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Possible reform of investor-State dispute settlement (ISDS)

Note by the Secretariat

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Reform Options: Tabular presentation of framework for discussion

<i>Possible reforms</i>	<i>Elements of the reforms - Link to other reform options</i>	<i>Main implications</i>	<i>Concerns addressed</i>
A. Tribunals, ad hoc and standing multilateral mechanisms			
<p>(i) Multilateral advisory centre</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.168</p> <p>A/CN.9/WG.III/WP.159/Add.1, <i>submission from the European Union and its Member States</i></p> <p>A/CN.9/WG.III/WP.161, <i>submission from the Government of Morocco</i></p> <p>A/CN.9/WG.III/WP.162, <i>submission from the Government of Thailand</i></p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, <i>submissions from the Government of Costa Rica</i></p> <p>A/CN.9/WG.III/WP.174, <i>submission from the Government of Turkey</i></p>	<p>Setting up advisory centre(s), for instance, as a stand-alone body, as part of an institution, as an inter-governmental or non-governmental organization, or as a trust fund, established with a seat in one location or on a regional basis</p> <p>Functions and services to be delineated (assistance in organizing the defence; support during dispute settlement proceedings; advisory services; alternative dispute resolution (ADR) services; as well as capacity-building and sharing of best practices)</p> <p>Beneficiaries to be determined (all or some States and/or small- and medium-sized enterprises (SMEs))</p> <p>This reform option can be implemented as a stand-alone reform or in conjunction with any other reform options</p> <p>Possible interactions: third-party funding reform (see F. below)</p>	<p>Resources for the establishment of relevant facilities to provide support particularly to developing and least developed countries and possibly SMEs</p> <p>Development of relevant best practices and sharing of institutional information to prevent disputes, while protecting confidentiality and avoiding potential conflicts of interest</p>	<p>Cost and duration of ISDS proceedings (excessive financial burden on the parties, including developing and least developed countries and possibly SMEs)</p> <p>Correctness and consistency</p> <p>Access to justice</p>
<p>(ii) Stand-alone review or appellate mechanism</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.159/Add.1, <i>submission from the European Union</i></p>	<p>Review of decisions</p> <p>Scrutiny system for awards prior to issuance</p> <p>Streamlined procedure for post-award actions such as</p>	<p>Review of decisions</p> <p>Setting up of a mechanism for review of ISDS tribunals decisions prior to issuance</p>	<p>Review of decisions</p> <p>Absence of, or limited mechanisms in many existing treaties to address inconsistency and</p>

<i>Possible reforms</i>	<i>Elements of the reforms - Link to other reform options</i>	<i>Main implications</i>	<i>Concerns addressed</i>
<p><i>and its Member States (Appellate body, see also below A(iii))</i></p> <p>A/CN.9/WG.III/WP.161, <i>submission from the Government of Morocco</i> (Prior scrutiny of awards and standing appellate mechanism)</p> <p>A/CN.9/WG.III/WP.163, <i>submission from the Governments of Chile, Israel and Japan</i> (Treaty-specific appellate review mechanism)</p> <p>A/CN.9/WG.III/WP.175, <i>submission from the Government of Ecuador</i> (Standing review and appellate mechanism)</p> <p>A/CN.9/WG.III/WP.177, <i>submission from the Government of China</i> (Stand-alone appellate mechanism)</p>	<p>interpretation, revision and annulment</p> <hr/> <p>Appellate mechanism</p> <p>Development of an appellate mechanism, possibly tasked with a review of awards and decisions made by:</p> <ul style="list-style-type: none"> - Arbitral tribunals - International investment court - Regional investment court - International commercial courts - Domestic courts in case of denial of justice <p>Determination of the framework within which it will be developed; it can be implemented jointly with any other reform options</p>	<p>Appellate mechanism</p> <p>The relationship between an appellate mechanism and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) would deserve careful consideration</p> <p>The impact on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) should also be addressed</p>	<p>incorrectness of decisions</p> <hr/> <p>Appellate mechanism</p> <p>Absence of, or limited mechanisms in many existing treaties to address inconsistency and incorrectness of decisions</p>
<p>(iii) Standing first instance and appeal investment court, with full-time judges</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.159/Add.1, <i>submission from the European Union and its Member States</i></p>	<p>Setting-up of a multilateral investment court, which would require preparing a statute to determine its functioning</p> <p>This reform option would cover, and possibly work in conjunction with, other reform options. The option may make a number of other options for reform redundant</p>	<p>The co-existence or articulation with the existing ISDS regime as well as with regional investment courts would need to be considered</p>	<p>Limits of the current mechanisms to address inconsistency and incorrectness of decisions</p> <p>Concerns addressed in relation to arbitrators and decision-makers</p> <p>Cost and duration</p>

Possible reforms	Elements of the reforms - Link to other reform options	Main implications	Concerns addressed
B. Arbitrators and adjudicators appointment methods and ethics			
<p>(i) ISDS tribunal members' selection, appointment and challenge</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.169</p> <p>A/CN.9/WG.III/WP.159/Add.1, submission from the European Union and its Member States (full time judges, see above, option A(iii))</p> <p>A/CN.9/WG.III/WP.162, submission from the Government of Thailand (Reform to the arbitrators' selection and appointment system, as well as mechanism for challenge)</p> <p>A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan (Reform to the arbitrators' selection and appointment system, as well as mechanism for challenge)</p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, submissions from the Government of Costa Rica (Reform to the arbitrators' selection and appointment system, as well as mechanism for challenge)</p> <p>A/CN.9/WG.III/WP.174, submission from the Government of Turkey (Proposal to prepare a comprehensive illustrative list of arbitrators and a database indicating the workload and timeframe, as well as to address challenge of arbitrators)</p>	<p>Appointments through strengthened regulations or development of alternative methods, such as:</p> <ul style="list-style-type: none"> - Increased use of appointing authorities with more transparent processes - Use of pre-established list of arbitrators/adjudicators (Roster) - Mechanisms used in other international courts and bodies <p>Determination of the framework within which reform option will be developed</p>	<p>The reform option may have a direct impact on party appointment mechanisms</p> <p>The impact on arbitral institutions' practice and their arbitration rules should be considered</p> <p>The impact on domestic legislation (including the Model Law on International Commercial Arbitration) would also need to be assessed</p>	<p>Lack or apparent lack of independence and impartiality of decision makers in ISDS</p> <p>Issues regarding disclosure and challenge mechanisms available under many existing treaties and arbitration rules</p> <p>Lack of appropriate diversity among decision makers in ISDS</p> <p>Mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules</p> <p>Correctness and consistency of decisions by ISDS tribunals</p>

Possible reforms	Elements of the reforms - Link to other reform options	Main implications	Concerns addressed
<p>A/CN.9/WG.III/WP.175, submission from the Government of Ecuador (Proposal to prepare substantive provisions on challenge, clear guidelines on conflict of interest)</p> <p>A/CN.9/WG.III/WP.177, submission from the Government of China (Proposal to strengthen the framework on challenge and conflict of interest)</p>			
<p>(ii) Code of conduct</p> <p>Mentioned in:</p> <p>A/CN.9/916</p> <p>A/CN.9/WG.III/WP.167</p> <p>A/CN.9/WG.III/WP.159/Add.1, submission from the European Union and its Member States (full time judges, see above, option A(iii))</p> <p>A/CN.9/WG.III/WP.161, submission from the Government of Morocco</p> <p>A/CN.9/WG.III/WP.162, submission from the Government of Thailand</p> <p>A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan</p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, submissions from the Governments of Costa Rica</p> <p>A/CN.9/WG.III/WP.174, Submission from the Government of Turkey</p>	<p>Development of a code of conduct for</p> <ul style="list-style-type: none"> - Arbitrators and adjudicators - Possibly other persons involved in ISDS (for instance, counsel, experts) <p>It would include determining appropriate sanctions in case of non-compliance</p> <p>Joint project by ICSID and UNCITRAL secretariats</p>	<p>Development of a legal standard, possibly together with an enforcement mechanism aimed at supplementing and harmonizing the existing legal framework, together with soft law guidance on its use</p>	<p>Lack or apparent lack of independence and impartiality of decision makers in ISDS</p>

Possible reforms	Elements of the reforms - Link to other reform options	Main implications	Concerns addressed
<p>A/CN.9/WG.III/WP.175, submission from the Government of Ecuador</p> <p>A/CN.9/WG.III/WP.176, submission from the Government of South Africa</p> <p>A/CN.9/WG.III/WP.177, submission from the Government of China</p>			
C. Treaty Parties' involvement and control mechanisms on treaty interpretation			
<p>(i) Enhancing treaty Parties' control over their instruments</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.159/Add.1, submission from the European Union and its Member States</p> <p>A/CN.9/WG.III/WP.161, submission from the Government of Morocco</p> <p>A/CN.9/WG.III/WP.162, submission from the Government of Thailand</p> <p>A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan</p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, submissions from the Government of Costa Rica</p> <p>A/CN.9/WG.III/WP.176, submission from the Government of South Africa</p>	<p>Setting up mechanism(s) for treaty interpretation and related questions, such as:</p> <ul style="list-style-type: none"> - Ad hoc authoritative interpretation mechanism - Authoritative interpretation by treaty institutions - Release of <i>travaux préparatoires</i> - Renvoi of interpretative questions <p>Aimed at:</p> <p>(i) Encouraging a more systematic use of:</p> <ul style="list-style-type: none"> - Unilateral interpretations, - Joint interpretations, or - Multilateral interpretations <p>(ii) Ensuring abidance by arbitrators and decision-makers</p> <p>This reform option can be implemented as a stand-alone reform or in conjunction with other reform</p>	<p>Design of mechanisms that could be applied to investment treaties generally</p>	<p>Unjustifiably inconsistent interpretations of investment treaty provisions</p> <p>Lacking or limited mechanisms in many existing treaties to address alleged incorrectness of decisions</p>

<i>Possible reforms</i>	<i>Elements of the reforms - Link to other reform options</i>	<i>Main implications</i>	<i>Concerns addressed</i>
	options, such as reforms aiming at strengthening the involvement of State authorities (see C(ii)), or at establishing review or appellate mechanisms (see A(ii))		
<p>(ii) <i>Strengthening the involvement of State authorities</i></p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.159/Add.1, <i>submission from the European Union and its Member States</i></p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, <i>submissions from the Governments of Costa Rica</i></p> <p>A/CN.9/WG.III/WP.171, <i>submission from the Government of Brazil</i></p> <p>A/CN.9/WG.III/WP.176, <i>submission from the Government of South Africa</i></p>	<p>Establishing/strengthening the framework for State-State preliminary consideration of issues, including:</p> <ul style="list-style-type: none"> - Technical consultations - Decisions by the respective State authorities - Setting up a joint review committee by the treaty Parties - Review/Appeal mechanism or State-State body to which application could be made if the claim cannot be settled at the technical level in a given time period <p>This reform option can be implemented as a stand-alone reform or in conjunction with other reform options, such as reforms aiming at enhancing the control by treaty Parties on their instruments (see C(i))</p>	<p>Development of a legal standard for inclusion in investment treaties; and/or</p> <p>Setting up of a multilateral framework, also applicable to existing treaties, such as an appellate mechanism or a body to allow for an appeal of joint State authorities' decisions</p>	<p>Unjustifiably inconsistent interpretations of investment treaty provisions</p> <p>Absence of, or limited mechanisms in many existing treaties to address inconsistency and incorrectness of decisions</p> <p>Cost and duration of ISDS proceedings, including frivolous claims and abuse of process</p>

Possible reforms	Elements of the reforms - Link to other reform options	Main implications	Concerns addressed
D. Dispute prevention and mitigation			
<p>(i) Strengthening of dispute settlement mechanisms other than arbitration (ombudsman, mediation)</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.156, submission from the Government of Indonesia</p> <p>A/CN.9/WG.III/WP.159/Add.1, submission from the European Union and its Member States</p> <p>A/CN.9/WG.III/WP.161, submission from the Government of Morocco</p> <p>A/CN.9/WG.III/WP.162, submission from the Government of Thailand</p> <p>A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan</p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, submissions from the Governments of Costa Rica</p> <p>A/CN.9/WG.III/WP.171, submission from the Government of Brazil</p> <p>A/CN.9/WG.III/WP.174, submission from the Government of Turkey</p> <p>A/CN.9/WG.III/WP.176, submission from the Government of South Africa</p> <p>A/CN.9/WG.III/WP.177, submission from the Government of China</p>	<p>For instance, mediation and ombudsman facilities as part of the promotion of early settlement of disputes, particularly during the cooling-off period</p> <p>This reform option can be implemented as a stand-alone reform or in conjunction with other reform options</p>	<p>Development of relevant standard clauses for investment treaties, promotion of existing mediation rules (ICSID and UNCITRAL Mediation Rules are being updated); and establishment of relevant facilities if necessary</p> <p>Promotion of the United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention on Mediation”)</p>	<p>Cost and duration of ISDS proceedings</p> <p>Preservation of long-term relations</p>

<i>Possible reforms</i>	<i>Elements of the reforms - Link to other reform options</i>	<i>Main implications</i>	<i>Concerns addressed</i>
<p>(ii) Exhaustion of local remedies</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.156, submission from the Government of Indonesia</p> <p>A/CN.9/WG.III/WP.161, submission from the Government of Morocco</p> <p>A/CN.9/WG.III/WP.176, submission from the Government of South Africa</p>	<p>Development of model provisions on exhaustion of local remedies</p> <p>This reform option can be implemented as a stand-alone reform or in conjunction with other reform options</p>	<p>Development of model provisions for treaties</p>	<p>By-passing of domestic courts</p>
<p>(iii) Procedure to address frivolous claims, including early dismissal</p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.156, submission from the Government of Indonesia</p> <p>A/CN.9/WG.III/WP.161, submission from the Government of Morocco</p> <p>A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan</p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, submissions from the Government of Costa Rica</p> <p>A/CN.9/WG.III/WP.174, submission from the Government of Turkey</p> <p>A/CN.9/WG.III/WP.176, submission from the Government of South Africa</p>	<p>Development of procedures or mechanism to dismiss frivolous claims at an early stage, including the possibility for the tribunal to order the claimant to pay all costs associated with such claims, taking the form of rules, guidelines for arbitrators, model clauses for treaties, specific procedure with a permanent or semi-permanent first instance court</p>	<p>Possible impact on/necessity of coordination with:</p> <ul style="list-style-type: none"> - Rules/treaties that already provide for these procedures 	<p>Cost of ISDS proceedings</p> <p>Lack of a mechanism to address frivolous or unmeritorious claims</p>

Possible reforms	Elements of the reforms - Link to other reform options	Main implications	Concerns addressed
<p>(iv) Multiple proceedings, reflective loss and counterclaims by respondent States</p> <p>Mentioned in:</p> <p>(Multiple proceedings)</p> <p>A/CN.9/915</p> <p>A/CN.9/WG.III/WP.170</p> <p>A/CN.9/WG.III/WP.159/Add.1, <i>submission from the European Union and its Member States</i></p> <p>A/CN.9/WG.III/WP.163, <i>submission from the Governments of Chile, Israel and Japan</i></p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178,, <i>submissions from the Government of Costa Rica</i></p> <p>A/CN.9/WG.III/WP.174, <i>Submission from the Government of Turkey</i></p> <p>A/CN.9/WG.III/WP.176, <i>submission from the Government of South Africa</i></p> <p>(Counterclaims)</p> <p>A/CN.9/WG.III/WP.161, <i>submission from the Government of Morocco</i></p> <p>A/CN.9/WG.III/WP.176, <i>submission from the Government of South Africa</i></p>	<p>Guidance to arbitral tribunals regarding multiple proceedings</p> <p>(i) Where different entities within the same corporate structure have a right of action against a State regarding the same investment/same State measure and for the benefit of substantially the same interests, possibility to consider developing legal standards regarding:</p> <ul style="list-style-type: none"> - Proactive use of consolidation - Possibility to exchange information between tribunals - Stay of proceedings - Considering the use of <i>lis pendens</i>, <i>res judicata</i> and other doctrines (e.g., abuse of process) <p>(ii) In the situation of a concurrent proceeding where a measure by a State has an impact on a number of investors which are not related, possibility to consider:</p> <ul style="list-style-type: none"> - Systemic approach to recurrent disputes by the creation of claims commissions - System of preliminary rulings by specific bodies 	<p>The role of tribunals is strengthened in options listed under (i), and the role of States is enhanced in options listed under (ii)</p> <p>Possible impact on:</p> <ul style="list-style-type: none"> - Arbitral institutions, their rules, practices and role - Non-institutional arbitration rules - Specific treaty language in certain treaties (e.g., “indirect” investor, providing a legal basis for counterclaims etc.) 	<p>Lack of framework to address multiple proceedings and allow counterclaims</p> <p>Consistency of decisions by ISDS tribunals</p> <p>Development of new legal standards (see A/CN.9/915)</p> <p>Can also address:</p> <p>Abuse of process</p> <p>Judicial economy</p> <p>Costs and Duration</p>

<i>Possible reforms</i>	<i>Elements of the reforms - Link to other reform options</i>	<i>Main implications</i>	<i>Concerns addressed</i>
E. Cost management and related procedures			
<p>(i) <i>Expedited procedures</i></p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.162, submission from the Government of Thailand</p> <p>A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan</p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, submissions from the Government of Costa Rica</p> <p>A/CN.9/WG.III/WP.174, submission from the Government of Turkey</p>	<p>Application of relevant rules and practices, or of specific procedures for smaller claims and non-complex cases; development of rules to streamline the procedure and expedite certain aspects of the procedure, for instance, preliminary objections</p>	<p>Both ICSID (current reform process) and UNCITRAL (current work on expedited arbitration by Working Group II) are working on the development of expedited procedure rules</p>	<p>Cost and duration of ISDS proceedings</p>
<p>(ii) <i>Principles/guidelines on allocation of cost and security for cost</i></p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.161, submission from the Government of Morocco</p> <p>A/CN.9/WG.III/WP.162, submission from the Government of Thailand</p> <p>A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan</p> <p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, submissions from the Government of Costa Rica</p> <p>A/CN.9/WG.III/WP.174, submission from the Government of Turkey</p>	<p>Development of cost-sharing mechanism between the parties to the dispute so as to include the loser-pays rule</p> <p>Development of regulation on security for cost to ensure its availability and use by tribunals</p>	<p>Development of principles and rules that provide guidance to tribunals in allocating cost and ordering security for cost</p> <p>The option can accompany any other option for reform</p>	<p>Cost and duration of ISDS proceedings</p> <p>Allocation of cost by ISDS tribunals; difficulties for States in cost recovery and need for rules on security for cost</p>

<i>Possible reforms</i>	<i>Elements of the reforms - Link to other reform options</i>	<i>Main implications</i>	<i>Concerns addressed</i>
A/CN.9/WG.III/WP.176 , <i>submission from the Government of South Africa</i>			
(iii) Other streamlined procedures and tools to manage costs Mentioned in: A/CN.9/WG.III/WP.161 , <i>submission from the Government of Morocco</i> A/CN.9/WG.III/WP.162 , <i>submission from the Government of Thailand</i> A/CN.9/WG.III/WP.163 , <i>submission from the Governments of Chile, Israel and Japan</i> A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178 , <i>submissions from the Government of Costa Rica</i> A/CN.9/WG.III/WP.176 , <i>submission from the Government of South Africa</i>	Streamlining the procedure including the introduction and implementation of stricter time line - Requiring parties and the tribunal to establish a budget at the outset of a case - Adopting a ceiling for overall costs; and - Requiring tribunals to provide parties with enhanced, real-time information about the status of a case, including budget	Introduction of stricter timelines and compliance mechanisms More effective management of costs through information-sharing Improved case management by ISDS tribunals The option can accompany any other option for reform	Cost and duration of ISDS proceedings Allocation of cost by ISDS tribunals; difficulties for States in cost recovery and need for rules on security for costs

F. Third party funding

Mentioned in: A/CN.9/WG.III/WP.172 A/CN.9/WG.III/WP.161 , <i>submission from the Government of Morocco</i> A/CN.9/WG.III/WP.162 , <i>submission from the Government of Thailand</i> A/CN.9/WG.III/WP.163 , <i>submission from the Governments of Chile, Israel and Japan</i>	Definition Prohibition Regulation with regard to: - Limitation of admissibility - Disclosure requirement - Consideration in cost decisions - Legal aid mechanism - Code of conduct	Impact on the overall ISDS procedure including transparency requirement, security for costs and allocation of costs	Definition of third-party funding Use or regulation of third-party funding
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<i>Possible reforms</i>	<i>Elements of the reforms - Link to other reform options</i>	<i>Main implications</i>	<i>Concerns addressed</i>
<p>A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, <i>submissions from the Government of Costa Rica</i></p> <p>A/CN.9/WG.III/WP.174, <i>submission from the Government of Turkey</i></p> <p>A/CN.9/WG.III/WP.176, <i>submission from the Government of South Africa</i></p> <p>A/CN.9/WG.III/WP.177, <i>submission from the Government of China</i></p>	<p>Possible interactions:</p> <ul style="list-style-type: none"> - Legal aid mechanism under umbrella of multilateral advisory centre - Equity funding and indirect claims, claims by shareholders and reflective loss - Application of UNCITRAL transparency standards 		
G. Other possible reform options	To be determined by the Working Group		
IMPLEMENTATION OF REFORM OPTIONS			
<p><i>Opt-in Convention</i></p> <p>Mentioned in:</p> <p>A/CN.9/WG.III/WP.159/Add.1, <i>submission from the European Union and its Member States</i></p> <p>A/CN.9/WG.III/WP.173, <i>submission from the Government of Colombia</i></p> <p>A/CN.9/WG.III/WP.175, <i>submission from the Government of Ecuador</i></p>	<p>Modelled after the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting</p>		<p>Possibility to ensure application of the reforms to existing investment treaties</p> <p>Possibility to offer a range of reform options</p>