

Presentation on Issues in the EU/Canada Discussion Paper on Establishment of a Multilateral Investment Dispute Settlement System

Adjudicators' Qualifications; Independence and Neutrality

[Art. 4.1(b)], Investment Division, OECD

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I would like to congratulate the European Commission and Canada for developing the discussion note and bring governments together to discuss these important issues. I would also like to thank the organisers for inviting us to participate in this important meeting.

I have been asked to address two issues: first, qualifications of adjudicators and second, the issues of independence and neutrality. I will deal with them in turn.

Qualifications

Governments and others addressed the desirable qualifications for investment treaty adjudicators at our 2016 Investment Treaty Conference and the issue was also discussed in October between governments at a meeting of our Investment Treaty Dialogue. Those considerations together with a few additional ones will hopefully provide a good initial basis for a discussion on qualifications today.

I will address four issues relating to qualifications: (i) treaty practice on adjudicator qualifications; (ii) the nature of the adjudicator pool; (iii) possible different or additional qualifications to those in the discussion paper; and (iv) generalist vs specialist adjudicators.

Treaty practice on adjudicator qualifications

A first point is that, in current practice, the necessary qualifications for investment arbitrators are expressed only in very general terms. Few investment treaties specify required competencies for arbitrators. Those that do use very general terms. So disputing parties and appointing authorities generally have broad freedom to choose people as arbitrators or potential arbitrators.

Second, the EU, Canada and Viet Nam have innovated in their recent treaties. They have adopted qualifications that are similar to those for international courts. Adjudicators must either be qualified to be domestic law judges or be

jurists of recognised competence. Expertise in public international law is required. Expertise in investment and trade law, including in dispute resolution, is desirable. The discussion paper identifies similar criteria – it's an approach inspired by the qualifications for judges at international courts.

Let's turn to the question of the current pool of arbitrators in ISDS.

The pool of arbitrators

It is useful to start from the characteristics of the known pool of ISDS arbitrators based on available information. Noted characteristics from our 2012 analysis include elite status in the legal profession, very high levels of compensation, a high representation of private lawyers with commercial arbitration experience, less representation of government backgrounds, very few if any serving government officials (such as investment treaty negotiators), a high representation of European and North American countries and a 95%/5% gender distribution. It appeared that over 50% of ISDS arbitrators had acted as legal counsel for investor claimants in other cases, while approximately 10% had done so for respondent states. Things may have evolved somewhat since our analysis but the broad outlines are likely still accurate.

Participants yesterday and today have pointed to the importance of diagnosis -- of identifying the issues that need to be addressed.

The description of the current pool of ISDS arbitrators raises a number of potential issues for governments including issues of diagnosis. For example, one question for governments is whether an adjudicator pool composed of private lawyers to a significant degree is well adapted to the questions at issue in ISDS. It can be framed as an issue of competence or legitimacy. We know that at the WTO the pool of panellists for trade cases comprises many government officials, often trade diplomats here in Geneva. They have also been a major presence on the WTO Appellate Body. We also know that that approach at the WTO goes along with a strong Secretariat role.

I think it is fair to say that some of the support for more of a court model has been inspired by a desire to change the composition of the group of adjudicators. A change is seen by some as important in protecting the right to regulate. It is also advanced as necessary for legitimacy. There are of course different views on these questions. Some, like the Association of German Judges, consider that the rules developed by the EU are not clear enough in this regard and that a change in adjudicator personnel is not certain. They think that the systems for nomination will be determinative in achieving what they see as

necessary change away from a pool composed primarily of commercial arbitrators.

I would observe here that the issue of a change in adjudicators is not necessarily linked with a court model. It could be achieved within the context of the existing system. In fact, without taking any position on whether a change of adjudicators might be desirable, the governments in our investment Roundtable have requested us to initiate a dialogue with appointing authorities under the current system to learn more about their role and views as part of our work on ISDS. The interesting input from the appointing authorities at this meeting -- Meg Kinnear (ICSID) and [Art. 4.1(b)] (PCA) -- makes the value of that dialogue clear for governments and others.

Appointing authorities are a focus of interest in part because they have a key role in determining the nature of the arbitrator pool -- for several reasons. First, they play a direct role if the parties cannot agree on a chair -- they either select the chair or provide a list from which he/she is selected. As Meg's and [Art. 4.1(b)] interventions here suggest, that direct role appears to be growing in part as a result of the polarisation of the pool of arbitrators.

Basic negotiation theory suggests a broader influence of appointing authorities on the arbitrator pool in two ways: (i) disputing parties and their counsel negotiate about an agreed chair against the background of what they would expect to get from the appointing authority, which affects the negotiations; and (ii) disputing parties and their counsel select their co-arbitrator against the background of the expected chair.

Some appointing authorities have told us they are trying to address certain issues about the arbitrator pool in different ways.

There are other measures government could take with regard to the pool of adjudicators. Governments could also seek to develop potential adjudicators with public sector or public law backgrounds. They could try to address qualifications in their treaties.

So there are a number of potential approaches if the diagnosis were that a change in the backgrounds and experience of adjudicators is needed -- although a court model would likely be the most direct way to achieve that outcome.

Additional or different qualifications to those set forth in the discussion paper

The discussion paper refers to some qualifications as I noted. In terms of possible additional or different qualifications, I will just list some considerations that have been raised. There are of course important issues of regional representation and diversity that Meg addressed and that I will omit here.

Some business and lawyer groups have advocated for an express requirement of knowledge of international investment law. They considered that investment law is complex and requires specialised knowledge.

Some governments like the US and Japan have emphasised their interest in the ability to choose an ad hoc arbitrator with expertise or knowledge relevant to the matter in dispute. They have seen this as important in providing a tribunal with competence to address the issues in the particular case or in explaining their success in defending cases.

It has been suggested that public law expertise – on issues like constitutional and administrative law – is an important qualification. Investment treaty cases are often described as a form of international judicial review involving a claim that a government has engaged in misconduct towards a private actor. These issues are similar to the types of issues regularly considered by public law judges in domestic law or by human rights court judges.

Some see selective access for foreign investors as the main problem with ISDS. They consider that different or broader qualifications for adjudicators would not address the key issue.

Since we are at preliminary stage that involves a degree of issue spotting, I would raise a fairly novel point. ISDS involves very large awards of legal costs against losing parties - frequently running into the millions of dollars or euros. This is unusual in public international law - each side usually bears its own costs.

There is little in the way of institutions in ISDS to evaluate the reasonableness of costs claims. Domestic systems that shift litigation costs have such systems which typically involve costs specialists rather than judges. It is not seen as a role that judges can easily or efficiently carry out. So consideration could be given to providing for people with qualifications in that area, again both in a possible investment court or in the current system.

Generalist vs. specialist adjudicators

Another issue is the choice between relatively generalist judges or experts in a particular field. Many international and domestic courts are staffed by generalist judges. Such courts generally address technical issues through the use of experts. It was suggested that the broader perspective of generalist judges can be important in the balancing of interests. For example, the WTO decision to select as initial WTO Appellate Body members distinguished individuals who were not closely associated with the international trade community has been described as important in the development of the AB as a separate institution with an ability to guide panels. As noted, others see a need for specialised knowledge.

Conclusion

There are important issues of diagnosis for governments. There is also a need for more information about the current system.

There are probably limits on the power of general criteria in a treaty although they serve a signalling function. The nomination systems, as described by Meg, may play a greater role in practice in defining the adjudicator pool.

Independence and neutrality

This is another sensitive and important topic. We have a lot of expertise in the room today and can benefit from it. I am going to try to provide some background on some of the major institutional issues that are presented by the discussion paper in comparison with investor-state arbitration.

Public and parliamentary concerns about investor-state arbitration in a number of jurisdictions have focused to a considerable degree on criticism about private "for-profit" arbitrators. It is an important question for governments to consider as part of their diagnosis. It goes primarily to issues of legitimacy.

The issue of the economic incentives of ISDS arbitrators was raised by some governments early in our inter-governmental discussion of ISDS. It is discussed in our [2012 scoping paper on ISDS](#) and the 2012 [progress report](#) by our investment Roundtable and the Roundtable has kept it under consideration since then.

I am sure many of you are familiar with some of the concerns in this area from the public debate. The ad hoc nature of arbitral appointments is seen by some as generating an interest in future appointments. The payment of arbitrators by parties on a per hour basis is seen by some as creating an incentive for arbitrators to, for example, accept jurisdiction and thus to continue to earn substantial fees. This view is not limited to NGOs. In an article that many of you may have seen, The Economist magazine pointed to this issue in light of arbitral fees running to 600-700 dollars an hour. There is also criticism of the possible multiple roles of the same person as arbitrator, legal counsel and expert, including concurrently in different ISDS cases.

Sundaresh Menon, who was then the Attorney-General in Singapore and is now the Chief Justice, addressed these issues in a well-known 2012 speech. He underlined both the excessive nature of some criticism and the existence of issues for consideration. Here is part of what he said:

Unbridled criticisms of how arbitrators are invariably profit-driven and biased, or that they always act strategically so as to be repeat players, are undoubtedly overstated. However, it is undeniable that

the typical conditions that assure impartiality in the judicial sphere are lacking in arbitration.¹

So I think it is fair to say there are public concerns. That raises issues of diagnosis for governments.

Some participants yesterday referred to the importance of preserving the strengths of the current system. One key element is the protection of investor-state arbitration tribunals from being influenced by host state governments. So consideration of any changes needs to bear that in mind.

It is useful to start from where we are. I will outline the current situation in five brief points.

Current situation

First, applicable principles in this area are again quite general at present. Generally, they are limited to requiring independence and/or impartiality without further detail. They are outlined in our 2012 ISDS scoping paper.

Second, alongside the applicable principles, the arbitration bar has developed more detailed principles, notably the IBA Principles.

Third, there have been a considerable number of challenges to individual arbitrators in which the applicable general principles are applied.

Fourth, Codes of conduct have emerged as an important issue. A range of treaties calls for governments to develop a code of conduct. Rules developed by the bar are not seen as fully adequate.

Fifth, in the context of challenges to individual arbitrators and rules within the arbitration system, the issues of ad hoc appointment or compensation by the hour are not at issue. They are taken as given.

The same is likely to be true of codes of conduct to be developed under treaties that call for investor-state arbitration.

¹ See Sundaresh Menon, [International Arbitration: The Coming of a New Age for Asia \(and Elsewhere\)](#), ICCA Congress 2012, Opening Plenary Session, §§ 39-40.

Discussion paper issues

Let me turn now to the discussion paper. The EU and Canada have emphasised the importance of investment treaty dispute settlement meeting the standard of well-established domestic courts and international courts. Investor-state arbitration has not often been subject to evaluation from this perspective.

As I mentioned yesterday, we compared ISDS to the WTO and the ECHR in our initial work in 2012. In our public consultation, we asked for views about a number of issues relating to conflicts of interest. But we did not ask questions about the differences between investor-state arbitration and well-established domestic courts. We did not for example ask about the ad hoc system of nomination or per hour compensation as such.

Today, there is growing interest in this comparison. In a number of jurisdictions, domestic judges and academics are examining investor-state arbitration. That scrutiny is likely to continue as cases continue to emerge. And the discussion paper squarely presents the issues.

Although more research is necessary, it appears that few if any national judiciaries today provide for payment of judges on a per case or per hour basis. Strong national judiciaries generally are paid by a fixed salary and have security of tenure. These characteristics are generally seen as important to judicial independence.

At the same time, most jurisdictions strongly support commercial arbitration which operates using ad hoc appointment and payment by the hour.

In beginning to analyse this issue, we have started to look at the historical development of the principles applicable in domestic courts - this is preliminary work in progress.

Salaries for judges were adopted in the late 18th and early 19th century in countries like England, the US and France. Article III of the US Constitution of 1789 has been seen as requiring fixed salaries for federal judges. Fixed salaries replaced systems in which judges were paid at least in part by fees paid by litigants.

Remuneration for judges through litigant fees was seen by prominent critics and law reformers as having some defects similar to those seen by critics of investor-state arbitration such as: (i) encouraging expansion of cases; or (ii) promoting competition for cases. The critics included prominent philosophers and law reformers such as Jeremy Bentham, notably in a major work edited by

John Stuart Mill.² There are some interesting parallels between the situations, but of course also many differences.

As noted, Article III of the US Constitution of 1789 has been seen as requiring fixed salaries for federal judges. Judicial remuneration was limited to salaries by 1825 in England – any litigant fees were henceforth payable to the State, not to judges.³

In 1852, not long after this reform, the House of Lords decided what remains the leading case on pecuniary interests of judges in the UK (*Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759). The case established what has been termed the rule of “automatic disqualification” where a judge has a pecuniary interest in a case. There is no inquiry into whether the judge was actually influenced by the pecuniary interest as a matter of fact – what matters is the appearance of bias.⁴

A similarly strict rule was articulated as a matter of US constitutional law by the US Supreme Court in 1927. (*Tumey v. Ohio*, 273 U.S. 510 (1927)). It is reflected in a 1974 statute that applies to the federal judiciary. (28 U.S.C. § 455.)

The focus in this context is thus on the appearance of bias rather than on whether there is actual bias. This may be an important consideration for governments in considering issues of diagnosis and legitimacy. Yesterday, a participant pointed to an important distinction between perceptions of problems in ISDS and actual problems as a matter of fact. In the field of bias and in particular bias based on financial interest, perceptions are facts. In the well-known words of Lord Hewart, justice must not only be done, but must be seen to be done.

Security of tenure is also generally seen as a key element of the independence of national judges. A key advance occurred in 1701 when the UK parliament eliminated the power of the monarch to remove judges and established judicial tenure during good behaviour. (Act of Settlement, 1701) Parliament claimed the power to remove judges for itself. Today it is seen as vital that the term of office

² Jeremy Bentham, *Rationale for Judicial Evidence*, Part 2, Book VIII, [chs. II-XIX](#) (1847).

³ See Daniel Klorman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. Chi. L. Rev. 1179, 1204 n.52 (citing Statute of 6 Geo IV, ch 82, § 11 (1825) (taking fees away from the Chief Justice of King's Bench); ch 83 § 10 (1825) (taking fees away from Chief Justice of Common Pleas); Statute of 39 Geo III, ch, 90, §§ 1-3 (1799) (taking fees away from puisne judges of King's Bench and Common Pleas and all judges of Exchequer)).

⁴ See, e.g., Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (2009) ch. 4 (Automatic Disqualification in the British Commonwealth). A well-known English administrative law treatise summarises the applicable law. Paul Craig, *Administrative Law* (7th ed. 2012) § 14-002.

of a judge and his or her remuneration can only be terminated in narrow and defined circumstances. Security of tenure is notably seen as providing protection for a judge from external pressures and for allowing him or her to make difficult or unpopular decisions.

As I noted, these principles for judges do not preclude parties to contracts agreeing to commercial arbitration mechanisms that involve ad hoc nominations and fee-based compensation for arbitrators. Indeed, as [Art. 4.1(b)] underlined yesterday, commercial arbitration is a vitally important part of the dispute settlement landscape both for domestic and international commercial disputes. It is important to recall this importance and the value of commercial arbitration in the discussion about ad hoc appointment and remuneration.

Perceptions about investment arbitration, however, may differ from commercial arbitration for several reasons:

- investment treaty cases are brought only by investors. The alignment of economic incentives on certain issues is thus consistent – for example the investor will always be the party seeking broad findings on jurisdiction. In commercial arbitration, the parties to a contract do not know beforehand who will be the claimant and who may be seeking, for example, broad interpretations of jurisdiction.
- unlike commercial arbitration, ISDS frequently involves issues of public interest and taxpayer liability for any damages.
- the repetitive nature of a relatively small number of investment law issues and the greater use of decisions as precedent compared to commercial arbitration where cases generally turn on specific contracts.
- the role of some ISDS tribunals, unlike commercial arbitration tribunals, in judging issues of due process in host States.

These factors may generate higher expectations about the due process in ISDS.

Conclusion

In light of the specific purpose of this meeting as a without-prejudice discussion of a possible multilateral dispute settlement based on the discussion paper, I have focused on some of the key institutional changes proposed by the discussion paper and the domestic and international court standard used in the discussion paper.

There are many other more detailed issues about independence that would need to be addressed. Here governments can look to the substantial body of

comparative law work of standards of judicial independence by bodies like the Council of Europe and other regional bodies as well as to their own standards of judicial independence and impartiality. Many of these principles developed by regional organisations are designed for application both in domestic and international courts.

As I noted, as governments consider whether or how certain issues should be addressed, it is important to preserve the strengths of the current system. A key consideration is the preservation of the independence of the adjudication system from the influence of the host government. In national and international courts, fixed salaries and security of tenure are generally seen as vital aspects of independence in those areas as well, but additional safeguards are needed. Participants have also noted the importance of the broader investment treaty context, including reform to investor-state arbitration and to substantive law. These factors also need to be borne in mind in considering dispute settlement issues.