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Settlement of commercial disputes

Investor-State Dispute Settlement Framework

Compilation of comments

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III. Compilation of comments

27. Belgium

[Original: English/French]
[Date: 15 February 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Belgium has signed 95 bilateral investment treaties and 67 treaties with investment provisions. Investor state dispute settlement measures are present in each of these treaties. Most of these measures provide for an ICSID arbitral procedure or the establishment of an ad hoc arbitral tribunal according to UNCITRAL rules.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Belgium is currently undergoing a revision of its model BIT and arbitration is one of the discussed topics. Belgium will provide UNCITRAL with the text of its new model BIT as soon as a final version is available.

Furthermore, Belgium is following closely the discussions relating to arbitration which are arising at the European level. Key priorities for Belgium relating to these evolutions are the selection process of the arbitration judges, their remunerations, the ethics standards that will be applied to them and the access of SMEs to the new system.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

None of the agreements that Belgium has signed have yet established an appeal mechanism.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

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Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Article 42 of the Energy Charter Treaty contains provisions on the amendment of the agreement.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

See Brussels Regulation No. 1215/2012 of 12 December 2012.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

See article 1716 of judicial Code — our legislation does not provide for appeal against arbitral awards and only allows parties to provide for such a possibility in their arbitration agreement.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The CIDS research paper sets out a number of interesting options for reforming the existing investor-State dispute settlement system. The main options range from creating an International Tribunal for Investments to the creation of an Appeal Mechanism for reviewing investor-State arbitral awards. Different alternatives for reviewing decisions or awards are discussed, as are different options with regard to the composition of the Tribunal, the nomination of Tribunal Members, the enforcement of decisions, or the applicable law. The paper also examines different ways of applying any such new mechanism to existing investment treaties in the form of an opt-in convention modelled on the Mauritius Convention.

To a certain extent, the different aspects discussed in the CIDS research paper are interlinked and adopting a particular position on the options presented for one aspect will have implications on the policy choices available for other aspects. It is therefore difficult to express a preference for any of the detailed options presented in the paper before further discussions about the main goals and priorities of the overall reform project have taken place. The EU and its Member States have already been engaged in a process of reform of investment policy and in particular of investor-State dispute settlement over the past years. One important element of that reform is the creation of a multilateral mechanism for the settlement of investment disputes which would seek to address some of the concerns which have arisen as regards the existing system. The EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such a mechanism, both EU-internally and with non-EU countries and we welcome the opportunity to pursue further discussions.

28. Chile

[Original: Spanish]
[Date: 6 March 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Chile has signed 26 trade agreements, including free trade agreements and economic complementarity agreements, nine of which contain chapters on investment protection with provisions on investor-State dispute settlement. In addition, Chile has concluded 36 agreements on the promotion and reciprocal protection of investments, all of which include provisions on investor-State dispute settlement.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

As noted above, with regard to investor-State dispute settlement, the international investment agreements concluded by Chile provide for an arbitration model (a) in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes (ICSID) and the Rules of Procedure for Arbitration Proceedings of ICSID, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention, (b) in accordance with the ICSID

Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention, (c) that is established on an ad hoc basis in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, or (d) in accordance with any other arbitration rules or institution agreed upon by the disputing parties.

Without prejudice to the foregoing, it should be noted that in cases in which it is not possible to reach an amicable settlement or a settlement through consultations within the prescribed time limit, the agreements concluded by Chile on the promotion and reciprocal protection of investments (including with France, Ecuador, the Plurinational State of Bolivia and El Salvador) grant the investor the option of recourse to the competent courts of the contracting party in whose territory the investment was made or to international arbitration.

A third possibility is that recourse must be made to the competent courts of the contracting party in whose territory the investment was made, unless arbitration is commenced by mutual agreement. Specific examples include, but are not limited to:

Article 8, paragraph 2, of the Agreement between the Government of the French Republic and the Government of the Republic of Chile concerning the Mutual Promotion and Reciprocal Protection of Investments, regarding the settlement of disputes between one contracting party and an investor of the other contracting party: “2. If any such dispute cannot be so settled within six months of the time when a claim is made by one of the parties to the dispute, the dispute shall, at the request of the national or the company, be submitted: — Either to the competent tribunal of the Contracting Party in whose territory the investment was made; — Or for arbitration to the International Centre for Settlement of Investment Disputes […]. Once the investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or for international arbitration, the choice of procedure shall be definitive.”

Article 10, paragraph 2, of the Agreement between the Republic of Chile and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments: “If a dispute within the meaning of the first paragraph cannot be resolved within six months of the date of the claim by one of the two litigants, it shall be referred at the request of either disputing party to the competent courts of the Contracting Party in whose territory the investment was made. […] 4. The provisions [of paragraph 2] do not affect the right of the Parties in dispute to mutually agree to submit the dispute to an international arbitral tribunal. (5) In the cases set out in paragraphs 3 and 4 of this Article, unless the disputing parties have agreed otherwise, disputes shall be submitted to arbitration proceedings within the framework of the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” of 18 March 1965.”

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

In the light of the reference made by the international investment agreements concluded by Chile to the provisions of the Convention and the Additional Facility Rules of the International Centre for Settlement of Investment Disputes and the Arbitration Rules of the United Nations Commission on International Trade Law, final awards may be subject to clarification, review and annulment, but not to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Four of the international investment agreements concluded by Chile (in the chapters on investment protection in the free trade agreements concluded with the United States of America, Colombia and Peru, and in the Additional Protocol to the Pacific Alliance Framework Agreement) address the creation in the future of a multilateral

appellate mechanism, specifically in the provisions on the conduct of arbitration, along the following lines:

Article 10.19, paragraph 10, of the United States-Chile Free Trade Agreement: "If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.25 in arbitrations commenced after the appellate body's establishment."

Article 10.20, paragraph 12, of the Additional Protocol to the Pacific Alliance Framework Agreement: "If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall explore the possibility of reaching an agreement that would have such appellate body review awards rendered under Article 10.26 in arbitrations commenced after the multilateral agreement enters into force as between the Parties."

To date, the international investment agreements concluded by Chile do not address the creation in the future of a permanent bilateral or multilateral investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

In accordance with the final provisions of the international investment agreements concluded by Chile, the parties may agree on any modification of the agreements. Specific examples include, but are not limited to:

Article 24.2, paragraphs 1 and 2, of the United States-Chile Free Trade Agreement: "The Parties may agree on any modification of or addition to this Agreement", "When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement."

Article 22.1 of the Free Trade Agreement between Colombia and Chile, entitled "Amendments, Modifications and Additions": "The Parties may agree on any amendment to, modification of or addition to this Agreement. 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, an amendment, modification or addition shall constitute an integral part of this Agreement."

With regard to provisions on transitional arrangements in case of modifications of or amendments to international investment agreements, all of the agreements concluded by Chile on the promotion and reciprocal protection of investments guarantee the continued effectiveness of the provisions for a period of 5, 10, 15 or 20 years in respect of investments made prior to the date of termination of the agreement:

Agreement between the Government of the Republic of Chile and the Government of the Republic of Italy on the Promotion and Protection of Investments. Paragraph 2 of article 15, entitled "Duration and Expiry": "With regard to investments made prior to the expiry dates referred to in the previous paragraph, the provisions of articles 1 to 13 shall remain in force for a further five years from the aforementioned dates."

Agreement between the Government of Malaysia and the Government of the Republic of Chile on the Promotion and Protection of Investments. Paragraph 4 of article 10, entitled "Entry into Force, Duration and Termination": "With respect to investments made or acquired prior to the date of termination of this Agreement, the

provisions of this Agreement shall remain in force for a period of ten (10) years from the date of termination."

Agreement between the Government of the Republic of Chile and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments. Paragraph 3 of article 11, entitled "Final Provisions": "With respect to investments made prior to the date on which the notice of termination of this Agreement became effective, its provisions shall remain in force for an additional period of fifteen years from that date."

Agreement between the Government of the French Republic and the Government of the Republic of Chile concerning the Mutual Promotion and Reciprocal Protection of Investments. Article 13: "Upon the expiry of the validity of this Agreement, investments made while it was in force shall continue to be protected by its provisions for an additional period of 20 years."

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The legal system of Chile does not provide for a special regime for the recognition and enforcement of judgments of international courts. Given that lack of a special regime, it is understood that the general rules for the recognition in Chile of foreign judgments apply; recognition is governed by the provisions of articles 242 to 251 of the Code of Civil Procedure. Those provisions cover the procedure before the Supreme Court of Justice that leads to the recognition and enforceability of a decision provided that it falls within the framework of one of the following models.

The three models contained in the Code of Civil Procedure are as follows:

Firstly, if there is an express provision in a treaty that establishes a particular procedure, the "treaty regime" applies. That regime is established in article 242 of the Code. The provision states that "decisions rendered in a foreign country shall have the force granted to them by the relevant treaties in Chile, and the procedures established by Chilean law shall be followed for their enforcement, insofar as such procedures are not modified by those treaties."

In the absence of special rules in the applicable treaties, the "reciprocity model" applies, as enshrined in articles 243 and 244 of the Code. The articles establish that, in the absence of international conventions and treaties that bind Chile in that area, the country must abide by the principle of both positive and negative reciprocity. Therefore, in cases in which no agreement has been concluded with the State in whose territory decisions for which recognition is sought have been rendered, such decisions "shall have the same legal force as that given to judgments rendered in Chile." Similarly, article 244 of the Code states that if the decision "is rendered in a country that does not give effect to the judgments of Chilean courts, the decision shall have no legal force in Chile."

Lastly, and with the greatest practical application, is the "model of international regularity", enshrined in article 245 of the Code. When none of the previous models can be applied, article 245 of the Code establishes that in Chile, the decisions of foreign courts will have "the same legal force as if they had been rendered by Chilean courts", provided that they meet the conditions set out in the provision.

Furthermore, according to article 245 of the Code, in Chile, decisions rendered by foreign courts shall have the same legal force as if they had been rendered by Chilean courts provided that they meet the following conditions:

"1a. They contain nothing contrary to the laws of the Republic. However, the procedural laws to which the determination of the judgment has been subject in Chile shall not be taken into consideration;

2a. They are not inconsistent with national jurisdiction;

3a. The party against whom the judgment is invoked has been duly notified of the action. However, that party may prove that, for other reasons, it was unable to present its case;

4a. They are enforceable under the laws of the country in which they have been rendered."

In respect of the procedure, as governed by article 248 of the Code, in short, once the enforcement request has been submitted, the party against whom enforcement of the foreign judgment is sought is notified, and is given a time frame in which to make any relevant comments. A report is also received from the prosecutor of the Supreme Court. Lastly, once the foreign judgment has been recognized by the Supreme Court, it may be enforced with the same value as a judgment rendered in a domestic court.

With regard to the recognition and enforcement of judgments of foreign courts, the procedure depends on the instrument through which the State became a party to the relevant legal body. For example, article 68 (2) of the American Convention on Human Rights states: "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." That article grants victims or their families recourse to domestic law for the enforcement of the judgment through the procedure for enforcing judgments against the State, in accordance with the domestic law of the respondent State.

Yes, domestic courts have been requested to recognize and enforce judgments of international courts. The judgment of the Inter-American Court of Human Rights in the case of Atala Riffo y Niñas vs. Chile is available at http://corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

No. Article 34 of the International Commercial Arbitration Act of 2004 provides for an application for setting aside an award as the exclusive recourse against an arbitral award.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

At the moment, Chile does not wish to make any comments regarding the CIDS research paper.

29. France

[Original: French]
[Date: 23 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

France is a party to 97 bilateral treaties on the promotion and protection of investments that are currently in force. Four treaties are undergoing an approval process that is nearing completion. Three other treaties have been unilaterally terminated, but remain applicable by virtue of their sunset clauses. With the exception of several treaties that, for the treatment of investor-State dispute settlement, refer to the contracts specifically concluded for the purposes of the investments covered by their provisions, those agreements typically contain a provision on the settlement of disputes that may arise between an investor and the

State receiving the investment. The Energy Charter Treaty, to which France is a party, also includes provisions on investment protection (part III) and an investor-State dispute settlement mechanism (part V, article 26).

Since the entry into force, on 1 December 2009, of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, foreign direct investment has formed part of the commercial policy of the European Union, in accordance with article 207 of the Treaty on the Functioning of the European Union, which permits the European Union to negotiate, within the framework of its trade agreements, provisions on investment protection and investor-State dispute settlement. On 30 October 2016, the European Union and its member States signed the Comprehensive Economic and Trade Agreement (CETA) with Canada, which contains provisions on investment (chapter 8) and investor-State dispute settlement. The European Union has also negotiated a free trade agreement with Viet Nam, chapter 8 of which, entitled "Trade in Services, Investment and E-Commerce", contains a sub-chapter II on investment and investor-State dispute settlement.

It should be noted that under Regulation No. 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between member States and third countries, existing bilateral investment agreements remain in force provided that member States notify the European Commission of those agreements, as has been the case with regard to the aforementioned agreements concluded by France. Furthermore, member States of the European Union still have the option of concluding bilateral investment agreements under certain conditions, provided that those agreements are duly authorized by the European Commission.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The international investment agreements to which France is currently a party do not provide for permanent courts or tribunals for investor-State dispute settlement. However, the recent agreements negotiated by the European Union and its member States with Canada and Viet Nam establish a permanent jurisdictional mechanism for the settlement of investor-State disputes which differs significantly from the ad hoc arbitration procedures currently used to resolve such disputes.

As previously indicated, the member States of the European Union are signatories, alongside the European Union, to the CETA with Canada. Chapter 8, section F, of the CETA establishes a tribunal with 15 members to resolve disputes arising out of alleged breaches of section C (non-discriminatory treatment with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of a covered investment) and section D (investment protection) of the Agreement (article 8.18). Article 8.27 of the CETA relates to the constitution of the tribunal responsible for settling the aforementioned claims. To that end, the CETA Joint Committee is responsible for appointing 15 tribunal members, five of whom are nationals of a member State of the European Union, five of whom are nationals of Canada and five of whom are nationals of third countries. The Agreement provides that those members shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. They are appointed for a five-year term, renewable once. The full text of the CETA is available at http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf (pages 107-146 are relevant to this questionnaire).

Sub-chapter II, section 3, of chapter 8 of the agreement negotiated with Viet Nam, which is currently undergoing legal fine-tuning, contains a similar mechanism to that of the CETA. In this case, article 12 of that sub-chapter of the Agreement provides for the establishment of a tribunal with nine members, appointed jointly by the European Union and Viet Nam, to rule on alleged breaches of the provisions on investment protection. Competence criteria similar to those established in the CETA

are also set out therein. The non-final text of the Agreement is available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (pages 28 to 66).

In view of the fact that neither agreement is yet in force, the permanent tribunals whose establishment they provide for have not yet been constituted and, therefore, have not yet rendered any decisions.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The international investment agreements to which France is currently a party do not provide for the possibility of appeal against arbitral awards delivered pursuant to their clauses on investor-State dispute settlement. However, the agreements negotiated by the European Union and its member States with Canada (article 8.28) and Viet Nam (sub-chapter II, article 13) establish a mechanism for appeal against first-instance awards rendered by the permanent tribunals whose establishment the agreements provide for.

Article 8.28 of the CETA provides for the establishment of an appellate tribunal to review awards rendered by the aforementioned CETA tribunal. The appellate tribunal may uphold, reverse or modify awards on three bases: (a) errors in the application or interpretation of the law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (c) the grounds for annulment set out in article 52 (1) (a)-(e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b) above.

Article 13, under sub-chapter II, of chapter 8 of the Agreement between the European Union and Viet Nam also provides for a permanent appeal tribunal and establishes grounds for appeal similar to those under the CETA.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The international investment agreements to which France is currently a party do not specifically provide for the possibility of establishing, on a bilateral or multilateral basis, an appellate mechanism for awards or a permanent investment court.

However, the agreements negotiated by the European Union and its member States with Canada and Viet Nam refer to those possibilities as follows:

(a) Appellate mechanism

Article 8.28 of the CETA provides for the establishment of an appellate tribunal responsible for reviewing awards rendered by the aforementioned CETA tribunal. The appellate tribunal may uphold, reverse or modify awards on three bases: (a) errors in the application or interpretation of the law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds for annulment set out in article 52 (1) (a)-(e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b) above.

Article 13, under sub-chapter II, of chapter 8 of the Agreement between the European Union and Viet Nam also provides for a permanent appeal tribunal and establishes grounds for appeal similar to those under the CETA.

(b) Permanent mechanism

Article 8.29 of CETA, entitled “Establishment of a multilateral investment tribunal and appellate mechanism”, provides that the Parties shall pursue the establishment of a multilateral investment tribunal and/or a permanent appellate mechanism. It also provides that upon the establishment of such a tribunal, the Joint Committee shall adopt a decision providing that disputes under the CETA be resolved by that tribunal, and make appropriate transitional arrangements.

Article 15 of the Agreement between the European Union and Viet Nam, entitled “Multilateral dispute settlement mechanisms”, provides that the Parties to the

Agreement shall enter into negotiations for an international agreement providing for a multilateral investment tribunal and a multilateral appellate mechanism. The Trade Committee is to be responsible for adopting transitional arrangements for the purposes of converting the bilateral system into a multilateral system.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The international investment agreements that are currently in force do not necessarily contain provisions on their amendment. However, that does not prevent some of them from being amended, as demonstrated, for example, by the exchange of letters of 20 March 1986 between the Government of France and the Government of Egypt amending the Convention on the Reciprocal Encouragement and Protection of Investments of 22 December 1974 (see Decree No. 87-58 of 29 January 1987: https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000882548). The agreements that contain provisions on their amendment include:

The Agreement between the Government of France and the Government of Colombia on the Reciprocal Encouragement and Protection of Investments, signed on 10 July 2014 and currently in the process of being approved, article 18 (2) of which establishes that the Parties may amend the Agreement and that amendments must be approved in accordance with the constitutional requirements of the Parties. Those amendments are regarded an integral part of the Agreement and enter into force on the date agreed upon by the Parties (the Agreement is not yet in force, but the text is already available online at https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000882548).

The text of that agreement does not provide for any transitional arrangements. However, establishing the date of entry into force of amendments should ensure the protection of the rights of investors whose investments have been made under the original agreement. Article 42 of the Energy Charter Treaty also allows the Parties to the Treaty to propose amendments, which may be submitted to the Energy Charter Conference for adoption and enter into force on the ninetieth day following deposit of the instruments of approval or ratification by at least three fourths of the Contracting Parties (see http://www.assemblee-nationale.fr/14/pdf/projets/pl3745-ai.pdf).

The CETA and the Agreement between the European Union and Viet Nam both contain, in articles 30.2 and X.6 respectively (chapter 17: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154231.pdf), a clause providing for amendment to the terms of the Agreement, including provisions on investment protection and investor-State dispute settlement. They provide that an amendment will enter into force following the exchange of written notifications certifying the Parties' fulfilment of their obligations and the completion of their internal procedures required for the entry into force of the amendment, or on the date agreed upon by the Parties.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

With regard to court decisions, a distinction should be made between decisions of the Court of Justice of the European Union (CJEU) and other international decisions (excluding those of the International Criminal Court). In the context of the law of the European Union, whose focus on integration distinguishes it from other international organizations, the General Court and CJEU render decisions that have a direct effect on the domestic law of member States. There are several types of remedy (actions for annulment, actions for failure to act, infringement proceedings and the mechanism of referral by the courts of member States to CJEU for a preliminary ruling). No domestic legal action is required to ensure that the decisions of CJEU and the General Court are enforced. However, member States may need to

take legislative or regulatory measures in order to comply with those decisions. Lastly, if a member State does not comply with the decisions of CJEU, the European Commission is entitled to refer the matter back to CJEU so that the Court can, on the basis of the State's failure to give effect to a judgment of the Court of Justice and thus to fulfil its obligations, order the member State in question to pay a fine and a daily penalty.

In addition to the law of the European Union, France is also a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which established the European Court of Human Rights. That court renders final judgments. Article 46 (1) of the European Convention on Human Rights provides that States must abide by the decisions of the Court in cases to which they are parties. In particular, States must pay any compensation ordered by the Court and take any measures set out in the decision with regard to the persons who have brought the case before the Court. It is not necessary to apply again to a national court following the delivery of a judgment by the European Court of Human Rights.

With regard to other international courts, taking into account that criminal courts are not covered by this questionnaire, disputes are of an inter-State nature. It should be recalled in this respect that other international dispute resolution mechanisms, such as the Dispute Settlement Body of the World Trade Organization, are available to States. Of course, it is not necessary to adopt laws or apply to a judge to make such decisions rendered by international courts enforceable.

The national legal framework does not contain specific provisions on the recognition and enforcement of decisions of international courts.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Under current legislation, international arbitral awards cannot be appealed against before the French courts.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

France wishes to thank CIDS for its valuable contribution to the ongoing discussions on the possibility of reforming the procedures for investor-State dispute settlement. The research paper reviews various options that could lead to the establishment of a permanent international tribunal for settling investment-related disputes or an appeal mechanism for controlling the awards and decisions rendered in the context of investor-State disputes. Several options regarding the control of those decisions are addressed in the CIDS research paper, in addition to a number of options regarding the composition of a possible permanent international tribunal, the appointment of its members, the enforcement of its judgments and the applicable law. The research paper also examines the possibility of applying those new mechanisms to existing investment agreements through an agreement based on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. It appears that those issues are closely interrelated, and that the approach adopted in relation to a particular aspect inevitably affects the other aspects of the proposed reform, the main priorities and objectives of which require further discussion before a position can be taken regarding the various options discussed in the CIDS research paper.

It is also important to highlight that the European Union and its member States have already engaged in an in-depth reflection on the reform of investor-State dispute settlement. That work was undertaken in the context of the negotiation of trade agreements with third States containing a section on investment, and led to the development of a new approach, the "Investment Court System", which the European Union now promotes in all its trade negotiations and which France has undertaken to include in its next model agreement on the promotion and protection of investments, which is currently being drafted. Under this new

approach, the European Union also promotes the establishment of a permanent court dedicated to settling investor-State disputes as an alternative to the current system. France has called for this reform and has directly contributed to the development of the new approach promoted by the European Union by publishing, as early as May 2015, a series of innovative and far-reaching proposals, which include the establishment of a permanent multilateral court (see http://www.diplomatie.gouv.fr/fr/IMG/pdf/20150530_isds_papier_fr_vf_cle432fca.pdf).Therefore, France fully endorses this proposed reform and hopes that the preliminary and exploratory work already undertaken by the member States of the European Union, as well as within and beyond the European institutions, to explore ways of establishing such a court will be actively pursued. However, the initiative remains a long-term project which requires further consideration at this stage.

30. Mexico

[Original: Spanish]
[Date: 10 March 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Mexico has signed 12 free trade agreements and 32 agreements on the promotion and reciprocal protection of investments, 29 of which are in force. Of the 12 free trade agreements to which Mexico is a party, 10 contain a chapter on investment with substantive disciplines and mechanisms for the settlement of investor-State disputes (the texts of the agreements signed by Mexico are available at http://www.gob.mx/se/acciones-y-programas/comercio-exterior-paises-con-tratados-y-acuerdos-firmados-con-mexico?state=published).

Those free trade agreements and agreements on the promotion and reciprocal protection of investments provide that an investor of a member country may use a dispute settlement mechanism to resolve an investment dispute that arises between it and the member country that receives its investment.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

None of the agreements to which Mexico is a party provide for permanent courts or tribunals. The agreements signed by Mexico provide for the possibility of referring to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, or to the United Nations Commission on International Trade Law; the establishment of ad hoc tribunals is also provided for.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The agreements in force in Mexico do not contain provisions whereby arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The agreements in force in Mexico do not provide for any such permanent mechanisms.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The existing agreements on the promotion and reciprocal protection of investments and free trade agreements with chapters on investment contain provisions on amendments and the termination of those agreements. In a number of cases, rights are established for investors, with transitional arrangements in case of termination (for example, article 19.6 of the free trade agreement with the Republic of Peru provides that, in the event of termination of the agreement, investors will be protected during the 10 years following termination). Certain procedures are also included to enable the entry into force of those arrangements.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Under article 1347-A of the Code of Commerce, published in the Official Gazette on 7 April 2016, judgments and decisions may be enforced if they meet certain requirements, as listed in that paragraph.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Mexican legislation does not provide for the appeal of arbitral awards.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Mexico does not have any comments regarding the CIDS research paper.

31. Pakistan

[Original: English]
[Date: 21 February 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Pakistan has concluded a number of Bilateral and Multilateral treaties on the Protection of foreign investment. The world's first Bilateral Investment Treaty (BIT) was signed on November 25, 1959 between Pakistan and Germany. To date Pakistan has signed BITs with 48 countries/organizations. Pakistan has also signed FTAs with Sri Lanka (12-06-2005), China (24-112006) and Malaysia (08-11-2007). The latter two FTAs are comprehensive and contain chapter on Investment embodied in the text. Most of the BITs that Pakistan signed with other states allow for a dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated can have recourse to competent judicial, arbitral or administrative bodies of the host country where investment has been made or can approach for international arbitration under the auspices of the ICSID, or Rules of Arbitration of UNCITRAL or Rules of Arbitration of International Chamber of Commerce.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The existing model BIT template of Pakistan do not provide for permanent courts or tribunals (as opposed to investor-state arbitration). However, it provides for all the available remedial national/international forums like mutual negotiations and consultations, the competent judicial, arbitral or administrative bodies of the

Contracting Party in whose territory the investment has been made; or international arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States under ICSID or the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL), or the Rules of Arbitration of the International Chamber of Commerce (ICC).

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The existing model BIT template of Pakistan does not provide provisions whereby investor-state arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Pakistani model BIT template do not provide for possible creation in the future of a bilateral or multilateral appellate mechanism for investor-state arbitral awards: and/or a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The existing model BIT template of Pakistan contains provisions on the amendments of the BITs. The following is the text of the provision: "Any changes and amendments to this Agreement may be made by the mutual agreement of the Contracting Parties, which shall form protocols to this Agreement and shall have the same effect, as if it were part of this Agreement".

Though Pakistani model BIT template do not specifically contain provisions regarding safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the BITs, however, it provides that the BIT shall remain in force for a further period of five years in case the agreement is terminated in the prescribed manner.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The Government of Pakistan has ratified the New York Convention of 1958 through legislation known as Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 conferring jurisdiction on the High Court which shall recognize and enforce the foreign arbitral award in the same manner as a judgement or order of the court in Pakistan. Further, the recognition of a foreign arbitral award shall not be refused except in accordance with Article V of the New York Convention. However, this Act shall not apply to foreign arbitral awards made before 14 July 2005.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Under the domestic legislation, there is no right of appeal against the Arbitral Awards made by the Court or Tribunal in cases of International Arbitration.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

We may support in principle a multilateral dispute settlement system, resulting in creation of single International Tribunal for Investments potentially competent to resolve investment disputes concerning as many States as would opt into it and creation of one single Appeal mechanism potentially competent to serve as an

appellate tribunal for Investor-State arbitral awards across all States. We believe that foreign investors look favourably upon the existence of bilateral and multilateral investment treaties between their home and host country as a means to have stronger protections of their investments.

However it may also be kept in view while designing such a system for dispute resolution that at the international level there is a serious concern over the dispute resolution provisions in BITs that allows investors to enter arbitration with states over treaty violations. Furthermore, the existing applicable legal frameworks provide for compensation in cases of direct expropriation and indirect expropriation and the meaning of indirect expropriation is constantly expanding to include even delays in decisions of the court, change in legislation and adverse decision of domestic courts. Some of the recently concluded BITs even did not contain investor-State Arbitration clause in them and a number of governments are now terminating or revising their BITs. In this background Government of Pakistan is also revising its BIT template and has initiated negotiations for revoking investor-State Arbitration Clause in BITs with some of the countries. We propose that while designing a system for broader reforms of the investor state dispute settlement framework, the above hitches of the existing framework may be looked into and appropriate redress may be provided in the new model.

32. Russian Federation

[Original: Russian]
[Date: 16 February 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

The Russian Federation has concluded 82 bilateral treaties on the promotion and mutual protection of capital investments (international investment agreements, or IIAs) of which 65 have entered into force. The Russian Federation is also a party to the multilateral Agreement on Promotion and Mutual Protection of Investments in the Member States of the Eurasian Economic Community and to multilateral treaties relating to the protection of foreign investment (the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (hereinafter, the Partnership Agreement between the Russian Federation and the European Union) and the Treaty on the Eurasian Economic Union).

The international investment agreement (IIA) of, and the Treaty on, the Eurasian Economic Union contain provisions on the procedure for the settlement of disputes between States and foreign investors.

The Partnership Agreement between the Russian Federation and the European Union does not contain specific provisions on the procedure for the settlement of disputes between States and foreign investors.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Almost all the international investment agreements (IIAs) contain provisions on the settlement of disputes between States and foreign investors. Most of the international investment agreements (IIAs) provide for the investor having the choice of settling disputes through courts in the place of investment or an arbitral tribunal (commercial arbitration) or the International Centre for Settlement of Investment Disputes (ICSID).

Examples include the agreement between the Government of the Union of Soviet Socialist Republics (USSR) and the Government of the Republic of Italy on the

promotion and mutual protection of capital investments (signed in Rome on 30 November 1989), the agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on the promotion and mutual protection of capital investments (signed in Moscow on 3 March 2015) and the Treaty on the Eurasian Economic Union (subsection 6 of section VII on trade in services, facilities, activities and investments (annex 16 to the Treaty on the Eurasian Economic Union)).

Some IIAs do not provide for the settlement of disputes between a State and foreign investor in the State court of a contracting party, for example in the agreement between the Government of the USSR and the Government of the Kingdom of Belgium and the Grand Duchy of Luxembourg on the mutual promotion and protection of capital investment (signed in Moscow on 9 February 1989).

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No IIAs contain provisions whereby arbitral awards in disputes between States and foreign investors may be subject to appeal.

Approximately 50 IIAs and the Treaty on the Eurasian Economic Union contain a special provision whereby the arbitral award on the investment dispute between the State and the foreign investor is final and binding for both parties.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The Russian Federation's IIAs do not address the possible creation in the future of: (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; or (b) a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Most of the IIAs contain provisions on the amendment of the IIA, such as the agreement between the Government of the Russian Federation and the Government of the Republic of Singapore concerning the encouragement and reciprocal protection of investment (concluded in Singapore in 27 September 2010). However, the IIAs do not contain provisions safeguarding investors' rights, nor do they provide for transitional arrangements in case of modifications or amendments of the IIA.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Russian legislation does not contain specific provisions on the procedure of recognizing or enforcing judgments of international courts and tribunals, except for a number of provisions relating to the implementation of European Court of Human Rights (ECHR) decisions. The decisions of the ECHR are implemented in the Russian Federation under the obligations set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms, if not contrary to the Constitution of the Russian Federation. There are no procedures for the enforcement of these decisions, but procedural legislation provides for the possibility of reviewing previous decisions of Russian courts in the light of ECHR decisions.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Russian legislation on international arbitration does not contain any provisions on appeal against arbitral awards but does provide for application to set aside the decision.

In accordance with the Russian Federal Arbitration Procedure Code (article 233), an international commercial arbitration decision may be set aside by an arbitral tribunal on the grounds provided for in an international treaty of the Russian Federation and the Federal Act on international commercial arbitration.

Russian Federal Act No. 5338-1 of 7 July 1993 on international commercial arbitration provides that any arbitral award which has been challenged in a State court may be changed only by applying for its setting aside.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The Russian Federation supports the UNCITRAL initiative to explore international practice in establishing institutional arbitral tribunals and bodies for the settlement of investment disputes and is prepared to engage constructively in the discussion of possible options for reforming investment arbitration.

33. Switzerland

[Original: French]
[Date: 29 December 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

There are currently 113 bilateral investment protection agreements concluded by Switzerland in force, 92 of which provide for an ISDS mechanism. Furthermore, free trade agreements with Japan, Singapore and South Korea, as well as the Energy Charter Treaty, contain provisions on investment protection, including an ISDS mechanism.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

No, the international investment agreements concluded by Switzerland do not provide for permanent courts or tribunals. Moreover, Switzerland does not have a model international investment agreement.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No, the international investment agreements concluded by Switzerland do not contain any provisions allowing appeals to be made against investor-State arbitral awards.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

No, the international investment agreements concluded by Switzerland provide neither for the future creation of a bilateral or multilateral appeal mechanism for investor-State arbitral awards nor for the future creation of a bilateral or multilateral permanent investment court or tribunal.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

In general, the international investment agreements concluded by Switzerland do not include provisions relating to their amendment. However, some of the international investment agreements concluded by Switzerland do include such provisions, although recourse has never been made to them.

In contrast, none of the international investment agreements concluded by Switzerland provide for the protection of investors' rights or transitional measures in the event of the modification or amendment of those agreements. The international investment agreements concluded by Switzerland do, however, include provisions for the protection of investors' rights in the event of termination of the agreement. Those provisions thus establish the period, from the date of termination of the agreement, during which the agreement continues to apply to investments made before that date.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

According to article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "The High Contracting Parties undertake to abide by the final judgment of the Court [European Court of Human Rights (ECHR)] in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." On the basis of that obligation, Switzerland, since its accession to the European Convention on Human Rights in 1974, has implemented about 100 ECHR judgments, with adoption of the necessary measures, including individual measures (payment of just satisfaction and other individual measures) and in some cases general measures (adaptation of practice and legislative amendments).

With regard to the other individual measures in particular, reference should be made to the possibility under Swiss law of reviewing the decision of the Federal Tribunal following a judgment by ECHR. If, in a final judgment, the latter finds that there has been a violation of the European Convention on Human Rights, a review of the contested decision of the Federal Tribunal may be requested, provided that the following two cumulative conditions are met: compensation does not remedy the effects of the violation, and a review is necessary to remedy the effects of the violation.

It should also be noted that the Committee of Ministers (Department for the Execution of Judgments of the European Court of Human Rights) has compiled a "Country Profile" for each of the 47 member States of ECHR, including Switzerland. Those country profiles provide a brief overview of the main issues being monitored by the Committee of Ministers and the main reforms adopted in closed cases, as well as general statistics. The profiles will be made available to the public shortly.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Actions for annulment against international awards delivered by Swiss arbitral tribunals may be brought before the Swiss Federal Tribunal (the "Federal Tribunal"). Any such actions must be based on one of the five grievances set out in article 190 (2) of the Federal Act on Private International Law, namely: if the tribunal was not properly constituted; if the tribunal lacked jurisdiction; if the tribunal ruled on a matter beyond the claims submitted to it; if the tribunal failed to respect the right of the parties to be heard or if the award was incompatible with public policy. Only parties to the proceedings have the right to take legal action.

The Federal Act on Private International Law that is currently in force does not contain any provisions relating to the appeal or review of arbitral awards. However, in international arbitration, Swiss legal opinion allows for the possibility of review without exceptions, even in the absence of a legal basis, through the analogous application of article 121 et seq. of the Federal Supreme Court Act. Only parties to the proceedings are entitled to take legal action.

The Federal Act on Private International Law currently in force does not contain express provisions on the interpretation or rectification of an arbitral award. However, legal opinion accepts that Swiss law allows arbitral tribunals, in cases of international arbitration in Switzerland, to interpret awards and rectify oversights. The parties to the proceedings are also entitled to apply to the court for the interpretation or rectification of an arbitral award.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Switzerland welcomes the discussions currently taking place at the multilateral level relating to options for reforming the investor-State arbitration regime, and is actively participating in those discussions. In view of the fact that existing investment arbitration institutions are governed at the multilateral level, any reforms should also be undertaken at the multilateral level, and not as part of bilateral free trade agreements.

Proposals to create a permanent tribunal to resolve investment disputes between investors and States and/or an appeal mechanism for awards rendered following a dispute between investors and States must be thoroughly examined. As a first step, the various elements (legal issues etc.) should be identified and compiled by experts. Switzerland will then decide on its position on the basis of those analyses.