The case for creating a multilateral investment dispute settlement mechanism

1. Promoting and retaining international investment is key for sustained economic growth. International investment rules have an important role to play and access to international dispute settlement for enforcing such rules has significantly contributed to the peaceful settlement of investment disputes over the last decades.

2. The continued relevance for countries and businesses of investment rules and efficient investment dispute settlement is confirmed by the steady increase in the number of international investment treaties and investment chapters included in bilateral and regional trade agreements. To this date there exist over 3200 international investment treaties and the number of investment disputes has increased commensurate with the tremendous growth in international investment flows.

3. At the same time, the last years have seen growing scrutiny and questioning of investor-state dispute settlement (ISDS) and search of balance in investment protection rules by policy makers and the public alike. Contrary to other areas of international economic relations where multilateral rules have gradually been put in place, international investment law has mostly developed through bilateral negotiations.

4. Many economies around the world have engaged in a reflection process about their policies in this area. In particular the backlash in certain parts of the world following a number of high profile ISDS cases has prompted discussions on the adequateness of this particular system of dispute settlement. The discussions have focussed on the fact that these cases have involved challenges to public policy in sensitive areas such as health, safety or the environment and therefore are different from traditional commercial arbitration. For some economies, ISDS has become one of the main stumbling blocks for the successful conclusion and implementation of new trade and investment agreements and has contributed to growing scepticism regarding the benefits of such agreements more generally.

5. Ideally, the international investment regime should provide investors and governments with one coherent set of rules, including an effective dispute settlement and enforcement mechanism, which is legitimate and accepted by citizens, business and policy-makers. It seems, however, that such an all-encompassing reform project may be difficult to achieve in the short or medium term.

6. What seems more easily within reach, and what would already constitute an important step in increasing the legitimacy and acceptance of the international investment regime, would be a multilateral reform of the investment dispute settlement system. The idea of creating a more institutionalised and accountable multilateral investment dispute settlement mechanism is gaining increased interest and momentum. We believe this can and should be achieved within the next years, showing that consensual initiatives are possible in times where bilateral or regional trade agreements are increasingly put into question. This would be combined with continued efforts with respect to substantive reform of investment rules and other efforts related to investment facilitation and promotion of sustainable investment.

Why engage in further reforms of investment dispute settlement?

7. While there seems to be consensus on the importance of promoting and regulating international investment, as well as on the need to ensure effective enforcement of agreed rules, the way in which investment disputes are currently adjudicated has become subject to increased criticism.

8. Although arguably some of the criticism directed against ISDS builds on fear and not on facts, the perceived lack of legitimacy of a dispute settlement system is a problem in itself. As it has been put by *Lord Chief Justice Gordon Hewart* as early as in 1924, it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." When citizens lose their trust in the way in which justice is administrated, something must be done to restore their confidence.

9. Why is there growing unease and distrust in the current system of ISDS? The dispute resolution mechanisms for investment disputes have been based on mechanisms stemming from the field of commercial arbitration. Such mechanisms are commonly used for resolving commercial disputes between private entities over a particular set of reciprocal obligations (contract-based arbitration). The outcomes of such proceedings do normally not have any implications other than for the parties to the dispute. In that context, elements such as confidentiality of proceedings and the appointment of ad doc arbitrators best suited for the particular dispute, have not been questioned.

10. The vast majority of ISDS claims are however about the correct interpretation and application of international agreements under public international law that regulate the obligations of governments towards a multitude of foreign investors. The outcome of the disputes can have important impacts on public budgets and cases often challenge public policy decisions of governments. Guaranteeing that justice is not just done, but seen to be done is crucial in this context when it comes to explaining the system and individual cases to legislators and the public.

11. Allowing the disputing parties to **individually choose their adjudicators** so as to best serve their individual interests in a particular case creates doubts about the objectivity and the systemic impacts of the current approach to ISDS. The polarisation of many frequent ISDS arbitrators (i.e. arbitrators are considered as being either 'pro-investor' or 'pro-state') is a symptom of this approach that contributes to raising concerns about the objectivity of the system.

12. Similar considerations apply to the **question of the remuneration of the adjudicators**. Whereas the administration of justice is considered a public good in most domestic and international judicial systems (and hence financed by governments), the disputing parties themselves pay the remuneration of the adjudicators in the current ISDS system. This raises concerns about the risk that financial incentives may have an impact on the decision making processes. A system of remuneration on a case-by-case basis also creates risks of conflicts of interest that may result from other professional activities that, by necessity, are pursued in parallel by the adjudicators.

13. The ad hoc nature of the current system of different ISDS tribunals constituted for each individual case also brings **problematic systemic implications**. The vast majority of the existing investment treaties are based on identical concepts (national treatment, most-favoured nation treatment, protection against expropriation, fair and equitable treatment) often with identical or very similar wording. The interpretation of investment rules in a particular dispute may have an impact on the interpretation of that rule or of similar rules in other agreements. It is therefore important that the rules are interpreted correctly by arbitrators not chosen by parties to a specific dispute. Conflicting rulings on identical or on very similar treaty provisions should also be avoided.

14. This lack of coherence and predictability is clearly problematic when long-term treaty obligations of States are at stake. It creates uncertainty for governmental policy making and for investors. A more permanent dispute settlement structure could address these problems by gradually building up a coherent body of case-law.

15. The **absence of appeal** against ISDS decisions is also a ground for concern. Existing international instruments in the field of investment arbitration only provide for very limited grounds of "appeal" of arbitral awards which do not include the possibility to review the correctness of arbitral decisions. This means ISDS decisions can be legally wrong, but cannot be corrected. This is difficult to explain to constituents. This may be less problematic in the field of private contract-based arbitration where reaching a quick decision may outweigh systemic and societal interests. The absence of an appeal becomes however problematic when the governments' long-term treaty obligations are at stake and public policy choices are challenged.

16. Complementing the investment dispute resolution system with the checks and balances known from other judicial systems in the field of public or international law would improve the legal quality of decisions. It would also rebuild trust in the system (and, consequently, improve the recognition and implementation of its decisions). At the same time, a standing review mechanism (such as in the form of an appellate tribunal) would contribute to building-up a more coherent case-law with the benefit of increased predictability and coherence for the users of the system.

Why a multilateral reform is preferable to a bilateral approach?

17. Gradual reform of the current system of ISDS has already started as part of on-going bilateral, regional or plurilateral investment treaty negotiations. However, renegotiating **over 3200 bilateral investment treaties** in force worldwide one by one would be too time consuming, and would inevitably result in continued fragmentation of the system.

18. The most promising and effective way is for interested governments to agree on a multilateral framework for resolving investment disputes that would be open to adherence by all interested countries, and which could then also be applied to existing investment treaties. Similar approaches have already been pursued for improving the transparency of ISDS proceedings (Mauritius Convention negotiated under the auspices of UNCITRAL) or for updating the multitude of existing double-taxation treaties (Multilateral Convention to Implement Tax Treaty Related Measures negotiated under the auspices of the OECD).

19. The same approach could be pursued for reforming ISDS. The result could be the creation of a new fully inclusive multilateral investment dispute settlement mechanism, with all necessary guarantees of legitimacy, legal correctness, transparency, predictability and efficiency. Criticism relating to the legitimacy of ISDS has not been limited to a few countries; rather it has arisen in both developing and developed economies. A multilateral response is therefore necessary.

20. Creating a genuine multilateral investment dispute settlement mechanism would also be the **only way to ensure more consistency and predictability** in the interpretation of identical or similar investment rules across different investment agreements. The more agreements would be subject to the jurisdiction of the new mechanism, the more coherence could be built up in the interpretation of their respective provisions, thus improving the legal certainty and predictability of the international investment regime across different regions of the world.

21. Bringing as many treaties as possible (and their related dispute settlement proceedings) together under one procedural roof would also result in efficiency gains, **with expected beneficial impacts on costs**. A broad coverage of treaties and of actual or potential disputes will also make it easier to move towards more permanent structures (such as full-time employed adjudicators).

22. Finally and most importantly, addressing the reform of ISDS multilaterally is the only way of guaranteeing a **fully inclusive approach** that takes into account the positions and experiences of all countries with a view of building a truly global consensus on the best possible regime for the resolution of international investment disputes. It would prevent further fragmentation of investment dispute resolution rules by offering a unique, transparent and predictable framework with resulting gains in terms of efficiency, coherence and institutional legitimacy.

23. Whilst a multilateral reform of the substantive standards is difficult to envisage at this moment in time, the process could also lead to discussion of further reforms of the international investment regime, beyond the question of dispute settlement, if governments so decide. Working on procedural issues should not preclude at the appropriate moment work on the substantive issues and the final result of any process on procedure should leave room for any future substantive rules to use the multilateral dispute settlement mechanism.

Questions for discussion:

1. Do Ministers agree that the current system of investment arbitration is in need of reform?
2. Do Ministers share the view that a multilateral process would be the most inclusive and effective way to pursue such reform?
3. Do Ministers have other, alternative suggestions for reforming the system of investment dispute resolution, or for increasing coherence internationally on investment policy more broadly?