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Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)

Note by the Secretariat

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I. Introduction

1. At its forty-eighth session, in 2015, the Commission noted with appreciation the ongoing cooperation and coordination efforts of the Secretariat with organizations active in the field of international arbitration and conciliation.[1] The Commission further noted that UNCITRAL standards in that field were characterized by their flexibility and generic application to different types of arbitration, including both purely commercial arbitration and investor-State arbitration. In that light, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination.[2]

2. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reform had been formulated by a number of organizations. In that context, the Commission was further informed that the Secretariat was conducting a study on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency" or "Mauritius Convention") could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations, including the Center for International Dispute Settlement (CIDS), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School. In that light, the Secretariat was requested to report to the Commission at a future session with an update on that matter.[3]

3. Pursuant to that request, at its forty-ninth session, in 2016, the Commission had before it a note providing an update on the study conducted within the framework of a research project of CIDS and a short overview of its outcome (A/CN.9/890). The Commission expressed its appreciation to the Secretariat and to CIDS for the research conducted.

4. At that session, the Commission heard an oral presentation of the CIDS research study (referred to below as the "CIDS report"),[4] which sought to provide a preliminary analysis of the issues that would need to be considered if a reform of the investor-State dispute settlement (also referred to as "ISDS") regime[5] were to be pursued at a multilateral level. It was pointed out that the CIDS report considered two different options in-depth: (i) a permanent international dispute settlement body providing direct access to private parties and State parties alike for investment related matters, and (ii) an appeal mechanism for investor-State arbitral awards. It was highlighted that the final part of the CIDS report addressed possible means for States to incorporate those options into their existing and future investment treaties.

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[1] For presentations made at the forty-eighth session of the Commission by the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the International Centre for Settlement of Investment Disputes (ICSID), The Permanent Court of Arbitration (PCA), and the Energy Charter Secretariat, see *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 269-274.

[2] Ibid., para. 268.

[3] Ibid.

[4] The CIDS report is available on the Internet at: http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[5] The term "investor-State dispute settlement ("ISDS") regime" is used in this note to refer generally to the use of arbitral tribunals established under the Rules of UNCITRAL, ICSID or other arbitral institutions, to solve a dispute between an investor and a State. While investor-State arbitration provisions show variations across different investment treaties, they normally provide for the following features: (i) the claimant-investor may bring a claim directly against the respondent-State; (ii) the dispute is heard by an arbitral tribunal constituted to hear that particular dispute; and (iii) disputing parties, including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal.

The conclusion reached regarding existing investment treaties was that, although not the only model that could be envisaged for that purpose, a convention modelled on the Mauritius Convention on Transparency with certain adaptations could effectively extend new dispute settlement options to existing investment treaties.

5. After discussion, the Commission requested the Secretariat to review how the project described in document A/CN.9/890 might be best carried forward, if approved as a topic of future work at the forthcoming session of the Commission, 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. In so doing, the Secretariat was requested to conduct broad consultations.[6]

6. Accordingly, the Secretariat circulated a questionnaire to States and regional economic integration organizations. The replies to the questionnaire are reproduced in document A/CN.9/918 and its addenda.

7. The Secretariat organized jointly with the CIDS a meeting with a view to consulting experts from governments and inter-governmental organizations.[7] Meetings are also planned for the purpose of collecting views from investors.[8] In addition, the Secretariat attended or monitored conferences where the matter was discussed.[9]

8. In order to assist the Commission in its further consideration of the matter, this note provides an insight on the consultation process undertaken by the Secretariat regarding possible reforms of the ISDS regime. The Commission may wish to note that it will also have before it an additional report from the CIDS, addressing the selection and appointment of members of international courts and assignment of individual cases to members.

II. Possible reforms of investor-State dispute settlement (ISDS)

A. Rationale for reforms

Current ISDS regime and criticisms

9. During the consultation process, key elements of the current ISDS regime and its origin were underlined. In particular, it was recalled that the ISDS regime had been developed to allow a foreign national (whether an individual or a company) to bring a claim directly against a sovereign State, in a significant break from traditional mechanisms which were essentially founded on the institution of diplomatic protection. Importantly, the ISDS regime resulted in the

[6] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 187-194.

[7] The meeting was held under the auspices of the Swiss Government; the agenda and the presentations made during the meeting are available on the Internet at: http://www.cids.ch/events-2/past-events/634-2/.

[8] The meetings, including with the Organization for Economic Cooperation and Development (OECD) and the International Chamber of Commerce are scheduled to be held after the date of submission of this note.

[9] For instance, 5th Asia Pacific ADR Conference, Seoul, Republic of Korea, 12-13 October 2016; King's College London, Workshop on "Multilateral Investment Tribunal", London, United Kingdom of Great Britain and Northern Ireland, 21 October 2016; United Nations International Law Week, Panel on "Reforming Investor-State Dispute Settlement System: the Way Forward", New York, United States of America, 24 October 2016; UNCITRAL's 50 Years, Global Standards for Rule-based Commerce, New Delhi, India, 28-29 November 2016; EU/Canada High Level Experts Meeting, Geneva, Switzerland, 13 December 2016; Vienna Arbitration Days, "Repositioning Arbitration", Vienna, Austria, 24-25 February 2017; and the Joint UNCITRAL-LAC Conference, Ljubljana, Slovenia, 4 April 2017.

"de-politicization" of investment disputes and effectively removed the risk of such disputes escalating into inter-State conflicts.[10]

10. Also, the ISDS regime was created within the broader context of the development of investment treaties as a means to enhance confidence in the stability of the investment environment. A growing number of investment treaties have been concluded by States over the last decades and more than 3,000 investment treaties are currently in force. In parallel, there have been a growing number of ISDS cases. According to the information collected by UNCTAD, there are currently 767 known ISDS cases, with 62 new known treaty-based cases initiated in 2016.[11] Over time, States have become more familiar with the current ISDS regime, and have organized themselves to better respond to investors' claims. The current ISDS regime has therefore been, and continues to be, widely used for solving disputes in a neutral and flexible manner between investors and States.

11. However, the current ISDS regime has recently attracted strong and growing criticisms in various parts of the world. Concerns are diverse, but generally relate to the method of appointing arbitrators, and the impact of such methods on arbitrators' independence and impartiality; the lack of coherence of a system based on decisions made by tribunals constituted to hear a specific case (also referred to as "ad hoc" tribunals), and the lack of corrective mechanisms (i.e., the lack of appropriate control or review mechanisms); the length and costs of the proceedings; and the lack of transparency.[12]

12. During the consultation process, it was reiterated that criticisms of the current ISDS regime in essence reflect concerns about the democratic accountability and legitimacy of the regime as a whole. While States themselves have established that regime and, therefore, their consent ensures its legitimacy under international law, this may not necessarily be how States and/or their constituencies perceive it.[13]

13. In that context, it was underlined that the public perception of any reform process was key to its success, and that communication should be handled adequately should any reform project be undertaken at a multilateral level.

Reform of the dispute settlement regime versus reform of the substantive investment protection standards

14. Comments were made during the consultation process that an inclusive approach might be necessary, requiring not only a reform of the ISDS regime but also of the substantive rules of investment protection. On that matter, suggestions were made that a phasing approach would be preferable in order to make progress. A reform focusing as a first step on ISDS was seen as more likely to be successful. Consideration of the substantive standards would most probably entail a different and more complicated process, and give rise to controversies on which and how substantive protection standards should be reformed.

15. As highlighted by commentators, it can be expected that a reform of the existing ISDS regime, in particular if it were to establish a permanent dispute settlement body and/or an appellate body, would bring more coherence as compared to the current system of ad hoc arbitral tribunals. On that point, the CIDS report highlights that even so, no absolute uniformity would be achieved, because the substantive standards on investment would continue to be anchored in different

[10] See also the CIDS report, paras. 8-14, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[11] The Commission may wish to note that UNCTAD developed an online tool which provides comprehensive information on investment treaties, as well as on ISDS, available on the Internet at: http://investmentpolicyhub.unctad.org/IIA and http://investmentpolicyhub.unctad.org/ISDS.

[12] See also the CIDS report, para. 22, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[13] Ibid., paras. 15-23.

investment treaties. However, consistency would be reached in the application of the same investment treaty and of different investment treaties with identical or nearly identical wordings. Furthermore, even when applying differently worded provisions in investment treaties, it would be expected that a permanent dispute settlement body's and/or appellate body's pursuit of consistency would be greater as a natural consequence of the in-built elements of tradition, continuity and collegiality, which are inherent in permanent bodies as opposed to ad hoc bodies.[14]

Questions for consideration

16. The Commission may wish to note the following questions that might require further consideration regarding the rationale for a reform of the current ISDS regime:

(i) What would be the aim of a reform (for instance, to address legitimacy concerns, lack of consistency in decision-making, lack of a review mechanism, methods for appointing arbitrators, arbitrators' independence and impartiality, and/or length and cost of the procedure); what elements to preserve from the current ISDS regime (for instance, neutrality i.e. distance of the adjudicators from politics and from business interests; enforceability of the decisions; and the manageability and workability of the process);

(ii) Whether to proceed with a reform of the ISDS regime in conjunction with, or separately from, a reform of substantive investment standards;

(iii) Whether a reform should aim at making adjustments to the current ISDS regime (see paras. 17 to 28 below), whether such adjustments would be feasible and would be sufficient to respond to the legitimacy concerns that have been expressed (see para. 11 above);

(iv) If establishing a permanent international dispute settlement body would be the preferred choice for a reform (see paras. 29-57 below), what would be the articulation between the new body and the current ISDS regime.

B. Options for reforms

1. Adjustments to the current ISDS regime

(a) Characteristics of the current ISDS regime

17. Many observed during the consultation process that there is currently a legal framework in place to deal with investment disputes unlike in the mid-sixties when the International Centre for Settlement of Investment Disputes (ICSID) was created, and the investment arbitration framework was still being developed. Therefore, it was mentioned that any reform of ISDS should address its articulation with such framework. The current ISDS framework is characterized by the use of arbitral tribunals established ad hoc to solve a dispute between an investor and a State under the arbitration rules of UNCITRAL, ICSID or of other arbitral institutions. Under that framework, both disputing parties, i.e. the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal. Awards rendered by the arbitral tribunals are final and binding, and can be set aside under the annulment procedure provided for by the ICSID Convention for ICSID awards, and according to setting aside procedures at the place of arbitration for non-ICSID awards. ICSID awards can be enforced through a self-contained system provided for in the ICSID Convention, and non-ICSID awards can be enforced under available instruments, mainly the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, New York) ("New York Convention"). The ICSID Convention as well as the New York Convention have been widely ratified.[15]

[14] Ibid., para. 73.

[15] 161 States are party to the ICSID Convention and 157 States are party to the New York Convention.

18. In light of the criticisms to the current ISDS regime (see para. 11 above), some adjustments have been recently implemented. New transparency standards have been adopted by ICSID in 2006, and UNCITRAL in 2013.[16] The Mauritius Convention on Transparency, open for signature since March 2015 and due to enter into force in October 2017, aims at applying the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") to investment treaties concluded before the coming into force of these Rules in April 2014. The Rules on Transparency have been incorporated in almost all investment treaties concluded since their coming into force.[17] It is foreseeable that the transparency standards will allow for a better understanding of the interpretation given by arbitral tribunals to investment standards, and will over time have the effect of enhancing consistency of decisions made by arbitral tribunals.

19. Further means to address criticisms to the current ISDS regime include the possible set-up of a stand-alone appellate body, as well as adjustments regarding the appointment procedures and ethical requirements for arbitrators.

(b) Possible adjustments

(i) Questions regarding the setting up of a stand-alone appellate body

20. A reform option which would consist in the creation of an appellate body would result in the current ISDS regime maintaining most of its basic features, while being complemented with an appeal mechanism. A standing or at least semi-permanent appellate body as opposed to ad hoc arbitral tribunals would pursue coherence and consistency across separate investment treaties. That is the reason why an appeal mechanism is often cited as a possible response to demands for greater consistency in the decisions of investor-State arbitral tribunals, as well as legal correctness.[18]

21. Despite the fact that most arbitration regimes emphasize the finality of the awards thus prohibiting appeals, there are nonetheless examples of institutional arbitration regimes that provide for appellate review of arbitral awards.[19] As reported in the responses to the questionnaire circulated by the Secretariat to States

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[16] In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") together with a new article 1(4) of the UNCITRAL Arbitration Rules (as revised in 2010). The Rules on Transparency, which came into effect on 1 April 2014, comprise a set of procedural rules that provides for transparency, and for accessibility to the public of treaty-based investor-State arbitration.

[17] The status of the Mauritius Convention and the Rules on Transparency is available on the Internet at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html and http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.

[18] See the CIDS report, paras. 189 and 283; also, the CIDS report notes in its para. 188 the following: "It is to be expected that even in the absence of a multilateral regime of substantive investment protection, a single multilateral Appeal Mechanism would 'develop a body of legally authoritative general principles' which would transcend the single IIA at issue. The Appeal Mechanism's broader 'vision' on certain issues (does MFN apply to dispute settlement? what are the limits of fair and equitable treatment (FET) clauses? is an expropriation rendered unlawful by mere lack of payment of compensation?, just to name a few) would likely permeate the regime [of investment treaties] beyond the specificities of a particular treaty."; the CIDS report is available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[19] See, for instance, Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (2009), Arbitration Appeal Rules (2009); American Arbitration Association (AAA) (2013), Optional Appellate Arbitration Rules; JAMS (2003), Optional Arbitration Appeal Procedure; International Institute for Conflict Prevention and Resolution (CPR) (2015), Arbitration Appeal Procedure; European Court of Arbitration (ECA) (2015), Arbitration Rules, Article 28; in the commodity sector, see the Grain and Feed Trade Association (GAFTA) (2014), Arbitration Rules No. 125, Articles 10-15; in sport-related matters, "[a]n appeal may be filed with Court of Arbitration for Sport (CAS) against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned"; see CAS Code, R47(2).

and regional economic integration organizations, under some national arbitration laws, parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration.[20] This reform option would therefore not be completely alien to the current arbitration system.

22. During the consultation process, it was mentioned that there are challenges associated with setting up an appellate body to review the decisions of ad hoc tribunals. Two risks associated with the presence of an appeal mechanism have in particular been identified. First, if appeals were possible, they might become the norm, as States and investors who have lost a case would most probably file an appeal, be it only for reasons of internal accountability. Second, appeal may lead to a duplication of the arbitral process itself in terms of duration, cost, and complexity. This could prove detrimental for States and investors with limited resources.

23. Another matter that would deserve consideration is the relationship between an appellate body and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53).

24. The Commission may wish to consider the following matters with regard to the establishment of an appellate body:

(i) Whether a single appellate body should be created to hear appeals against awards irrespective of the rules applied, and the extent to which this would be feasible; how to endow jurisdiction to the appellate body;

(ii) The composition of the appellate body: for instance, how should adjudicators of the appellate body be appointed; what procedures should be used to avoid conflicts of interest; what role should the disputing parties play, if any, in selecting the adjudicators or designing the procedures;

(iii) Grounds for appeal: in particular, should the grounds for appeal encompass both (clear/serious/manifest) errors of law and errors in the finding and/or assessment of facts, or alternatively be restricted to such errors of law; what should the standard of review be (i.e. should there be any measure of deference or a de novo review); whether there should be any remand power of the appellate body to the arbitral tribunal and, if so, how should it be delineated;

(iv) Whether the decisions of the appellate body would be binding on the disputing parties only or whether a principle of law stated in the decisions of the appellate body would constitute a precedent;

(v) The relationship of the appellate body with existing annulment mechanisms;

(vi) Specific enforcement issues in relation to the creation of an appellate body to supplement the existing ISDS regime; and

(vii) Whether the seat of the appellate body would differ from that of the arbitration of first instance; in the affirmative, what criteria would be used to determine the choice of seat.

(ii) Questions regarding alternative methods for appointing arbitrators and code of conduct

Appointment of arbitrators

25. Consultations have shown that one of the main criticisms to the existing ISDS regime relates to the appointment of arbitrators by the parties, the lack of diversity in the appointment of arbitrators and the absence of transparency in the appointment process. A further possible adjustment to the current ISDS regime could consist in

[20] See A/CN.9/918, and its Addenda.

setting up a new mechanism for appointing arbitrators, which would come closer to a court system where the disputing parties do not choose the adjudicators.[21]

26. Possible options for setting up a new appointment procedure system under the current ISDS regime could be envisaged. For example, whether the parties could agree to refer to a pre-established group of arbitrators under article 37 of the ICSID Convention and its Additional Facility Rules and whether article 6 of the UNCITRAL Arbitration Rules and its system of designating and appointing authorities could allow for adjustments to the appointment process are elements for further consideration.

27. A question raised during the consultations was whether a procedure whereby parties would not have the right to appoint the arbitrators would still qualify as arbitration for enforcement purposes under existing instruments. On that matter, the CIDS report highlights that the most important element in qualifying a procedure as arbitration is that recourse to the procedure is based on an agreement between the State and the investor. That consent usually encompasses the acceptance of the arbitrators' selection method provided for in the applicable instrument.[22]

Code of conduct

28. Recently concluded investment treaties have included a code of conduct for arbitrators, in order to ensure respect of high ethical and professional standards. It may be noted that such codes define procedures to follow in order to ensure that any situation that could give rise to real or perceived conflicts of interest would be fully disclosed. Such codes also include concrete steps to determine whether a conflict of interest could arise or has arisen. The Commission may wish to note that the preparation of a code of conduct is also one of the items on its agenda for consideration as possible future work (see document A/CN.9/916).

2. Setting up of an international investment court

29. A more radical option for reform would consist in the creation of an international investment court, which would be a permanent body, composed of tenured (or semi-tenured) members tasked with resolving investment disputes. Based on past and recent developments,[23] that option for reform has also been

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[21] The appointment process of arbitrators in the current system is based on party autonomy. Regarding appointment of arbitrators in relation to specific arbitration cases, the norm is party appointment coupled with a default appointing mechanism. Reports show that parties appoint arbitrators in 75 per cent of cases under the Rules of ICSID, and that the default mechanism whereby an institution will appoint the arbitrator is mainly used for the appointment of the presiding arbitrator. As reported by the Permanent Court of Arbitration at The Hague ("PCA"), a list procedure is sometimes used for the appointment of arbitrators when the UNCITRAL Arbitration Rules apply; see presentations made during the consultations at the joint CIDS – UNCITRAL meeting on 2 and 3 March 2017, available at http://www.cids.ch/events-2/past-events/634-2/.

[22] See the CIDS report, paras. 81-99, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[23] The last decade has evidenced strong debate on, and repeated calls for, the creation of permanent bodies within the investment treaty regime, both in the form of an appeal mechanism and in the more radical replacement of ISDS with a permanent dispute settlement body: See generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIA II*, p. 192; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap, Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 8; See also generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIAs II*, p. 194; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 9. The most significant of these proposals include attempts by the International Centre for Settlement of Investment Disputes (ICSID) [see ICSID Secretariat (2004), *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, p. 5] and the Organization for Economic Co-operation and Development (OECD), as well as the programmatic language contained in a number of

explored during the consultation process. It would consist in the establishment of a truly multilateral dispute settlement mechanism, resulting in the creation of an international investment court (also referred to as "international tribunal for investments" or "international dispute settlement body"). Such a court would generally be established through a founding legal instrument, the statute (referred to below as the "statute"), to which States would become party.

30. Such an international investment court could either be based on a two-tier adjudicative system with a built-in appeal or without one. The presence of a built-in appeal in that scenario must not be confused with the setting up of an appellate body mentioned above in paras. 20 to 24, which addresses the creation of an appeal mechanism for awards rendered in the current ISDS regime. The setting up of an international investment court would constitute a departure from the current ISDS regime. In short, an international investment court would bring key features of domestic and international courts to the settlement of investment disputes. A multilateral process to set up such a court would aim at ensuring coherence of the reform efforts, and address the fragmentation of the current regime.

31. During the consultation process, the following views were expressed by some regarding the establishment of an international investment court:

(i) An international investment court should (a) handle disputes arising under both existing and future investment treaties; (b) provide for transparency; (c) strike a proper balance between the protection of investors and the preservation of governments' right to regulate; and (d) provide for an efficient mechanism to solve disputes; in that context, a built-in appeal mechanism was seen as more efficient taken into consideration the public policy issues usually addressed in those cases, even if it could prolong the proceedings;

(ii) An international investment court might need to include (a) mechanisms for ensuring early dismissal of unfounded claims; (b) a possibility for encouraging parties to solve their dispute through mediation; and (c) a mechanism to cater for possible counter-claims by respondents; in that context, it was mentioned that such a court should permit consolidation of cases, and allow to better manage the relationship between procedures at the domestic level and remedies that can be obtained through international proceedings, thereby limiting instances of concurrent proceedings.[24]

32. During the consultation process, the main elements of an international investment court were considered. They include questions regarding adjudicators, review mechanisms, enforcement, and costs of its establishment and operation.

(a) Questions regarding adjudicators

33. The consultations covered the questions of composition and structure of an international investment court with the purpose to review in more detail issues relating to the appointment of adjudicators, and ethical and nationality requirements. In the following, a distinction should be made between the way adjudicators are elected as members of an international investment court and the way those adjudicators are appointed or assigned to a panel to decide a specific dispute.

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investment treaties [see, for instance, Canada-Korea Free Trade Agreement, 1 January 2015, (Annex 8-E)], and the pioneering innovations towards the creation of permanent investment bodies in recent investment treaties [see, for instance, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (Chapter 8 Section F); or the European Union-Vietnam Free Trade Agreement (Chapter 8.II Section 3)]; Both the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement foresee setting up a permanent multilateral mechanism and contain a reference to it.

[24] The Commission may wish to note that the question of concurrent proceedings in investment arbitration is a topic on its agenda for possible future work (see A/CN.9/915).

34. During the consultations, it was underlined that the selection process of adjudicators should be transparent, rigorous, susceptible of being clearly monitored by all stakeholders in order ensure legitimacy and gain public confidence. The election and appointing process ought to take account of the independence and impartiality of the adjudicators, their nationality, as well as of the possibility of investors' input or involvement in the election and appointment process (see para. 36 below). Additional features to be considered in that process include the expertise and experience of the adjudicators, as well as the geographical and gender balance. A matter highlighted during the consultations was that in order to ensure their integrity, the elected and appointed adjudicators should generally be restricted from conducting other ISDS-related activities which could raise conflict of interest issues.

35. The criteria to determine the overall number of adjudicators at the international investment court include the expected number of cases,[25] and the need to ensure proper representation of various legal systems and States Parties. Costs and infrastructure are also salient issues that will have a practical impact on the workability of an international investment court (see paras. 51-57 below).[26]

36. Questions were raised whether only States would participate in the election process or whether a consultation with business organizations, i.e. organizations representing the interest of the investors should be considered in order to avoid that only or mainly "pro-State" adjudicators are selected, in particular if the system were to be funded by States entirely. It was underlined that States were both hosting investments and home State of investors, and would therefore take account of the interests of both when electing adjudicators.

37. Regarding the assignment of disputes to adjudicators, two different models were discussed. Under a first model, a roster of adjudicators would be formulated, from which the disputing parties could choose to constitute the tribunal or panel. That approach would keep some features of party autonomy. Under the alternative model, the disputing parties would have no say in the constitution of the panel hearing their dispute.

38. The Commission will have before it a report from CIDS providing information on the matter, including examples from existing international bodies regarding the number of judges composing such bodies,[27] the various nomination and selection processes,[28] the term of an adjudicator's office (and the possibility of re-election),[29] number of adjudicators on a panel[30] and methods of assigning cases.

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[25] ICSID provided the following information: there are currently around 70 new ICSID cases per year, 34 per cent of the cases being discontinued before an award is rendered and the average length of a case is 3 years.

[26] The various elements to consider regarding the term of office of an adjudicator are discussed in the CIDS report (see para. 170), available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[27] For instance, the European Court of Human Rights (47 judges), the European Court of Justice (28 judges), the International Tribunal on the Law of the Sea (21 judges), the International Court of Justice (15 judges), the Iran-United States Claims Tribunal (9 arbitrators), the Appellate Body of the World Trade Organization (7 members).

[28] For instance, nomination by contracting States (International Tribunal on the Law of the Sea), or by other constituencies (International Court of Justice).

[29] For instance, the European Court of Human Rights (9 years, non-renewable), the European Court of Justice (6 years, renewable once), the International Tribunal on the Law of the Sea (9 years, renewable), the International Court of Justice (9 years, renewable once), the Appellate Body of the World Trade Organization (4 years, renewable once).

[30] For instance, chambers of 15 to 17 judges at the International Court of Justice; chambers of 7 or 17 judges at the European Court of Human Rights; chambers of 3, 5 or 15 judges at the European Court of Justice; chambers of 3 or the full tribunal of 9 arbitrators at the Iran-United States Claims Tribunal; the Appellate Body of the World Trade Organization, composed of 7 members, sits in formations of 3, but exchanges views on cases among all members and benefits from strong institutional support in the preparation of the decisions (see also para. 175 of the CIDS

39. The Commission may wish to consider the following matters with regard to adjudicators of an international court:

(i) The election process of adjudicators of an international investment court (whether they should be elected by States or through a different mechanism possibly involving some consultation/participation of investors); the number of adjudicators of an international investment court including where a roster is maintained;

(ii) The number of adjudicators for a panel or division; appointment methods for adjudicators to a particular panel or division (whether there should be a roster from which disputing parties can choose);

(iii) Whether there should be any nationality restrictions;

(iv) The mechanism that could be envisaged to account for increasing membership of the international investment court.

(b) Questions regarding review mechanisms

40. Consultations also covered the question of control mechanisms in respect of decisions to be made by an international investment court, in particular annulment and appeal, and the alternative options, such as preliminary rulings, *en banc* determinations and consultation mechanisms. It was generally considered that a review mechanism should aim at striking a balance between the need for an efficient dispute settlement mechanism and the protection of the correctness of the decision-making.

41. According to some views expressed during the consultations, annulment is a control mechanism typically associated with arbitration, but if an international investment court were to be set up as a permanent body, then a control mechanism akin to an appeal could be more appropriate and might more likely contribute to addressing the criticisms of the current ISDS regime.

42. Regarding a built-in appeal mechanism, questions that would require careful consideration include whether the review should be limited to review of issues of law, or also encompass the assessment of the facts, and what the standard of review should be. An appeal system could have different purposes, including ensuring correctness of the decisions, legitimacy of the system, and consistency of decisions. A number of recurrent issues under treaties could also be addressed systematically through an appeal mechanism.

43. During the consultation process, alternative means to ensure the correctness and consistency of decisions were presented, mainly: (i) preliminary rulings, (ii) “en banc” determinations, and (iii) consultations mechanisms.[31] The preliminary ruling procedure addresses inconsistency ex ante, rather than ex post, as is the case with appeals. However, it was felt that preliminary rulings would be useful to ensure consistency, but would not be sufficient to fix correctness of the decisions. It was suggested that preliminary rulings could be combined with other review mechanisms, such as appeal or annulment. Other mechanisms include transferring a particular case from a division to the plenary tribunal for final determination. Several domestic legal systems provide for such mechanisms when issues of coherence and consistency of the law are at stake.[32]

44. The Commission may wish to note that the CIDS report contains analyses of the usual control options, annulment and built-in appeal (with relevant questions, such as the appellate tribunal’s composition, the grounds of appeal and standards of

report).

[31] See also the CIDS report, paras. 125-137, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[32] Ibid., para. 132.

review, the effect of the appellate decision, and the binding nature of the decision). It also considers the alternatives to a built-in appeal system.[33]

45. Specific questions on annulment and appeal as well as alternative systems of control include the following:

(i) What are the main purposes and usefulness of control mechanisms;

(ii) Regarding annulment, whether annulment would be better conducted through a self-contained built-in system; if so, what are the procedural aspects to be considered, including grounds for annulment;

(iii) Regarding built-in appeal, how would an appeal mechanism interact with annulment (if provided for); when and under what conditions could a request for appeal be filed; what would be the grounds for appeal (in particular, should the grounds for appeal encompass both (clear/serious/manifest) errors of law and errors in the finding and/or assessment of facts, or alternatively be restricted to such errors of law; what should the standard of review be (i.e. should there be any measure of deference or a de novo review; which decisions could be appealed); whether there should be any remand power of the appellate body to the arbitral tribunal and, if so, how should it be delineated;

(iv) Regarding alternatives, what mechanisms may be considered; which of them would best serve the purpose; how would these alternative mechanisms relate to the annulment of awards; how could they best be applied to the new regime.

(c) Questions regarding enforcement

46. Enforcement of the decisions of an international investment court is essential to ensure the effectiveness of the system. Two different situations have been considered: enforcement of a decision of an international investment court in the territory of a State that consented to its statute, and enforcement in States not party to the court's statute.

47. With regard to enforcement of decisions of an international investment court in the territory of a State that would have consented to its statute, there are two possible options. The first option would be to provide in the statute a special enforcement regime, for instance obliging a Contracting State to recognize a decision of the international investment court as binding and enforce the obligations arising therefrom as if it were a final judgment of its courts. A second option would be to provide that decisions of the international investment court are enforceable pursuant to the New York Convention, under which States would retain some control over the decision through the grounds for non-recognition and non-enforcement as provided for in article V of the Convention.[34]

48. States not party to the statute would not be bound by any enforcement regime provided therein. There is currently no uniform regime for the enforcement of judgments of international courts, and in most States, there is currently no statutory basis or judicial mechanism for enforcing such judgments.[35] Therefore, enforceability of decisions by an international investment court would largely depend on whether its decisions would fall within the scope of the New York Convention.[36]

49. The CIDS report addresses in detail the question of enforcement of decisions of an international investment court.[37] It discusses whether a permanent dispute settlement body would qualify as a "permanent arbitral body" under the New York

[33] Ibid., paras. 105-137.
[34] CIDS report, para. 140.
[35] See A/CN.9/915 and Addendum, responses to question 6.
[36] CIDS report, para. 143.
[37] CIDS report, paras. 138-164.

Convention, either under the "ordinary meaning" of article I(2) of the New York Convention or under an "evolutionary interpretation" of the phrase which would take account of developments in international law and arbitration since 1958. When discussing whether the process under an international investment court would qualify as "arbitration", the consensual basis of the adjudicator's jurisdiction was identified as a key criterion, which would be met with regard to the new dispute resolution process (see para. 27 above). Further, it seems established that "delocalized" awards, in particular those made under the ICSID Convention, can be enforced under the New York Convention regime when recognition/enforcement is sought in a non-ICSID Contracting State.

50. The questions that would deserve preliminary consideration regarding that matter are as follows:

(i) Whether the statute of an international investment court should include a specific enforcement regime;

(ii) How could decisions of an international investment court be enforced in States that would not be party to its statute; in particular, what would be the role of domestic courts in enforcing decisions of the international investment court;

(iii) If the international investment court would not have a specific enforcement regime, what would be required so that its decisions could be enforceable under the New York Convention; would a built-in appeal mechanism affect the enforceability of the decisions of an international investment court through the New York Convention.

(d) Questions regarding costs

51. During the consultation process, a number of considerations underpinning the financing of an international investment court or a stand-alone appellate body discussed in the CIDS report were outlined. While the features of the court and the appellate body would determine the financial resources required, it would mostly be the case that the financial resources available would determine the design and structure of the court and appellate body.

52. At the current stage, it is not possible to come up with an estimate figure due to the possible variations and uncertainty about how a new system would operate.[38] The underlying objective of the reform, the scope and legal basis of the disputes, key functions of the system, whether the system would attempt to replace existing mechanisms or co-exist, the number of disputes expected to be handled, working language and provisions of other dispute resolution services are some of those variations, which could have an impact on the budget structure of the system.

53. During the consultation process, two options were presented regarding the establishment of an international investment court. One possibility would be to design the system as an add-on to the current ISDS regime or under the auspices of an existing institution. Such an approach would allow the use of existing resources for the preparation and initial set-up, saving costs. This would essentially require the approval by the existing regime or institution constituents for an additional mandate and that, in any case, would require additional financial resources.

[38] During the consultation process, some figures relating to the International Tribunal for the Law of the Sea (ITLOS) and the World Trade Organization (WTO) Appellate Body were provided, which provided a comparison on (i) the number of judges or members; (ii) budget allocated for the remuneration of the judge or members; (iii) budget and the structure (including the number of staff members) of the Registry and the Secretariat; (iv) the governing body (Meeting of the States Parties (UNCLOS) or the Dispute Settlement Body) and the entity providing secretariat services to that body; (v) location of the premises and relevant arrangements with the host country; (vi) number of State members contributing to the budget and key contributing States. Comparison with ITLOS and the WTO Appellate Body might not be as relevant as those institutions only dealt with inter-State disputes. Presentations on the topic are available on the Internet at http://www.cids.ch/events-2/past-events/634-2/.

54. Another possibility is that an international investment court would be established independently from any existing mechanism or institution. In such a case, it could be conceived that States that have consented to the statute of an international investment court would generally be responsible for the financing of the court (the same applies to a permanent appeals body). Questions to be considered include how best to allocate the budget among those constituent States, noting that not all States might be joining at the initial stages of establishment and that the number of investment treaties concluded by States as well as claims brought against those States differ to a substantial degree.

55. An alternative would be that the users of the system, including claimant-investors should be charged a fee, which would contribute to the financing of the system. The fee to be charged to users could vary, from covering the minimal cost of administration to an amount which would allow the system to cover a significant portion of its budget. The latter approach was seen as potentially useful to discourage frivolous claims by investors. In that context, it was also mentioned that one of the criticisms about the current system was that the tribunal members were being selected and paid by the parties, and therefore the funding of any new system should be set up so as to guarantee the independence and impartiality of the adjudicators. During the consultation process, it was also discussed whether an international investment court would address the legal costs of the disputing parties, as such costs constitute a significant portion of the overall costs of the current ISDS regime. Some recent investment treaties include provisions on the matter.[39]

56. As to the budget structure of the system, three broad items were identified during the consultation process. The first item is the remuneration of the adjudicators, which would depend on a number of variables like the number of adjudicators, their employment status (fully-employed, part-time, on-call) and their salaries, privileges and immunities including tax benefits and pension. The second item was the financing of the registrar or secretariat. Again, the budget would vary depending on the number of staff, their employment status and their salary structure as well as the services to be provided. The third item was operating facilities, which would cover the premises, costs of maintenance, security, information and communication and others.

57. In that context, the possibility of any new body having regional offices to give better access was mentioned. In addition, the establishment of an advisory centre to support developing countries in investment disputes was mentioned. The budget for such an advisory centre, which would greatly assist developing countries, could be part of, or be separate from, the overall budget of the system.

C. Applicability of reforms

58. A third element that was considered during the consultation process is the question of the applicability of the reforms to disputes that would arise under existing investment treaties. The options for reforms envisaged in this section are the creation of a stand-alone appellate body (see paras. 20-24 above) or the creation of an international investment court (see paras. 29-57 above).

59. The questions considered are whether a multilateral mechanism, possibly modelled on that of the Mauritius Convention on Transparency, could be envisaged in order to extend the new dispute resolution options to disputes arising under existing investment treaties and, if so, the legal issues to be considered.

60. Precedents for modifying bilateral treaties with a multilateral instrument exist in a number of areas of public international law. For instance, the OECD study, entitled “Developing a Multilateral Instrument to Modify Bilateral Tax Treaties”

[39] For instance, the CETA and EU-Viet Nam Free Trade Agreements provide that it is for the losing party to pay the costs; in comparison, in the case of permanent international tribunals for inter-State disputes, the general principle is that each party bears its own costs.

(the "OECD study")[40] notes that "there have been a number of situations in which States have adopted multilateral conventions in order to introduce common international rules and standards and thereby harmonise a network of bilateral treaties, for example, in the area of extradition".[41]

61. Document A/CN.9/890 and the CIDS report provide an insight on questions to be considered if an approach similar to that of the Mauritius Convention were to be adopted for the implementation of reforms. In short, this approach would relieve States from the burden of pursuing potentially complex and long amendment procedures set forth in their numerous existing investment treaties. Indeed, a mechanism implementing reforms, modelled on the Mauritius Convention, would render the innovations directly applicable to existing investment treaties for those States that wish to embrace such innovations.

62. Furthermore, a multilateral mechanism modelled on the Mauritius Convention approach could allow a reform to begin as a plurilateral project, with the possibility for other States joining at a later stage, whenever they consider it appropriate. This, too, would strengthen the chances for success of such reform.

63. A procedural reform of ISDS could lead to an amendment/modification of the ISDS provisions in the existing investment treaties, in particular where a reform would aim at replacing existing ISDS mechanisms by a new one. In that case, attention should be given to provisions on amendment/modification of investment treaties.[42]

64. Following the Mauritius Convention approach, if such a reform project were to be implemented, the first task could consist in determining the features of the reforms to be implemented. This step would reflect what was done in respect of transparency, where the content of the new transparency provisions was first agreed in the Transparency Rules. The second, logically subsequent step would consist in determining the relevant mechanism which would accomplish the extension of the reforms to existing investment treaties.

65. Moreover, if reforms were implemented, mechanisms could be envisaged to allow for a level of flexibility regarding States' commitments. In this respect, it should be noted that the Mauritius Convention allows for a limited number of reservations and that a similar approach could be adopted with regard to the reform project.

66. Within agreed boundaries, States could modulate the degree of their involvement in the reforms by making appropriate reservations or opt-in/opt-out declarations. These possibilities would accommodate specific concerns or objectives of States.

III. Concluding remarks

67. The Commission may wish to consider whether work should be undertaken on the question of ISDS reforms. In its consideration of the matter, the Commission may wish to note that various initiatives are currently on-going in that field. ICSID has launched a consultation process on a possible reform of its rules.[43] Canada and the European Union, which have set up a new court system in a recently concluded comprehensive economic and trade agreement, have held consultations on a possible reform of ISDS.[44] Organizations that have taken part in the consultation process carried out by UNCITRAL, and are active in the field include, in addition to

[40] OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 — 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.
[41] Ibid., p. 31, para. 14.
[42] See A/CN.9/918 and Addendum, question 5.
[43] See available information on the website of ICSID, at https://icsid.worldbank.org/en/.
[44] See the questionnaire of the EU on options for a multilateral reform of investment dispute resolution, available on the Internet at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233.

ICSID,PCA, UNCTAD and OECD. The need for reforms has been acknowledged in various fora specialised in investment policy (such as UNCTAD, OECD and the World Bank). As underlined in certain studies, international investment dispute settlement plays an important role in attracting investments and in strengthening confidence in the investment environment. It is therefore essential to ensure that the resolution of investment disputes is carried out effectively, and that those involved in, or affected by, such disputes have confidence in the system.

68. During the consultation process, it was underlined that efforts to proceed with a reform of the current ISDS regime should be transparent, undertaken on a multilateral basis in order to avoid fragmentation, and should provide the opportunity for non-State actors to give their views. It was generally expressed that the reform process should be the result of an inclusive and collective effort that would permit input from States with different levels of economic development and legal traditions. The importance of handling communication appropriately in relation to any reform process was also underlined.

69. During the consultation process, examples of international courts set up under the auspices of the United Nations were mentioned, for example, the International Criminal Court (ICC),[45] and the International Tribunal for the Law of the Sea (ITLOS).[46]

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[45] In that context, it may be interesting to note the processes that lead to the creation of the International Criminal Court. In 1994, the International Law Commission (ILC) adopted a draft statute of the international criminal court and recommended that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of an international criminal court. In the same year, the General Assembly established an Ad Hoc Committee open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by ILC and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries (resolution 49/53). In 1995, the Ad Hoc Committee recommended further work, including on redrafting the text of the draft statute prepared by ILC. The General Assembly established the Preparatory Committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to discuss further the major substantive and administrative issues arising out of the draft statute prepared by ILC (resolution 50/46). The Preparatory Committee worked until 1998. In 1998 the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held. The Secretariat prepared the text of the draft rules of procedure of the Conference and established trust funds for the participation of the least developed countries and developing countries in the work of the Preparatory Committee and in the Conference.

[46] The United Nations Convention on the Law of the Sea, which includes the Statutes of ITLOS in Annex VI, was negotiated from 1973 to 1982, opened for signature in 1982 and entered into force in 1994 (after 60 ratifications). Judges were elected in August 1996, with the first case submitted to ITLOS in November 1997.