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Settlement of commercial disputes

Investor-State Dispute Settlement Framework

Compilation of comments

Note by the Secretariat

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I. Introduction

1. At its forty-ninth session, in 2016, the Commission considered a research study carried out by the Secretariat in conjunction with the Center for International Dispute Settlement (CIDS) of the University of Geneva and the Graduate Institute of International and Development Studies.[1] The CIDS research study, briefly outlined in document A/CN.9/890, seeks to provide a preliminary analysis of the issues that would need to be considered if a reform of the investor-State dispute settlement system were to be pursued at a multilateral level and to map the main options available in reforming investor-State dispute settlement. At that session, the Commission requested the Secretariat to review how the CIDS research study might be best built upon, if approved as a topic of future work at the forthcoming session of the Commission, in 2017, taking into consideration the views of all States and other stakeholders, including how this project might interact with other initiatives in this area and which format and processes should be used.[2]

2. Pursuant to the request of the Commission, and to facilitate the collection of information by delegations, the Secretariat circulated a questionnaire regarding practices or experience with respect to investor-State dispute settlement, together with a short background note on the CIDS research study, reproduced below in section II. The replies are reproduced below in section III in the form in which they were received.

II. Questionnaire

A. Questions regarding the investor-State dispute settlement framework

3. In September 2016, the Secretariat circulated a questionnaire aimed at collecting information on the investor-State dispute settlement framework and the dispute settlement provisions usually included in international investment agreements (IIAs), as well as on the legislative and judicial framework on recognition and enforcement of decisions of international courts as well as appeal against arbitral awards.

4. The questionnaire included a background note introducing the CIDS research paper presented to UNCITRAL at its forty-ninth session, in 2016. The Commission may wish to recall that the CIDS research paper seeks to analyse whether the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention), adopted in December 2014, could provide a useful model for broader reform of the investor-State dispute settlement framework. To this end, the CIDS research paper proposes a possible roadmap that could be followed if States (including regional economic integration organizations that are party to investment treaties) were to decide to pursue a reform initiative aimed at replacing or supplementing the existing investor-State arbitration regime in international investment agreements (IIAs) with a permanent investment tribunal and/or an appeal mechanism for investor-State arbitral awards.

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[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 187-195; the CIDS report is available (in English only) on the website of UNCITRAL at: http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[2] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 194.

5. The proposed reform plan is developed on three main blocks: the design of an International Tribunal for Investments (ITI); the design of an Appeal Mechanism (AM) for investor-State arbitral awards; and the establishment of a multilateral instrument (the Opt-in Convention) to extend those new dispute resolution options to States' existing IIAs.

6. The main pillars of the possible reform initiative reviewed in the CIDS research paper are the following. First, what is envisaged would be a truly multilateral dispute settlement system, possibly resulting in the creation of one single International Tribunal for Investments potentially competent to resolve investment disputes concerning as many States as would opt into it, and/or in the creation of one single Appeal Mechanism potentially competent to serve as appellate tribunal for investor-State arbitral awards across all States' IIAs. Second, the suggested reform initiative would be directed at one discrete issue of IIA reform, i.e. the treaties' investor-State arbitration provisions. Third, the mechanism of the Opt-in Convention effectively would release States from the burden of pursuing the potentially complex and long amendment procedures set out in the existing 3,000 IIAs.

7. Against this backdrop, the CIDS research paper first analyses the main challenges that would be faced when designing the International Tribunal for Investments and the Appeal Mechanism respectively and sets out the principal architectural and institutional options available to States when setting up those dispute settlement bodies. These include the options available in relation to the determination of the law governing the proceedings before the new dispute settlement bodies, their composition and structure, the systems of control over their awards and decisions, and questions of enforcement. The research paper then addresses the legal issues to be considered in drafting the Opt-in Convention. It concludes that the challenges involved in broader reforms of the investor-State arbitration regime are substantially more complex than the introduction of a transparency standard in investment treaties. At the same time, the paper also shows that the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention) could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level.

8. The questionnaire contained the following questions:

A/International Investment Agreements (IIAs)

(1) Is your country a Party to bilateral or multilateral treaties on the protection of foreign investments, including free trade agreements containing a chapter on investment protection (hereinafter "international investment agreements" or "IIAs")? If so, do your IIAs include provisions on the settlement of investor-State disputes?

(2) Do any of the IIAs concluded by your country or your country's model IIA (if available) provide for permanent courts or tribunals (as opposed to investor-State arbitration) for the resolution of investor-State disputes? If so, could you please provide us with the texts of such IIAs, or any information relating thereto, including any information on decisions rendered by such permanent courts or tribunals?

(3) Do any of the IIAs concluded by your country or your country's model IIA (if available) contain provisions whereby investor-state arbitral awards may be subject to appeal (as distinguished from annulment)? If so, could you please provide us with the texts of such IIAs, or any information relating thereto?

(4) Do any of the IIAs concluded by your country or your country's model IIA (if available) address the possible 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? If so, could you please provide us with the texts of such IIAs, or any information relating thereto, including any information as to whether the Contracting Parties to those IIAs have undertaken any steps to implement those provisions?

(5) Do the IIAs concluded by your country contain provisions on the amendment of the IIAs? If so, could you please provide us with the text of such provisions, or any information relating thereto, including any information as to any instances in which such amendment procedures have been resorted to? Do any of the IIAs concluded by your country contain provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs?

B/Legislative and judicial framework

(6) Is there any statutory basis or judicial mechanism in your country to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)? If so, could you please provide us with any information relating thereto (to the extent it does not relate to judgments of international criminal courts and tribunals)? Have domestic courts in your country ever been requested to recognize or enforce judgments of international courts? If so, could you please provide us with any of those court decisions or information relating thereto (to the extent such decisions or information do not relate to international criminal courts and tribunals)?

(7) Does the legislation on international arbitration in your country contain any provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards?

(8) Do you have any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper?

B. Reference to the questionnaire

9. In the remainder of this note and its addenda, the above questions are referred as follows:

A/International Investment Agreements (IIAs)

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

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

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

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

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

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)

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

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

III. Compilation of comments

1. Austria

[Original: English]
[Date: 21 December 2016]

A/International Investment Agreements (IIAs)

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

Austria has so far concluded more than 60 bilateral investment treaties (BITs). Most of Austria's BITs provide for investor-state arbitration as a means of dispute settlement. Moreover, Austria is party or signatory to more than 70 treaties with investment provisions.

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

So far, the dispute settlement clauses contained in Austria's IIAs follow the classic model of ad-hoc investor-State arbitration. However, as Austria is a member of the European Union (EU) and since the EU has gained explicit power to conclude IIAs to the extent that they concern foreign direct investment within the Common Commercial Policy, Austria will be bound by EU agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) or the EU-Vietnam Free Trade Agreement (FTA), in the foreseeable future. The texts of these agreements provide for a permanent "investment court system" but have not yet entered into force and are thus yet not legally binding.

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

No appeal mechanisms have been included in Austria's IIAs so far. The investment court system in CETA and the EU-Vietnam FTA, however, will provide for such a possibility.

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

This possibility has not been taken into consideration in Austria' s IIAs. In the EU context, the (future) parties to CETA and to the EU-Vietnam FTA agree to work towards the establishment of a multilateral investment tribunal and appellate mechanism.

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

Austria' s IIAs follow the rules of general public international law, i.e., of the Vienna Convention on the Law of Treaties, in this regard and do not provide for a special regime.

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)

There is no general applicable statutory basis of judicial mechanism in this respect. Whereas foreign arbitral awards can be declared enforceable in a declaratory procedure by a national court, no such procedural instrument exists for a decision or a judgment of an international court. Judgments of the European Court of Human Rights (ECtHR), e.g., are not directly applicable and enforceable under domestic law, and national statutes or decisions not in conformity with the European Convention on Human Rights (ECHR) are not directly set aside by them. Control is exercised politically and collectively, as the execution of the Court' s judgments is supervised by the Committee of Ministers of the Council of Europe. However, compensation based on judgments in accordance with Article 41 ECHR is always paid punctually and fully.

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

If the question deals with possible appeals "to" state courts or arbitral tribunals, the answer would be no. However, Austria would like to add the following: Section 610 of the Austrian Code of Civil Procedure (ZPO) provides for a request by any party to the arbitral tribunal to correct or supplement the award in certain aspects. The provision refers to clerical errors, calculation errors, etc. in the award, to lack of reasons of the decision and to incompleteness of the award. It does not provide for an appeal on the merits. It is up to the parties to determine the number of instances of the proceedings in their arbitration agreement. Austrian law does not provide for any standard in this regard and simply respects the decision of the parties. Section 610 ZPO which provides for the possibility of certain challenges to an arbitral award exclusively refers to annulment and is therefore no provision within the meaning of this question.

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

The EU and its Member States have been engaged over the past years in a reform process of their investment policy and in particular of investor-State dispute settlement procedure. As indicated above, 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 regarding the existing system. Since discussions on the creation and on possible features of such a mechanism are at a very early stage, many questions are still open. Against this background, the options and aspects mentioned in the CIDS research paper constitute useful contributions to the current discussion.

To a certain extent, the different aspects discussed in the CIDS research paper are inter-linked, 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 and too early 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.

2. Finland

[Original: English]
[Date: 22 December 2016]

A/International Investment Agreements (IIAs)

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

Finland is a Party to multilateral, such as the Energy Charter Treaty, and bilateral treaties on the protection of foreign investments, including European Union free trade agreements containing a chapter or provisions on investment protection (referred together as International Investment Agreements — IIAs). The IIAs include provisions on the settlement of investor-State disputes.

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

The Comprehensive Trade and Economic Agreement between the European Union (EU) and its Member States and Canada (CETA) signed on 30 October 2016 and the Free Trade Agreement between the EU and its Member States and Vietnam, not yet signed, include an investment court system, providing for a renewed system for the resolution of investor-State disputes. These two IIAs are not yet in force.

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

Yes, please refer to question 2 above.

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 IIAs concluded by Finland contain rather standard provisions regarding amendment of the IIAs. Article 30.2 of the above mentioned CETA also contains provisions on the amendment of the agreement. Amendments are subject to domestic ratification procedures in accordance with national constitutions of each Contracting Party.

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 legislation on rules concerning the administration of justice relating to the Finnish membership of the EU (1554/1994), a judgment or a decision of a court or another authority of the EU, which is enforceable according to Article 18(3) or Article 280 of the Treaty on the Functioning of the European Union, or Article 299 of the European Atomic Energy Community Treaty, or according to certain separately mentioned EU-regulations, is to be enforced in Finland in the same way as a Finnish court judgment that is no longer subject to ordinary forms of appeal. The Ministry of Justice issues an order for enforcement on application. There is no information available on national court cases on recognition or enforcement of judgments given by international courts. The existence of such cases is improbable.

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

No.

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. To a certain extent, the different aspects discussed in the CIDS research paper are inter-linked 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 rather 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 of investor-State dispute settlement over the past years. One element of the reform is also the work towards 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 internally within the EU and with non-EU countries and we welcome the opportunity to pursue further discussions.

3. Netherlands

[Original: English]
[Date: 21 December 2016]

A/International Investment Agreements (IIAs)

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

Yes.

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

Netherlands is member of the EU and creating a multilateral investment court has been included in the EU's new investment approach, presented in September 2016. The EU recently concluded the EU-Vietnam FTA and the Comprehensive Economic and Trade Agreement (CETA) with Canada in which a reference to a permanent court is found.

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

No, not in particular, but the Dutch IIA's are subject to the ICSID Convention and UNCITRAL Arbitration Rules (i.e. New York Convention). If one of these treaties would be amended, such an appeal mechanism could be incorporated.

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 current treaties do not contain such provisions. However, this might change when the new Model Bilateral Investment Treaty (BIT) will be ready.

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

Provisions for amending are provided in our Model BIT in the last paragraph. As of 2014, EU Regulation 1219/2012 is in force, which means that amending or changing a BIT should be notified and authorized by the European Commission.

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 international court of which a judgement has been challenged before a Dutch Court is the Permanent Court of Arbitration (following the New York Convention). Its judgement is an arbitral award and is thus treated as such. There is a provision on the recognition and enforcement of foreign judgements. A distinction is made between foreign judgements for which an agreement on recognition and enforcement exists between the Netherlands and the State of origin of the judgement and other foreign judgements for which no such agreement exists. There is no provision for the recognition and enforcement of judgements of international courts.

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

The Dutch arbitration bill contains provisions on appeal, only applicable if the parties gave their written consent (prior, and mutually agreed via a contract).

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

For reference, please see the submission of the European Commission.

4. United Kingdom of Great Britain and Northern Ireland

[Original: English]
[Date: 22 December 2016]

A/International Investment Agreements (IIAs)

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

The United Kingdom has Bilateral Investment Treaties (BITs) in force with over 90 countries. Since the Treaty of Lisbon entered into force, the EU has held competence to negotiate investment treaties on behalf of Member States and since then the United Kingdom has not negotiated any new BITs. The UK's BITs include provisions for the settlement of investor-State disputes under the international arbitration investor-state dispute settlement (ISDS) model.

The UK is currently a Party to the Energy Charter Treaty. This treaty contains provisions on the protection of foreign investments and on the settlement of investor-State disputes.

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

The existing 90+ UK BITs contain provisions for investor-State arbitration and therefore do not provide for a system of permanent courts or tribunals. Since the

EU has held competence for the negotiation of investment treaties on behalf of Member States the United Kingdom has not negotiated any new BITs.

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

BITs agreed under the existing UK model treaty do not contain 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

BITs agreed under the existing UK model treaty do not contain provisions that 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

BITs agreed under the existing UK model treaty do not contain provisions on the amendment of the IIAs.

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 UK has a statutory provision for recognizing and enforcing judgments of the CJEU, e.g. the European Communities (Enforcement of Community Judgments) Order 1972 (SI 1972/1590). Domestic courts in the UK may be requested to recognize or enforce judgments of other international courts, however, there is no statutory basis or judicial mechanism under which this takes place.

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

The Arbitration Act 1996, the Arbitration (Scotland) Act 2010 and Arbitration (International Investment Disputes) Act 1966 provide for the enforcement of arbitral awards in the United Kingdom under the New York Convention or the ICSID Convention. The powers of review are generally limited as provided for in those treaties.

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

The UK supports the inclusion of investor-state dispute settlement mechanisms in IIAs to provide investors with an independent means of redress in the event of a dispute with a host State. We support measures to achieve fair outcomes of claims, high ethical standards for arbitrators and transparency of tribunal hearings.

The UK believes that further analysis is needed in terms of the evidence base as well as procedural hurdles before considering the details of how any multilateral mechanism could be established and resourced. We would not seek to prejudice any policy position we would wish to adopt in due course regarding such a court, appeal mechanisms or implications towards existing IIAs.

5. European Union

[Original: English]
[Date: 22 December 2016]

A/International Investment Agreements (IIAs)

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

The EU is currently a Party to the Energy Charter Treaty. This treaty contains provisions on the protection of foreign investments and on the settlement of investor-State disputes.

The EU has also concluded the negotiations of two other agreements containing provisions on investment protection and on the settlement of investor-State disputes which are not yet in force. These agreements are the EU-Canada Comprehensive Trade and Economic Agreement (CETA) and the EU-Vietnam Free Trade Agreement.

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

The EU-Canada Comprehensive Trade and Economic Agreement (CETA) signed on 30 October 2016 establishes a Tribunal composed of fifteen Members that will decide claims submitted with regard to alleged breaches of the investment protection provisions of the agreement (Article 8.27 CETA). The text of the agreement can be found here: http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf.

The text of the EU-Vietnam Free Trade Agreement (currently subject to legal revision) establishes a Tribunal composed of nine Members that will decide claims submitted with regard to alleged breaches of the investment protection provisions of the agreement (Chapter 8 on Trade in Services, Investment and E-Commerce, Chapter II (Investment), Section 3 (Resolution of Investment Disputes), Sub-Section 4 Investment Tribunal System), Article 12 — the numbering of the Chapters, Sections and Articles is currently subject to legal revision). The text of the agreement can be found here: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf.

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

The EU-Canada Comprehensive Trade and Economic Agreement as well as the EU-Vietnam Free Trade Agreement establish Appeal Tribunals to review awards rendered by the Tribunals established under those agreements (Article 8.28 CETA, Article 13 EU-Vietnam FTA).

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

In both the EU-Canada Comprehensive Trade and Economic Agreement and the EU-Vietnam Free Trade Agreement, the Contracting Parties have committed to work towards the creation of a multilateral investment tribunal and/or appellate mechanism (Article 8.29 CETA, Article 15 EU-Vietnam FTA).

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. The text of these provisions can be found here: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

Article 30.2 of the EU-Canada Comprehensive Trade and Economic Agreement contains provisions on the amendment of the agreement and of its annexes. The text of these provisions can be found here: http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf.

Article X.6 of Chapter 17 of the EU-Vietnam Free Trade Agreement contains provisions on the amendment of the agreement and of its annexes. The text of these provisions can be found here: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf.

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 Mechanisms 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 inter-linked 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.