some countries had defended multiple cases while others had not yet faced a claim. Some had adjusted the ISDS provisions in their model treaty texts and their agreed treaties to reflect their experiences as respondents.
- *Diverse policies and attitudes.* As outlined in a 2012 Roundtable progress report on its work on ISDS,<sup>4</sup> most countries in the Roundtable considered that the ISDS system was valuable but could be improved. Several countries stated that they consider that it is important to recognise that the ISDS system has worked well overall. It was also noted that the domestic courts in some countries perform poorly or are inefficient. Some countries participating in the Roundtable voiced fundamental concerns about the design and impact of ISDS and/or had never agreed to ISDS.

## 2. Key issues in ISDS

5. The ISDS scoping paper<sup>5</sup> and early Roundtable discussions on ISDS also addressed a range of key issues, some longstanding and others only emerging at that time:

- *Access to justice for different types of investors and for other victims of government misconduct.* A survey of the available information about ISDS claimants showed that (i) there was little or no public information about

<sup>3</sup> Pohl, J., K. Mashigo and A. Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", OECD Working Papers on International Investment, 2012/02. <http://dx.doi.org/10.1787/5k8xb71nf628-en>.

<sup>4</sup> "Government perspectives on investor-state dispute settlement: a progress report"; Freedom of Investment Roundtable, 14 December 2012 (<http://oe.cd/IZq>).

<sup>5</sup> Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03. <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

many investor claimants in ISDS; (ii) small investors were present as ISDS claimants; and (iii) medium and large multinational enterprises accounted for about half of the cases surveyed. Completion rates for claims and outcomes were not evaluated. Nationality of the controlling entity/individual was often hard to determine. It was noted that while ISDS is a powerful international dispute resolution system available to covered foreign investors, other investors and other non-state actors without access to ISDS must generally rely on their home States for espousal of international claims (unless they have access to certain regional human rights systems).

- *Costs and third party financing of investment arbitration claims.* The ISDS scoping paper noted generally that: (i) costs of ISDS were high and some reform efforts were underway to try to reduce them; and (ii) rules for allocating these costs among the parties were very flexible and were a source of uncertainty. Limited available information suggested average costs of USD 8 million/case. The high costs and potentially high damages awards characteristic of ISDS appeared to make it an attractive market for third party funders.
- *The question of a level playing field between foreign and domestic investors: remedies and treaty shopping.* The question of whether investment treaties give covered foreign investors greater substantive and procedural rights than those of domestic investors under domestic law has been debated in a number of jurisdictions in recent years, as have the relevant policy conclusions. Initial analysis and discussions focused on available remedies (generally only non-pecuniary remedies under domestic law in contrast to money damages in ISDS) and the broad availability of “treaty shopping” in ISDS.
- *Enforcement of ISDS awards.* At the time of the initial discussions, state compliance with ISDS arbitration awards was generally considered to have been good, but some problems had arisen with compliance with both ICSID and non-ICSID awards. A number of Roundtable participants and stakeholders expressed concerns about enforcement.
- *Characteristics, selection, incentives and regulation of arbitrators.* The Roundtable considered an overview in the ISDS scoping paper of available information and policy issues relating to the (i) characteristics of the pool of investment arbitrators (e.g., elite status in the legal profession, preponderance of lawyers in private practice, low levels of government and public law backgrounds, contrast between regional origins of arbitrators and respondent states, 95 per cent/5 per cent gender balance, etc.); (ii) selection of arbitrators including the debate over appointment of arbitrators by parties and their counsel in ISDS, and the issue of information asymmetries between disputing parties; (iii) the issue of economic incentives of arbitrators and conflicts of interest; and (iv) the limited regulation of arbitrators including as applied to emerging issues such as the multiple roles of individuals as arbitrator, legal counsel and expert.

### **C. Follow-up work on consistency in ISDS and government input into interpretation, and on shareholder claims for reflective loss (2012-2014) (Roundtables 18, 19, 20, 21)<sup>6</sup>**

6. The initial work on ISDS had addressed the issue of consistency and a substantial number of Roundtable participants expressed serious concerns about inconsistencies in ISDS decisions. Some others took a more positive view,

<sup>6</sup> See Summaries of discussions 18th Roundtable (<http://oe.cd/1Zr>), 19th Roundtable (<http://oe.cd/1Zs>), 20th Roundtable (<http://oe.cd/1Zt>), 21st Roundtable (<http://oe.cd/1Zu>).

highlighting differences between treaties and contexts. Many tools exist for governments to communicate about how treaties should be interpreted. The Roundtable requested follow-up work on consistency including on the role of government input into interpretation. It subsequently addressed (i) different forms of government “voice” as an alternative to “exit” from treaties perceived as subject to unwanted interpretations;<sup>7</sup> (ii) the legal regime governing joint government interpretations of investment treaties;<sup>8</sup> and (iii) and state-to-state dispute settlement (SSDS) as a possible method to improve treaty interpretation.<sup>9</sup>

7. Roundtable work on the acceptance in ISDS of claims by covered shareholders for losses incurred by companies in which they own shares (claims for reflective loss) began as part of the work on consistency. A paper on the impact of reflective loss claims on consistency<sup>10</sup> outlined the sharply contrasting approaches to such claims between advanced systems of corporate law on the one hand (where reflective loss claims are generally barred for policy reasons) and in ISDS on the other hand (where reflective loss claims have been widely permitted). It noted that while the ISDS approach provides benefits to claimant shareholders, the consistency-related risks associated with reflective loss claims included concurrent or multiple claims arising out of the same facts and parties, inconsistent decisions, exposure of governments to double recovery, reduced predictability, hindrance of amicable settlement of claims and facilitation of treaty shopping.

8. The initial work on shareholders had also noted that the unusual approach to claims for reflective loss in ISDS can disrupt the hierarchy of claims on company assets. It may create new risks for some investors in companies (creditors and non-covered shareholders), possibly increasing uncertainty and raising the overall costs of capital for investment. (Creditors were broadly defined to include contractual claimants on the company, including bondholders and other lenders, employees, suppliers and others.) The Roundtable subsequently further investigated the corporate law issues raised by reflective loss claims<sup>11</sup> including the impact on corporate finance and investment, corporate governance and the transferability of shares; it also addressed relevant investment treaty practice.<sup>12</sup> A further paper presented the issues primarily to a business audience.<sup>13</sup>

## **D. Current Roundtable work on investment treaties (2014-present) (Roundtables 22, 23, 24, 25, 26)<sup>14</sup>**

### **1. The balance between investor protection and governments’ right to regulate**

9. Governments are now frequently called on to explain their policy choices in particular with respect to the balance between governments’ right to regulate and the

<sup>7</sup> Gordon, K. and J. Pohl (2015), “Investment Treaties over Time — Treaty Practice and Interpretation in a Changing World”, OECD Working Papers on International Investment, 2015/02. <http://dx.doi.org/10.1787/5js7rhd8sq7h-en>.

<sup>8</sup> Gaukrodger, D. (2016), “The legal framework applicable to joint interpretive agreements of investment treaties”, OECD Working Papers on International Investment, 2016/01. <http://dx.doi.org/10.1787/5jm3xgt6f29w-en>.

<sup>9</sup> Gaukrodger, D. (2016), “State to State dispute settlement and the interpretation of investment treaties”, OECD Working Papers on International Investment, 2016/03. <http://dx.doi.org/10.1787/5jlr71rq1j30-en>.

<sup>10</sup> Gaukrodger, D. (2013), “Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency”, OECD Working Papers on International Investment, 2013/03. <http://dx.doi.org/10.1787/5k3w9t44mt0v-en>.

<sup>11</sup> Gaukrodger, D. (2014), “Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law”, OECD Working Papers on International Investment, 2014/02. <http://dx.doi.org/10.1787/5jz0xvngnrmr3-en>.

<sup>12</sup> Gaukrodger, D. (2014), “Investment Treaties and Shareholder Claims: Analysis of Treaty Practice”, OECD Working Papers on International Investment, 2014/03. <http://dx.doi.org/10.1787/5jxvk6shpvs4-en>.

<sup>13</sup> “The impact of investment treaties on companies, shareholders and creditors” OECD Business and Finance Outlook 2016, Chapter 8 (<http://oe.cd/1Zv>).

<sup>14</sup> Summary of the 22nd Roundtable (<http://oe.cd/1Zw>), 23rd Roundtable (<http://oe.cd/1Zx>), 24th Roundtable (<http://oe.cd/1Zy>), 25th Roundtable (<http://oe.cd/1Zz>).

protection of foreign and domestic investors. Suggested methods to address the balance in investment treaties can include adjustments to substantive law that (i) define or limit individual treaty protections for foreign investors; (ii) establish carve-outs or special regimes for particular sectors; (iii) incorporate general exceptions, right-to-regulate clauses or clarifications; (iv) clarify or establish conditions on access to treaty benefits, such as compliance with domestic law; or (v) align the treatment of foreign and domestic investors. They can also include the design of dispute resolution (see below).

10. The ongoing work in this area has included (i) discussion of a scoping paper on balancing investor protection and governments' right to regulate;<sup>15</sup> (ii) an examination of fair and equitable treatment (FET) provisions with particular regard to NAFTA government policy<sup>16</sup> and views about FET as one possible method to address the balance by limiting FET to customary international law and actively intervening on its interpretation; and (iii) an Investment Treaty Conference addressing The Quest for Balance.<sup>17</sup>

## **2. Societal benefits and costs of investment treaties**

11. Early Roundtable discussions considered the development impacts of ISDS, including its impact on domestic institutions of public governance. Since 2014, broader work on the societal benefits and costs of investment treaties has generated an inventory of evidence on the economic effects for home, host and transit economies; the effects on global and domestic governance; and the impact on the pursuit of strategic foreign policy objectives. The work also identifies information needed to make a more comprehensive assessment of benefits and costs. The issues were discussed at the 2017 Investment Treaty Conference on Evaluating and Enhancing the Outcomes of Investment Treaties.<sup>18</sup>

## **3. Arbitrators, adjudicators and appointing authorities**

12. Ongoing work has reviewed recent developments in this area including the investment court system approach to a standing tribunal as set out in the recent Comprehensive Economic and Trade Agreement between Canada and the EU (CETA). It is also considering the role and importance of appointing authorities in investor-state arbitration. Appointing authorities are typically charged with appointing the chair of an arbitral tribunal if the parties or co-arbitrators are unable to agree on one. Negotiation theory suggests that appointing authority nominating practices likely have significant influence on the composition of investor-state arbitration tribunals and the overall pool of arbitrators. The impact of dispute settlement institutions on the balancing of interests was also addressed at the Investment Treaty Conference on The Quest for Balance,<sup>19</sup> and a possible multilateral investment court was addressed in an Investment Treaty Dialogue.

<sup>15</sup> Gaukrodger, D. (2017), "The balance between investor protection and the right to regulate in investment treaties: A scoping paper", OECD Working Papers on International Investment, 2017/02. <http://dx.doi.org/10.1787/82786801-en>.

<sup>16</sup> Gaukrodger, D. (2017), "Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law", OECD Working Papers on International Investment, 2017/03. <http://dx.doi.org/10.1787/0a62034b-en>.

<sup>17</sup> Conference on investment treaties: The quest for balance between investor protection and governments' right to regulate (<http://oe.cd/1ZA>).

<sup>18</sup> Conference on evaluating and enhancing outcomes of investment treaties (<http://oe.cd/1ZB>).

<sup>19</sup> Conference on investment treaties: The quest for balance between investor protection and governments' right to regulate (<http://oe.cd/1ZA>).



## **E. Other work partly relating to investment treaties (Responsible Business Conduct, State-owned enterprises, investment facilitation)**

13. Many governments are seeking to attract investment that meets the standards of responsible business conduct (RBC) and sustainable development. A broad survey of treaty provisions in 2014<sup>20</sup> revealed that only 12 per cent contained references to these issues. However, practices varied by country and the frequency of inclusion was increasing rapidly. The potential role of investment treaties in fostering RBC was discussed at the first government-led Investment Treaty Dialogue in 2015. Together with the Roundtable, several OECD Committees have engaged in an intensive discussion of the role of state-owned enterprises in domestic and international markets,<sup>21</sup> with attention given to relevant investment treaty policy. The Roundtable is also considering the issue of investment facilitation, building on the long-standing attention to many similar issues in the development and application of the Policy Framework for Investment.

## **F. Conclusion**

14. The views shared by countries participating in the Roundtable and supporting background studies by the OECD Secretariat have generated information that can advance mutual understanding and help governments with their treaty and investment policy.

## **2. United Nations Conference on Trade and Development**

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Growing unease with the current functioning of the global international investment agreements (IIA) regime, together with today's sustainable development imperative, has triggered a move towards reforming international investment rule making. Over the past years, countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate new, more modern IIAs. Significant progress has been made during this first phase of IIA reform, but much remains to be done. To move to phase 2 of IIA reform, policy attention needs to focus on comprehensively modernizing the stock of outdated, first-generation treaties. In the World Investment Report 2017, UNCTAD presents and analyses the pros and cons of 10 policy options for reforming existing old-generation IIAs (UNCTAD, 2017). Reforming investment dispute settlement is high on the agenda, with concrete steps undertaken, including at the multilateral level. Some of the reform steps could potentially extend to the existing stock of older treaties. Overall, reform efforts should aim at a holistic approach, ensuring a transparent and inclusive process, and not losing sight of the overarching objective of sustainable development.

## **I. Reforming investment dispute settlement as part of UNCTAD's Road Map for IIA Reform**

UNCTAD's advocacy for systemic and sustainable development-oriented investment policymaking started in 2010. Following UNCTAD's Investment Policy Framework

<sup>20</sup> Gordon, K., J. Pohl and M. Bouchard (2014), "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey", OECD Working Papers on International Investment, 2014/01. <http://dx.doi.org/10.1787/5jz0xvngx1zlt-en>.

<sup>21</sup> "State-Owned Enterprises as Global Competitors – A Challenge or an Opportunity?", 2016 (<http://oe.cd/1ZC>).



for Sustainable Development (published in 2012 and updated in 2015) (figure 1), which offers policy options for designing new-generation IIAs, it culminated in UNCTAD's Road Map for IIA Reform (2015) (figure 2), which sets out five action areas for reform: (i) safeguarding the right to regulate, while providing protection; (ii) reforming investment dispute settlement; (iii) promoting and facilitating investment; (iv) ensuring responsible investment; and (v) enhancing systemic consistency.

Figure 1

**UNCTAD's Investment Policy Framework for Sustainable Development**  
[Source: ©UNCTAD]

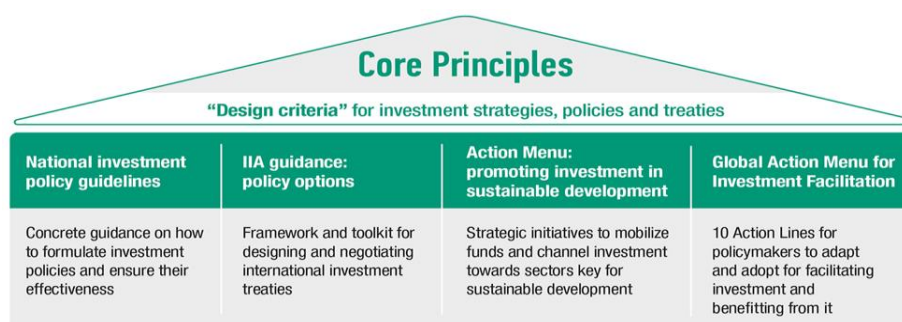
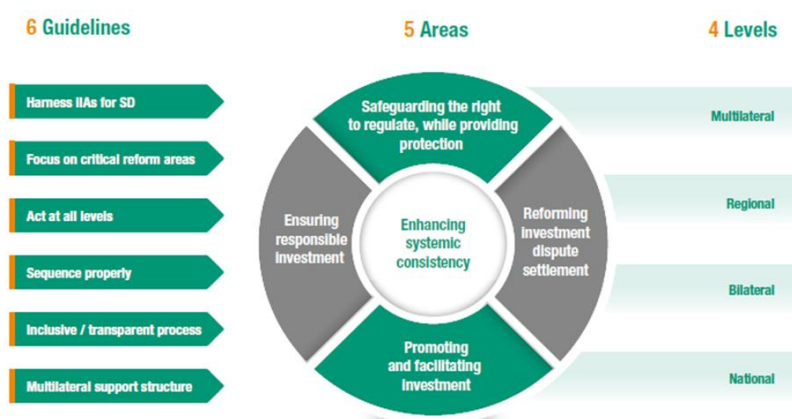


Figure 2

**UNCTAD's Road Map for IIA Reform** [Source: ©UNCTAD]



Building on UNCTAD's past work on investor-State dispute settlement (ISDS),<sup>22</sup> the Road Map identified three sets of options for improving investment dispute settlement along two prongs of actions: reforming the existing mechanism of ad hoc arbitration for ISDS, while keeping its basic structure; or replacing it (table 1).<sup>23</sup>

<sup>22</sup> This includes, for example, the 2012 version of UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2012 at [http://unctad.org/en/PublicationsLibrary/diaepcb2012d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf)), the World Investment Report 2013 (UNCTAD, 2013, at [http://unctad.org/en/PublicationsLibrary/wir2013\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf)) and the Sequel on ISDS (UNCTAD, 2014, at [http://unctad.org/en/PublicationsLibrary/diaeia2013d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf)). See also "Policy Options for IIAs: Part A. Post-Establishment" in the 2015 version of UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015a, at [http://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf)).

<sup>23</sup> For a more detailed analysis of the set of options for reforming investment dispute settlement, including their pros and cons, see UNCTAD (2015b at [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf)), Chapter IV, pp. 145-155.

Table 1  
Sets of options for reforming investment dispute settlement

Reforming existing investor-State arbitration		Replacing existing investor-State arbitration
Fixing existing ISDS mechanisms	Adding new elements to existing ISDS mechanisms	
<b>1. Improving the arbitral process</b> , e.g. by making it more transparent and streamlined, discouraging submission of unfounded claims, addressing ongoing concerns about arbitrator appointments and potential conflicts. <b>2. Limiting investors' access</b> , e.g. by reducing the subject-matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by "mailbox" companies <b>3. Using filters for channelling sensitive cases</b> to State-State dispute settlement <b>4. Introducing local litigation requirements</b> as a precondition for ISDS	<b>1. Building in effective alternative dispute resolution</b> <b>2. Introducing an appeals facility</b> (whether bilateral, regional or multilateral)	<b>1. Creating a standing international investment court</b> <b>2. Replacing ISDS by State-State dispute settlement</b> <b>3. Replacing ISDS by domestic dispute resolution</b>

Source: ©UNCTAD, World Investment Report 2015.

All identified reform options have their pros and cons, and pose their own specific challenges. Whatever option countries prefer, they need to bear in mind three challenges: (i) what is needed is comprehensive reform, applying not only to ISDS but also to the substantive IIA provisions; (ii) reform steps ideally should not only apply to future treaties, but also address the stock of existing IIAs; and (iii) domestic capacity-building is needed for improving developing countries' administrative and judicial capacities, a prerequisite for some of the reform options.

## A. Reforming existing investor-State arbitration

The option of keeping and reforming the existing system of investor-State arbitration has two entry points: fixing the existing system and adding to it.

### *Fixing the existing ISDS mechanisms*

Reform elements could be the inclusion in IIAs of new provisions designed to (1) improve the arbitral process; (2) refine investors' access to investment arbitration; (3) establish filters for channelling sensitive cases to State-State dispute settlement; and (4) introduce local litigation requirements. These reform options could be implemented by contracting States in existing and future individual IIAs and would not require coordinated actions by a large number of countries.

(1) Improving the arbitral process: This option focuses on reforming the way arbitration proceedings are conducted while preserving the main features of the ISDS system. The goals of such modifications are to (i) enhance the legitimacy of the ISDS system, (ii) enhance the contracting parties' control over the interpretation of their treaties and/or to (iii) streamline the process and make it more efficient.

(2) Limiting investors' access to ISDS: This approach aims to narrow the range of situations in which foreign investors may resort to international arbitration, thereby reducing States' exposure to legal and financial risks posed by ISDS.

(3) Using filters for channelling sensitive cases to State-State dispute settlement: This reform option provides for State-State dispute settlement if a joint committee fails to resolve a case. While maintaining the overall structure of today's ISDS mechanism, this constitutes a "renvoi" of disputes on sensitive issues to State-State dispute settlement.

(4) Introducing local litigation requirements as a precondition for ISDS (including exhaustion of local remedies): This reform option aims to promote recourse by foreign investors to domestic courts while retaining the option for

investor-State arbitration, as a remedy of last resort (i.e. after a certain period of time of litigating the dispute in domestic courts or after exhaustion of local remedies). In so doing, it would respond to some of the concerns arising from the steep rise in ISDS cases over the last decade.

*Adding new elements to the existing ISDS mechanisms*

These policy options add new elements to complement the existing investor-State arbitration mechanism. They can be combined with the above-mentioned improvements of the mechanism.

(1) Building in effective alternative dispute resolution: This approach to ISDS reform promotes the use of alternative dispute resolution (ADR) mechanisms as a step before the commencement of international investment arbitration. Although ADR cannot in itself solve key ISDS-related challenges, it can reduce the number of disputes which result in full-scale arbitration. This renders it a complementary, rather than a stand-alone, avenue for ISDS reform. Policy options are available at the national and the international level (through the IIA), that can be complementary, such as the designation of lead agencies for amicable settlements or ombuds offices at the national level and the inclusion of ADR provisions in IIAs (UNCTAD, 2015b).

(2) Appeals facility: This option would preserve the structure of the existing investment arbitration mechanism and add a new layer to it. An appeals facility could take two main forms: either a standing or an ad hoc body. It could have the competence to undertake a substantive review and correct the arbitral tribunals' first instance decisions. An appellate mechanism could be given review jurisdiction that goes beyond the scope of review available under the existing annulment procedures under the ICSID Convention. It could serve to enhance the predictability of treaty interpretation and improve consistency among arbitral awards. All this could significantly contribute to enhancing the political acceptability of ISDS and the IIA regime as a whole.

Should countries decide to opt for establishing such an appeals mechanism, questions would need to be resolved regarding several sets of issues: (i) the establishment of such a body, notably whether it would have a bilateral, regional or multilateral nature; whether it would be permanent or ad hoc; (ii) its organization and institutional set-up; (iii) the added time and cost of the proceedings; and (iv) the competence of such a body.

## **B. Replacing the existing ISDS system with other dispute resolution mechanisms**

The options below would abolish the existing system of ad hoc investor-State arbitration and replace it with other mechanisms for settling investment disputes. Potential replacements include (1) the creation of a standing international investment court, (2) State-State dispute settlement, and/or (3) reliance on domestic judicial systems of the host State. The replacement options differ in the extent of change they bring. States can focus on one of the options or can pursue them in parallel or in combination.

(1) Standing international investment court: This option retains investors' right to bring claims against host States but replaces the system of multiple ad hoc arbitral tribunals with a single institutional structure, a standing international investment court. Such a court would consist of judges appointed or elected by States on a permanent basis; it would be competent for all investment disputes arising from IIAs made subject to its jurisdiction and could also have an appeals chamber. A standing investment court would be a public institution serving the interests of investors, States and other stakeholders and, more broadly, strengthening the legitimacy of the investor-State regime. It has also been suggested, that the competence of the court be broadened, depending upon the content of the

agreements made subject to its jurisdiction, for example, by giving legal standing or procedural rights to other stakeholders.

Clearly, establishing such a court raises a number of important legal and political challenges, and, in its very nature, would constitute a long-term project. As countries move in this direction, they need to consider a number of key issues: (i) the establishment of such a court, such as the need to build consensus among a critical mass of countries around a convention establishing such a court; (ii) the organization and institutional set-up, such as the location, financing and staffing of the court; (iii) the participation of countries in the court and how to transition from a possible bilateral or plurilateral court to a more universal structure serving the needs of developing and least developed countries; (iv) the competence of the court, such as the type of treaties and cases it is competent to address.

(2) State-State dispute settlement: State-State arbitration is included in virtually all existing IIAs, and it is also the approach taken by the WTO for resolving international trade disputes. Unlike the fostering of State-State dispute resolution as a complement to ISDS, this option presupposes that State-State proceedings would be the only way of settling investment disputes at the international level. The home State would have discretion on whether to bring a claim. States would need to decide on the court that should hear a case; options include the International Court of Justice, ad hoc tribunals or an international court as envisaged above. The option of replacing ISDS with State-State dispute settlement can help to address some of the concerns with regard to ISDS. However, it also raises a number of difficult challenges that would need to be addressed before taking this route.

(3) Exclusive reliance on domestic dispute resolution: This option abolishes investors' right to bring claims against host States in international tribunals and limits their options for dispute resolution to domestic courts. Unlike the promotion of domestic resolution as a step preceding investor claims at the international level (e.g. exhaustion of local remedies, local litigation requirement), under this option, domestic judicial institutions would be the only and final mechanism for settling investor-State disputes. This option entails a number of pros and cons, and some have noted that it has merits mainly in countries where reliance on ISDS is less important because of their sound legal systems, good governance and local courts' expertise.

## II. Recent developments

So far, 109 countries have been respondents to one or more known ISDS claims (UNCTAD, 2017). In 2016, 62 new cases were initiated, bringing the total number of known cases to 767. This number is lower than the 74 initiated in the preceding year, but higher than the 10-year average of 49 cases per year (2006-2015). About two thirds of ISDS cases in 2016 were brought under bilateral investment treaties (BITs), most of them dating back to the 1980s and 1990s. The IIAs most frequently invoked in 2016 were the Energy Charter Treaty (ECT) (with 10 cases), the North American Free Trade Agreement (NAFTA) and the Russian Federation — Ukraine BIT (3 each).

In terms of treaty-making, most of today's new IIAs include sustainable development-oriented reform elements that preserve the right to regulate, while maintaining protection, foster responsible investment and improve investment dispute settlement (UNCTAD, 2017). A comparison of treaties over time shows that selected ISDS reform options are more frequently found in recent BITs than in earlier ones (table 2).

**Table 2**  
**Selected ISDS options in IIAs — comparison of “old” and “new” BITs**

Treaty provisions Selected ISDS options	UNCTAD Policy Framework Option	Earlier BITs (1959-2010) (2,432)	Recent BITs (2011-2016) (110)
Limit treaty provisions subject to ISDS or exclude policy areas from ISDS	6.2.1	8%	29%
Limit time period to submit claims	6.2.1	5%	40%

Source: ©UNCTAD, IIA Mapping Project.<sup>24</sup>

Among the IIAs signed in 2015 and 2016, most of the treaties reviewed included at least one element limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS or limiting time period to submit claims), with several omitting ISDS altogether (e.g. those signed by Brazil with its treaty partners).

To these reform efforts add steps for improving investment dispute settlement undertaken at the multilateral level. Current discussions on the establishment of a multilateral investment court and/or appellate mechanism could result in an instrument that ultimately changes ISDS provisions included in earlier treaties. Such efforts to reform investment dispute settlement can help address key concerns and pursue procedural and institutional improvements.

### III. Conclusions: a holistic, inclusive and sustainable development-oriented process for reforming investment dispute settlement

The IIA regime is currently facing several challenges of which ISDS is but one part. To effectively reform the current IIA regime, more thinking would be needed on how to synchronize reform of investment dispute settlement and the reform of substantive IIA content. UNCTAD’s Road Map for IIA Reform can provide guidance for addressing these key areas of IIA reform (UNCTAD, 2015a) and so can UNCTAD’s 10 policy options for modernizing the existing stock of old-generation IIAs, as set out in the World Investment Report 2017.<sup>25</sup>

Throughout, countries’ engagements in reform initiatives should be guided by three key considerations:<sup>26</sup>

- (i) Taking a holistic approach to IIAs and IIA reform; exploring new ways for dispute settlement, while not losing sight of substantive content of the current stock of treaties.
- (ii) Ensuring an inclusive and transparent process, addressing the “development challenge” (i.e. avoiding a situation in which countries with small bargaining power or latecomers find themselves in the role of “rule-takers”) and involving other affected stakeholders.

<sup>24</sup> The numbering refers to “Policy Options for IIAs: Part A. Post-Establishment” in the 2015 version of UNCTAD’s Investment Policy Framework for Sustainable Development (UNCTAD, 2015a). Data derived from UNCTAD’s IIA Mapping Project. The Mapping Project is an UNCTAD-led collaboration of more than 45 universities around the globe. Over 2,500 IIAs have been mapped to date, for 100 features each (including some 20 options for the settlement of investment disputes).

<sup>25</sup> For a detailed analysis of the 10 policy options for phase 2 of IIA reform, and their pros and cons, see Chapter III of the World Investment Report 2017 (UNCTAD, 2017), at [http://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf).

<sup>26</sup> See also “UNCTAD Director contributes to exploratory discussions on a multilateral investment court”, 15 December 2016, available at <http://investmentpolicyhub.unctad.org/News/Calendar/Archive/533>.

- (iii) Not losing sight of the overarching objective of sustainable development-oriented IIA reform, pursuing an IIA regime that is conducive to sustainable development and mobilizes investment required for achieving the Sustainable Development Goals (SDGs).

Comprehensive regime reform — addressing new and existing treaties across the five action areas identified in UNCTAD's Road Map — would benefit from intensified multilateral backstopping. UNCTAD, through its three pillars of work (research and policy analysis, technical assistance and intergovernmental consensus building) can play a key role in this regard. As the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's existing multi-layered and multifaceted IIA regime, UNCTAD can help bring coordination and coherence to reform efforts.

UNCTAD additional resources

UNCTAD International Investment Agreements Navigator, available at <http://investmentpolicyhub.unctad.org/IIA>

UNCTAD IIA Mapping Project, available at

<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>

Figure 1:

UNCTAD Investment Dispute Settlement Navigator, available at <http://investmentpolicyhub.unctad.org/ISDS>