ACADEMIC FORUM ON ISDS

Concept Paper Project

Matching Concerns With Reform Options – Summary Conclusions[*]

✓ : Concern/issue resolved under a specific scenario

X : Concern/issue not resolved under a specific scenario

~ : Concern/issue resolved subject to conditions

\+ : Concern/issue can be addressed through targeted improvements

CONCERNS / ISSUES		**SCENARIOS**			
		Investment arbitration improved	**Investment arbitration + appeal**	**MIC**	**No ISDS**
1. COSTS					
Excessive costs	Excessively high costs	~	~	~	X
	Length of proceedings[1]	✓	~[2]	~[3]	X[4]
	Insufficient resources to fund proceedings[5]	✓	✓	✓	✓
Insufficient recoverability of cost awards	Third Party Funding[6]	✓	✓	✓	✓
	Security for costs[7]	✓	✓	✓	X

CONCERNS / ISSUES	SCENARIOS			
	Investment arbitration improved	**Investment arbitration + appeal**	**MIC**	**No ISDS**
2. DURATION				
Constitution of the tribunal	+[8]	~[9]	+[10]	~[11]
Bifurcation	+[12]	~[13]	~[14]	~[15]
Challenges to the award	+[16]	~[17]	~[18]	~[19]
Overall length	+[20]	✓~[21]	~[22]	~[23]
3. CONSISTENCY				
Unjustifiable inconsistencies	X[24]	✓[25]	✓[26]	X[27]
4. INCORRECT DECISIONS				
Incorrect identification of applicable law	~[28]	~[29]	~[30]	X[31]
Excessively broad/narrow interpretation of obligations	~[32]	~	~	X
Lack of textual basis/authority for legal obligations	~	~	~	X
Legal standard unworkable as policy/practical matter	~	~	~	X
Insufficiently precise/diligent application of law	✓[33]	~	~	X

CONCERNS / ISSUES	SCENARIOS			
	Investment arbitration improved	**Investment arbitration + appeal**	**MIC**	**No ISDS**
5. DIVERSITY	X	~	~	~
6. INDEPENDENCE				
Appointment of arbitrators by disputing parties	X	~	✓	✓
Unilateral contact between arbitrator and disputing party	~	X	✓	~
Multiple appointments	~	~	✓	✓
Double-hatting (arbitrator/counsel)	~	X	✓	~
Challenge procedures	~	X	~	~
Potential for pro-investor bias	~	~	✓	✓
Dual role (arbitrator/annulment committee member)	~	✓	✓	✓
Staff or secretariat loyalties	~	~	~	~

[*] Table compiled by Gabrielle Kaufmann-Kohler & Michele Potestà on the basis of the conclusions contained in the concept papers. For more details, please refer to the concept papers (available at https://www.cids.ch/academic-forum-concept-papers).

[1] If the proposed solutions are adopted, the problem of length of proceedings would presumably be solved and a time-cost efficient arbitration would be achieved.

[2] An improvement in the second tier (i.e. appeal mechanism) would only occur if the new appeal mechanism substitutes the current annulment proceeding— not becoming a de facto third instance— and is more efficient than the latter.

[3] If the MIC were to adopt all the measures discussed, the result would be a streamlined arbitral procedure that would likely be shorter and cheaper. Moreover, since the arbitrators in the MIC would have been pre-approved by the institution, the grounds for challenging the arbitrators, which can significantly delay the proceedings, would be reduced.

[4] If the only possibility left is recourse to domestic courts, it is practically impossible to draw a clear conclusion due to the significant differences between jurisdictions. If a State-to-State arbitration system is contemplated and it were to adopt essentially a similar procedure and structure as investment arbitration, no real difference could be seen from a cost-time efficiency perspective with one exception: a State-to-State arbitration may be even longer than investment arbitration since, presumably, investors would first need to seek the representation of their home States, thus adding an extra phase to the whole proceeding.

[5] Both TPF and contingency and conditional fee arrangements may have positive aspects as they may provide resources to claimants with valid claims that have limited or no funds. While institutions and parties have long been aware of the broad implications these methods may have on the legitimacy of the ISDS system, arbitral institutions and States are lagging behind in regulating these matters. It would be a welcome development to incorporate a specific regulation of the ISDS financing market in institutional rules and other bodies of hard and soft law affecting the ISDS system. For this reason, since the solution to address the concerns about TPF and other financing arrangements requires regulating the ISA financing market, the concerns can be positively addressed in all four reform scenarios.

[6] Third-party funding is a financing method in which a natural or legal entity external to the underlying legal relationship in dispute agrees to fund one party's legal fees or other arbitration costs, or otherwise agrees to provide that party with similar support, often in return for remuneration should that party prevail in the proceedings. For the reasons stated in footnote 156, we believe that the concerns can be positively addressed in all four reform scenarios.

[7] SfC is an important tool to guarantee that the State will be able to recover costs awards and the costs related to proceedings that are abandoned by the investor. The use of SfC would resolve the concerns in the first three scenarios. Concerning the no ISDS scenario, the concerns related to recoverability of costs are less likely to be justified. Thus, here it would not be necessary to include provisions on SfC.

[8] A proposal to simplify the establishment of the tribunal can be made, which would speed up the establishment, but there are trade-offs as to the right to select arbitrators.

[9] The proposal does not tackle this specific cause of delay.

[10] A MIC largely pre-establishes the tribunal. The trade-off consists in limiting the right to select arbitrators.

[11] The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.

[12] Bifurcation could be abolished through a corresponding proposal.

[13] The proposal does not tackle this specific cause of delay.

[14] The proposal does not tackle this specific cause of delay.

[15] The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.

[16] Challenges to awards could be limited. The trade-off in this regard is that the right to challenge potentially flawed awards is limited.

[17] As described in the section the effect of an appeal can differ.

[18] The proposal does not tackle this specific cause of delay.

[19] The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.

[20] Specific proposals can speed up proceedings. But such proposals come with trade-offs.

[21] The effect of this reform on the length of proceedings is unclear.

[22] The effect of this reform on the length of proceedings is unclear.

[23] The various alternatives to ISDS are described in the corresponding section. Their impact differs widely.

[24] Scenario 1 (ISDS improved) would not be likely per se to lead to a decrease or the elimination of unjustifiable inconsistencies. It may lead to qualitative improvements in the ISDS system, and may have indirect benefits, but it would not directly lead to improvements in the consistency or coherence of decision-making.

[25] Scenario 2 (ISDS plus the implementation of an appellate system) would likely have benefits for consistency in arbitral decision-making, as any "rogue" or "outlier" decisions could be appealed (depending on the scope of the appellate body's jurisdiction).

[26] Scenario 3 (the creation of an MIC) would also have benefits for consistency in arbitral decision-making, as the same body of lawyers would be making decisions on the interpretation of IIA provisions.

[27] Scenario 4 (No ISDS) would be unlikely to lead to benefits from the perspective of unjustifiable inconsistencies as different national courts, which would not be bound to have regard to the others' decisions, would be ruling on the correct interpretation of IIA provisions.

[28] A range of actors could support the correct identification of applicable law by ISDS tribunals. Such support could be particularly effective with respect to reinforcing the correct identification of customary international law. Correctly identifying the precise relationship between treaty law and customary international law under particular investment treaties would remain a key challenge.

[29] Institutionalization, including the development of one or more appellate mechanisms, likely would lead to advances in finality, predictability, and coherence in ISDS decision-making. But the extent to which the development of one or more appellate mechanisms also would lead to advances in correctness - ie the correct identification and precise application of applicable law is less clear. With respect to the appellate mechanism/correctness relationship, one key factor would be the extent to which appellate-level decision-makers have public international law expertise.

[30] Introducing far greater levels of institutionalization through the development of an MIC almost certainly would lead to advances in finality, predictability, and coherence in ISDS decision-making. But the extent to which the development of an MIC also would lead to advances in correctness – ie the correct identification and precise application of applicable law –is less clear. With respect to the MIC/correctness relationship, one key factor would be the extent to which MIC decision-makers have public international law expertise.

[31] Eliminating ISDS would 'resolve' incorrectness concerns only in the sense that investment treaty obligations would no longer be applied by ISDS tribunals. Shifting application of investment treaty obligations from ISDS tribunals to domestic courts and/or inter-State tribunals would not, on its own, address concerns arising from incorrect ISDS decision-making.

[32] With respect to interpretations that are (i) excessively broad or narrow in scope, (ii) not supported by treaty text, or (iii) unworkable in practice, a range of actors could provide support to address such concerns. But eliminating the risk of such interpretations remains challenging, particularly given the nature of how investment treaty obligations are drafted (often in opentextured terms) and interpreted (under Vienna Convention rules).

[33] A range of actors could support the precise and diligent application of law under investment treaties. With respect in particular to two areas of fundamental importance for such precision and diligence – (i) treaty interpretation (under the Vienna Convention) and (ii) the application of customary international law (in particular, consideration of State practice and *opinio juris*) –concerns should be resolvable through focused and sustained support by a range of actors.