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## **Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)**

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## I. Introduction

1. At its fiftieth session, the Commission had before it notes by the Secretariat on “Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration” (A/CN.9/915); on “Possible future work in the field of dispute settlement: Ethics in international arbitration” (A/CN.9/916); and on “Possible future work in the field of dispute settlement: Reform of investor-State dispute settlement (ISDS)” (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on the ISDS framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s).<sup>1</sup>

3. At its thirty-fourth to thirty-sixth sessions, the Working Group undertook work on the possible reform of ISDS. The deliberations and decisions of the Working Group at the thirty-fourth to thirty-sixth sessions were set out in documents A/CN.9/930/Rev.1 and its addendum, A/CN.9/935 and A/CN.9/964, respectively.

4. At its fifty-first session, the Commission took note of the discussions of the Working Group. The Commission welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent. The Commission noted the engagement of the Working Group and of the Secretariat with diverse stakeholders, including intergovernmental organizations such as the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), the International Centre for the Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA).<sup>2</sup> At that session, the Commission also expressed its appreciation for the provision of information by various stakeholders to assist the Working Group in its deliberations, as well as for proposals by an academic forum and a group of practitioners to make information from their research and experience available to the Working Group.<sup>3</sup>

5. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. The Commission noted that the Working Group would continue its deliberations pursuant to the mandate given to it, allowing sufficient time for all States to express their views, but without unnecessary delay.<sup>4</sup>

<sup>1</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264.

<sup>2</sup> *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 140 and 143.

<sup>3</sup> *Ibid.*, para. 144.

<sup>4</sup> *Ibid.*, para. 145.

## II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its thirty-seventh session in New York from 1–5 April 2019. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Lesotho, Libya, Malaysia, Mauritania, Mauritius, Mexico, Namibia, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Algeria, Bahrain, Belgium, Belize, Benin, Bolivia (Plurinational State of), Burkina Faso, Cambodia, Costa Rica, Croatia, Cuba, Cyprus, Democratic Republic of the Congo, Dominican Republic, Egypt, Equatorial Guinea, Estonia, Ethiopia, Finland, Gabon, Gambia, Georgia, Guinea, Iceland, Iraq, Kyrgyzstan, Madagascar, Mali, Morocco, Myanmar, Netherlands, New Zealand, Niger, Papua New Guinea, Paraguay, Peru, Qatar, Saudi Arabia, Senegal, Serbia, Slovakia, South Africa, Sudan, Sweden, Uruguay, Uzbekistan, Viet Nam and Zimbabwe.

8. The session was also attended by observers from the Holy See, the State of Palestine and the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organizations*: Commonwealth Secretariat, East African Community (EAC), Energy Charter Secretariat, Eurasian Economic Commission, Organization for Economic Cooperation and Development (OECD), Organisation Internationale de la Francophonie (OIF), Permanent Court of Arbitration (PCA) and the Cooperation Council for the Arab States of the Gulf;

(c) *Invited non-governmental organizations*: Africa World Institute (IAM), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Asian Academy of International Law (AAIL), Asociación Americana de Derecho Internacional Privado (ASADIP), Association pour la Promotion de l'Arbitrage en Afrique (APAA), Caribbean Association of Industry and Commerce (CAIC), Center for International Dispute Settlement (CIDS), Center for International Governance Innovation (CIGI), Center for International Legal Studies (CILS), Central American Court of Justice (CCJ), Centre for International Law (CIL), Centre for Research on Multinational Corporations (SOMO), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Client Earth, Club of Arbitrators, Columbia Centre on Sustainable Investment (CCSI), Corporate Counsels' International Arbitration Group (CCIAG), Europa-Institut, European Federation for Investment Law and Arbitration (EFILA), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Friends of the Earth International (FOEI), Georgian International Arbitration Centre (GIAC), iCourts, Institute for Transnational Arbitration (ITA), Instituto Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Dispute Resolution Institute (IDRI), International Institute for Conflict

Prevention & Resolution (CPR), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), International Trade Union Confederation (ITUC), Jerusalem Arbitration Centre (JAC), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), New York City Bar Association, New York International Arbitration Center (NYIAC), PluriCourts (UIO), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration Lagos (RCICAL), Russian Arbitration Association (RAA), Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), South Centre (SC), Swiss Arbitration Association (ASA) and United States Council for International Business (USCIB).

10. The Working Group elected the following officers:

*Chairperson:* Mr. Shane Spelliscy (Canada)

*Rapporteur:* Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

11. The Working Group had before it the following documents:

(a) Annotated provisional agenda ([A/CN.9/WG.III/WP.155](#));

(b) Notes by the Secretariat on third-party funding ([A/CN.9/WG.III/WP.157](#)); and on information on options for implementing a workplan ([A/CN.9/WG.III/WP.158](#));

(c) Submissions from the Governments of Indonesia ([A/CN.9/WG.III/WP.156](#)); Morocco ([A/CN.9/WG.III/WP.161](#)); Thailand ([A/CN.9/WG.III/WP.162](#)); Chile, Israel and Japan ([A/CN.9/WG.III/WP.163](#)); Costa Rica ([A/CN.9/WG.III/WP.164](#)); and from the European Union and its member States ([A/CN.9/WG.III/WP.159](#) and its addendum as well as [A/CN.9/WG.III/WP.145](#));

(d) Submission by the Government of the Dominican Republic providing a summary of the intersessional regional meeting on ISDS reform ([A/CN.9/WG.III/WP.160](#)).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

### III. Deliberations and decisions

13. The Working Group considered agenda item 4 on the basis of documents referred to in paragraph 11 above. The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV.

## IV. Possible reform of investor-State dispute settlement (ISDS)

### A. General remarks

#### *Second Intersessional Regional Meeting*

14. At the outset of the session, the Working Group heard an oral report of the Second Intersessional Regional Meeting on ISDS Reform held on 13 and 14 February 2019 in Santo Domingo. The Meeting was co-organized by the

Ministry of Industry, Commerce and MSMEs of the Dominican Republic and UNCITRAL. The Working Group was informed that the Meeting was attended by government officials from 32 States as well as representatives from intergovernmental and non-governmental organizations. It was further informed that the Meeting consisted of panels covering recent developments and initiatives in the Latin American and Caribbean region, lack of predictability, correctness and coherence in arbitral decisions by ISDS tribunals, issues pertaining to arbitrators and their appointment mechanisms, as well as the cost and duration of ISDS.

15. It was generally felt that the Meeting provided the opportunity to raise awareness in the Latin American and Caribbean region of the current work of the Working Group, to share experiences and views on ISDS and to explore the reform agenda, as reflected in document [A/CN.9/WG.III/WP.160](#). The Working Group expressed its appreciation to the Government of the Dominican Republic and the Secretariat for having organized the Meeting.

#### *Organization of the session*

16. Recalling the mandate given to it by the Commission (see para. 2 above), the Working Group considered the organization of its deliberations at the current session. The Working Group noted that, at its previous sessions, it had sought to identify and consider concerns regarding ISDS as well as the desirability of UNCITRAL undertaking reforms in light of identified concerns, as part of discharging the first and second phases of its mandate. It was recalled that the concerns identified related to three broad categories regarding the lack of consistency, coherence, predictability and correctness of arbitral decisions, arbitrators and decision makers, and cost and duration of ISDS. It was noted that the current session would therefore be devoted to: (i) considering whether reform was desirable in relation to concerns relating to third-party funding; (ii) identifying any other concerns; and (iii) considering the options available to facilitate the workplan to be developed as well as proposals for the workplan, as part of discharging the third phase of its mandate.

## **B. Concerns pertaining to third-party funding**

17. The Working Group recalled that, at its thirty-sixth session, some concerns were expressed with respect to third-party funding. At its current session, the Working Group considered whether it would be desirable for UNCITRAL to develop reforms in order to address such concerns based on document [A/CN.9/WG.III/WP.157](#).

18. At the outset, it was emphasized that the phenomenon of third-party funding was one of great concern and the necessity of developing reforms in that area was underlined, particularly in light of the current lack of transparency and of regulation of third-party funding.

19. A number of the concerns previously raised about third-party funding were reiterated. Concerns highlighted in document [A/CN.9/WG.III/WP.157](#) were also noted. It was further noted that third-party funding had an impact on different aspects of ISDS, aspects on which the Working Group had already decided that reforms would be desirable, for example, those related to lack or apparent lack of independence and impartiality of arbitrators and to the cost of ISDS proceedings and security for costs. Concerns about third-party funding also included its potential to increase the number of frivolous claims, the negative impact it could have on amicable resolution of disputes, and the impact on foreign direct investment flows generally. It was also said that third-party funding introduced a structural imbalance in the ISDS regime as respondent States generally did not have access to it.

20. The following were suggested as possible ways to address concerns relating to third-party funding. One was to prohibit third-party funding entirely in ISDS. Another was to regulate third-party funding, for example, by introducing mechanisms to ensure a level of transparency including through disclosures (which could also assist in ensuring the impartiality of the arbitrators), by imposing sanctions for failure to

disclose, and by providing rules on third-party funders and on when they could provide funding.

21. The Working Group noted that there were many different types of third-party funding. It was also said that the definition of third-party funding varied across different sources including legislation and treaties. It was, therefore, suggested that a clear definition of third-party funding would need to be developed for any reform to be effective.

22. In that context, the need for any regulation on third-party funding to have a clear scope of application was stressed. The need for balance in any solution to be developed by the Working Group was emphasized, so that it does not inadvertently limit access to justice particularly for small- and medium-size enterprises.

23. It was also said that issues pertaining to third-party funding could be addressed by solutions developed to cope with other concerns. For example, it was explained that frivolous claims could be addressed through early dismissal mechanisms regardless of whether a third-party funder was involved.

24. It was further emphasized that, in developing solutions, the Working Group should take stock of work being done by other organizations on the topic such as the proposed amendments to the ICSID Rules and the report by the Third-Party Funding Taskforce prepared jointly by ICCA and QMUL as well as reforms made by States.

*Decision by the Working Group*

25. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL in order to address concerns related to the definition, and to the use or regulation of third-party funding in ISDS.

### **C. Other concerns**

26. The Working Group then engaged in a discussion to identify possible additional concerns not already addressed in its deliberations. It was noted that in identifying additional concerns, due consideration should be given to the mandate of the Working Group focusing on the procedural aspects of ISDS reform as well as concerns that had already been identified by the Working Group as deserving reform by UNCITRAL.

27. It was mentioned that there might be existing concerns about substantive standards in investment agreements, which were also of significant importance. It was, however, reiterated that the mandate of the Working Group was to work on the possible reform of ISDS rather than reform of substantive standards in international investment agreements and that the focus of its work should be on the procedural aspects of ISDS, though taking due note of the interaction with underlying substantive standards.

28. In that context, a number of different aspects were suggested as warranting consideration by the Working Group.

*Means other than arbitration to resolve investment disputes as well as dispute prevention methods*

29. An aspect that was raised as warranting consideration was the availability of means other than arbitration to resolve investor-State disputes as well as methods to avoid and prevent disputes. In response, it was noted that those means and methods were tools that could address some of the concerns already identified by the Working Group.

*Exhaustion of local remedies*

30. Similarly, it was agreed that requiring investors to exhaust local remedies before bringing their claims to investment arbitration was a tool to be considered in reforming ISDS rather than a concern to be addressed.

*Third-party participation*

31. Another aspect that was raised as warranting consideration by the Working Group was the need to ensure the participation of third parties in ISDS, including the participation of the general public and local communities affected by the investment or the dispute at hand. It was said that, currently, there was very little opportunity for interested third parties to take part in ISDS proceedings. It was stressed that third-party participation in ISDS could allow for relevant interests to be presented and considered by the investment tribunal, for example on issues relating to environment, protection of human rights, as well as obligation of investors. It was further said that, as a matter of legitimacy of the ISDS system, it would be important that affected communities and individuals as well as public interest organizations be able to participate in ISDS proceedings beyond making submissions as third parties.

32. During the discussion, it was noted that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) as well as the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration (“Mauritius Convention on Transparency”) addressed submissions by a third person (article 4 of the Rules on Transparency) and by a non-disputing Party to the treaty (article 5 of the Rules on Transparency). Therefore, the question was raised whether those provisions were insufficient and required the development of guidance to tribunals on how to apply the requirements for third-party submissions and to ensure that such submissions would be duly considered when rendering their decisions.

33. It was generally felt that some of those aspects could be addressed as the Working Group dealt with concerns about the inconsistency and incorrectness of awards and as the Working Group developed means to give the treaty Parties more control over the ISDS process.

*Counterclaims*

34. The Working Group then considered proposals with respect to whether obligations of investors (for example, in relation to human rights, the environment as well as to corporate social responsibility) warranted further consideration. It was noted that that aspect was closely related to the question of allowing counterclaims by States as well as claims by third parties against investors.

35. In that context, the general understanding was that any work by the Working Group would not foreclose consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so.

*Regulatory chill*

36. The regulatory chill effect of ISDS was mentioned as an aspect that warranted consideration by the Working Group. It was said that ISDS or the mere threat of using ISDS had resulted in regulatory chill and discouraged States from undertaking measures aimed to regulate economic activities and to protect economic, social and environmental rights. The inherent asymmetric nature of the ISDS system, costs associated with the ISDS proceedings and high amount of damages awarded by tribunals were mentioned as some of the elements that could undermine the States’ ability to regulate. It was noted that States were in the process of reforming their investment agreements to preserve their sovereign right to regulate.

37. It was agreed that that aspect would not be addressed at this stage as a separate concern by the Working Group, while the potential impact of ISDS on the regulatory policy of States should guide the work on ISDS reform.

*Calculation of damages*

38. Another aspect that was raised as warranting consideration by the Working Group was the determination of damages by arbitral tribunals. In that respect, it was generally felt that concerns about incorrect calculation of damages by tribunals could be linked to other concerns, for example, concerns about incorrect decisions by arbitral tribunals and therefore, for the purposes of structuring the work, they could be considered as a sub-topic of those other concerns.

*Conclusion*

39. After discussion, the Working Group agreed that there was no additional concern that could be identified with regard to ISDS at the current stage of its deliberations. The agreement was based on the fact that the aspects raised related to concerns that had already been identified, to tools to be considered by the Working Group in phase three of its mandate, or to guiding principles for developing reforms. It was noted that it would be important to take into account all of those aspects mentioned in paragraphs 29 to 38 above as the Working Group developed tools to address concerns that had been identified so that they would be considered legitimate by all relevant stakeholders. It was reiterated that that conclusion did not preclude other concerns to be identified and dealt with at a later stage of the deliberations.

40. It was further noted that any work by the Working Group would need to take into account developments in investment agreements including with regards to the substantive standards therein. It was emphasized that solutions to be developed by the Working Group should be flexible enough to adapt to these developments.

**D. Options for implementing a workplan**

41. At its thirty-sixth session, the Working Group had agreed that it would have to develop a workplan to address the concerns for which it had decided that reform by UNCITRAL was desirable. At its current session, the Working Group had before it document [A/CN.9/WG.III/WP.158](#) which indicated means available for implementing a workplan within the existing resources of UNCITRAL and means that would involve additional resources.

42. The Working Group was invited to consider the following questions:

- (i) Whether the Working Group would request the Commission to allocate an additional week for its deliberations in 2019;
- (ii) Whether colloquiums, intersessional meetings and other forms of informal consultations should be sought and if so, how;
- (iii) Whether the Working Group would suggest to the Commission to request to the General Assembly to allocate conference time in addition to the fifteen weeks currently allocated to the Commission for the Working Group to move forward with the workplan, which, as explained in paragraph 16 of document [A/CN.9/WG.III/WP.158](#), would require “proper justification” and approval by the General Assembly as it had programme budget implications; and
- (iv) How it would organize its interaction with the Academic Forum and the Practitioners’ Group, both set up as informal groups to make constructive contributions to the ongoing discussions of the Working Group.

*Additional week of conference time in 2019*

43. The Working Group first considered whether it would request the Commission to allocate an additional week for its deliberations in 2019 (the “Request”). The discussion took place on the basis that, at its fifty-first session, in 2018, the Commission had agreed that it would aim to complete its work agenda in two weeks, with the third week being made available for other purposes, for example, allocating



that week to a working group or another project. A wide range of views were expressed on the Request.

44. Some expressed support for the Request as it was foreseen that the Working Group would undertake work on a wide range of concerns and solutions to address those concerns. Considering such anticipated workload, it was suggested that an additional week could facilitate the Working Group in effectively implementing its mandate and making progress in a formal setting, where decisions could be made. It was also mentioned that a formal meeting justified the attendance of government representatives. It was stated that this would ensure that the process in the Working Group would continue to be government-led and inclusive. It was also noted that the Request would not prejudice the use of other tools, such as informal meetings, that the Working Group could utilize to implement its mandate.

45. Some expressed concerns about the Request, mainly based on the limited resources (both financial and human) available to governments, particularly those of developing States, to attend an additional week of the Working Group. It was mentioned that the additional week could impair the government-led process and the need to provide support to developing States to ensure their participation was highlighted. In that context, the Working Group expressed its appreciation to the European Union, the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), as well as the Swiss Agency for Development and Cooperation (SDC) for their contributions to the UNCITRAL Trust Fund, that has allowed participation of developing States in the deliberations of the Working Group.

46. It was also mentioned that it was premature to consider the Request as the Working Group had yet to agree on its workplan. Therefore, it was suggested that the Request be considered after deliberation on the workplan.

47. Generally, it was noted that the Commission would be presented with different projects which would require conference time and a decision on the Request would need to take into account various other factors. It was also suggested that the additional week might be better used for colloquiums or other conferences where exploratory work could be conducted. On the other hand, it was mentioned that the availability of an additional week of conference time could not be guaranteed in the future and it would be advisable to make the Request when there was the opportunity.

48. After discussion, it was decided that the Working Group would consider whether to make that Request after it had considered the proposals for its workplan (see para. 86 below).

#### *Request for additional conference time with programme budget implications*

49. The Working Group then considered whether it should suggest to the Commission that it request to the General Assembly conference time in addition to the 15 weeks currently allocated to the Commission. It was noted that such a request with programme budget implications would need proper justification. Similar to the Request for additional conference time in 2019, the Working Group agreed that that matter might deserve consideration at a later stage of the deliberations, after it had discussed the workplan (see para. 87 below). It was, however, cautioned that obtaining an increased budget which would allow for additional conference time might not be practical nor feasible, considering the current budget situation.

#### *Joint work with other Working Groups*

50. The Working Group then considered the option of holding joint sessions with other working groups where there were topics of mutual interest. It was explained that there had been instances where two working groups of the Commission held joint sessions to discuss overlapping issues. In that context, it was questioned whether any work could be conducted jointly with Working Group II (Dispute Settlement).

51. It was mentioned that Working Group II had recently commenced work on issues relating to expedited arbitration and had made a preliminary decision to focus its work

on commercial arbitration. Therefore, it was suggested that it might be difficult to hold joint sessions, which could be complicated as well as burdensome for certain States. Rather, it was suggested that joint sessions could be sought at a later stage depending on the progress of work in both working groups. It was also suggested that there might be more benefit in cooperating with organizations that were involved in ISDS reforms, such as ICSID.

52. After discussion, the Working Group agreed that, at the current stage of its work, there was no need to consider working jointly with another working group.

*Other means and tools to facilitate the work*

53. The Working Group considered various additional means to support its work in between its sessions, for example, expert group meetings, colloquiums, regional intersessional and other informal meetings. It also considered the possibility of holding meetings on the margins of Commission and Working Group sessions, holding meetings jointly with other international organizations, and using the resources available in the Academic Forum and the Practitioners' Group.

54. It was suggested that informal meetings could allow for more detailed work to be carried out and that, given the anticipated workload, deserved due consideration. It was pointed out that efforts should be made that informal meetings take place in different regions with broad and inclusive participation of all States and other stakeholders. The use of technological means was also suggested, for instance, videoconferencing, which would enhance remote participation.

55. It was emphasized that the objective of the informal meetings should be to facilitate further deliberations of the Working Group, allowing it to explore various avenues. It was stated that informal meetings should allow for a balanced and constructive discussion leading to reforms that would be broadly acceptable.

56. It was underlined that no decisions should be made at informal meetings. In that context, it was stressed that the Working Group should always be informed of developments in informal meetings and have adequate oversight of the discussions therein. It was further clarified that informal meetings held with the purpose of exchanging views and information should be differentiated from those held for the purpose of drafting preparatory documents for the Working Group. In the latter case, it was stated that the involvement of the Secretariat should be sought to ensure neutrality.

57. Given that the ISDS reform process in the Working Group should be government-led, concerns were raised that discussing reform options in informal meetings, particularly in multiple tracks, could pose difficulties to certain delegations. It was mentioned that when planning informal meetings, the resource constraints of States as well as the Secretariat ought to be considered.

58. After discussion, the Working Group agreed that it would consider the use of means and tools to enhance the efficient use of its conference time, when appropriate and in accordance with the practice of UNCITRAL. The Working Group agreed that such tools could include informal meetings on the margins of Commission and Working Group sessions, drafting groups, colloquiums, joint meetings with other international organizations, intersessional meetings, and further interactions with the Academic Forum and the Practitioners' Group.

59. The Working Group agreed that those tools should only be used when practical and on the basis of a decision by the Working Group to advance preparation of an upcoming session. It was also agreed that any work resulting from informal meetings would be without prejudice to any discussion in the Working Group and that decisions would only be made at its formal sessions.

60. The Working Group agreed that when such tools were used, the process should remain government-led with the involvement of the Secretariat to ensure the quality and neutrality of the outcome, which would then be reported to the Working Group.

It was further agreed that the process should be open, inclusive and transparent and, in that regard, the use of technological means to facilitate the participation by all interested stakeholders should be sought.

61. In light of the above, the Secretariat was requested to manage the use of means and tools, resources permitting, by:

- Establishing a separate link on the Working Group III webpage where information regarding the proposed or ongoing use of those tools could be made public;
- Maintaining a list of contact details to ensure effective communication;
- Publishing proposed agendas in advance for comment and consideration;
- Assisting in the organization of meetings with a view to ensuring inclusiveness and transparency;
- Preparing reports to the Working Group reflecting any outcome; and
- Developing any other means and tools in consultation with interested stakeholders while ensuring transparency, inclusiveness and effectiveness.

## **E. Proposals for the workplan**

62. The Working Group then heard proposals on how to carry out its work during the third phase of its mandate.

63. Throughout the discussion, it was stressed that the workplan to be developed should ensure that the process would be government-led and consensus-based as well as inclusive and open to take into account a wide range of views. It was also stressed that the workplan should allow for a flexible and pragmatic approach to the reform options so that all options would be duly considered by the Working Group.

64. One proposal (as presented in document [A/CN.9/WG.III/WP.159](#)) was that the workplan could be formulated into four steps as outlined below:

- The first step would involve governments making proposals on reform options addressing identified concerns.
- The second step would be to identify which of those reform options would be the subject of further work by the Working Group (including combination of the options).
- The third step would be to discuss and decide the organization of the work of the reform options identified during the second step (including but not limited to the priority to be given, the sequencing of the deliberations, the possibility of multiple tracks, coordination with other international organizations and intersessional work).
- The fourth step would be to develop concrete solutions and text proposals, which could be finalized or adopted by the Commission and ultimately, the General Assembly of the United Nations.

65. Another proposal (as presented in document [A/CN.9/WG.III/WP.162](#)) suggested a three-step workplan as outlined below:

- The first step would be taking stock of the concerns identified and discussing possible reform options for each concern, including the possible advantages and disadvantages of each option. States would be allocated time to consider and discuss all reform options.
- The second step would be for the Working Group to identify the most suitable reform option, which could be a combination of a number of proposed options. It was noted that, at that stage, the Working Group could decide to choose

reforms that could be achieved in a short time period rather than embarking on reform options which would require some time to accomplish.

- The third step would be to discuss in detail the most desirable reform options.

66. In the context of that proposal, the following reform options were outlined: (i) preparation of UNCITRAL ISDS Rules; (ii) preparation of guidelines on dispute prevention; (iii) establishment of an advisory centre on international investment law; and (iv) preparation of model clauses on substantive provisions.

67. Another proposal (as presented in document [A/CN.9/WG.III/WP.164](#)) suggested a staged approach where priority would be given to reform options where there was consensus and that would seek to address the most pressing concerns first. It was said that such an approach could achieve results within a reasonable time. It was suggested that where short-term solutions were available to address certain concerns, work should focus on those concerns without excluding the possibility of seeking reform options of a broader scope. In that context, coordination with other organizations was emphasized.

68. A further proposal (as presented in document [A/CN.9/WG.III/WP.163](#)) suggested that the Working Group should aim at developing a menu of relevant solutions, which might vary in form. It was suggested that States would then have the flexibility to adopt solutions, based on their specific needs and interests. The proposal suggested that the work could be divided into two stages as follows:

- The first stage would consist of: (i) prioritizing the concerns already identified; (ii) discussing and compiling a list of possible solutions for those concerns (including existing reform efforts); and (iii) assessing the degree of consensus for each possible solution and focusing on areas of consensus that could result in immediate material impact.
- The second stage would be to develop the solutions as identified during the first stage, which might include a number of different approaches. It was said that this would avoid the situation in which all solutions must be completed by the Working Group before any reforms could be adopted by States.

69. In response to the proposals that priority should be given to certain concerns based on consensus or certain reform options based on their feasibility, it was stated that the Working Group might wish to take a holistic approach in its workplan so as to address all of the concerns identified by the Working Group as deserving reform.

70. It was stated that it would be difficult to prioritize concerns as they were intertwined and as States had different experiences with ISDS. It was said that addressing specific concerns might result in other concerns being not addressed. And therefore, it was suggested that the concerns identified by the Working Group would need to be addressed in a more comprehensive manner.

71. In that context, the following reform option was outlined: a multilateral investment court with a built-in appeal mechanism designed to adhere to the standards of transparency, legitimacy and fairness. It was explained that such a systemic reform option would aim to address all of the concerns by suggesting a structural change to the current ISDS regime. It was said that such a reform option could be implemented through a mechanism similar to that of the Mauritius Convention on Transparency, which could lead to broader ISDS reform. It was further noted that such a reform option would be binding only to the extent that States opted in.

72. It was suggested that that reform option could also offer solutions to States to achieve reforms within the current ISDS system based on their own priorities. It was suggested that, for instance, the code of conduct for adjudicators developed for a multilateral investment court could be used to apply to arbitrators and the appeal mechanism could be used to review arbitral awards by ad hoc arbitral tribunals. It was suggested that the possibility of establishing regional investment courts could be considered as part of that reform option.

73. It was, however, highlighted that there were a number of other reform options. Therefore, it was suggested that the workplan should be developed in a flexible and constructive manner, based on the commonalities found in the various workplan proposals. It was further emphasized that the starting point should be that there was consensus within the Working Group on the need for ISDS reform.

74. Accordingly, a further proposal was made which would consist of two workstreams as outlined below:

- Work would be allocated to each workstream and the sequencing of the options to be dealt with by each workstream would be determined.
- The first stream could focus on preparing a code of conduct for arbitrators, developing solutions to address issues of cost (including allocation of cost, security for cost, third-party funding, and the creation of an advisory centre), and of duration (including early dismissal of frivolous claims), and addressing issues related to concurrent proceedings, counterclaims and dispute prevention.
- The second stream could focus on structural reform options and cover issues relating to the jurisdiction of a multilateral investment court, its composition (including selection of members, qualifications and diversity), the establishment of an appeal mechanism (either as built-in or stand-alone), the enforcement of decisions as well as the legal framework (including an instrument similar to the Mauritius Convention on Transparency).
- Each workstream would first engage in preparatory work through informal meetings, the output of which would then be presented to the Working Group where any decision would be made, ensuring coordination between the two workstreams. The last step would consist in drafting relevant instruments.
- The Working Group sessions could be equally allocated to each workstream.

75. It was said that the workstream-based workplan would lay down the foundation for an inclusive approach where all identified concerns would be addressed, and various solutions explored. It was explained that the proposal was based on the recognition that States had different policy objectives and that they should be provided with an opportunity to decide on the type of reform options that they would consider appropriate. It was explained that the proposed workplan would avoid the need to prioritize and could allow tangible results in a short time frame while also allowing the development of long-term reform options. It was further said that such organization of work could reduce the burden on States as they would be able to decide on which workstream to participate.

76. Doubts were expressed about the workstream-based workplan. It was stated that overlap was inevitable because the workstreams would indeed be addressing the same identified concerns, resulting in possible duplication of work. It was also cautioned that having more than one workstream may result in fragmentation of the work and lead to unnecessary divide, which could impair the constructive spirit. It was also questioned how the two workstreams would interact and be managed. It was noted that under the current conference time allocated to it, having two workstreams could result in the workstreams meeting only once a year or for one or two days during the five-day Working Group session, which could result in inefficiency.

77. Nonetheless, it was suggested that organization of work through workstreams would not necessarily lead to overlaps. Solutions developed would also not be exclusive because each workstream could complement each other. It was said that a workstream-based approach would not only strike a balance among the various reform options but also accommodate States that did not yet have views on a preferred reform option. It was suggested that methodology could be further developed to guide the formulation of possible solutions in the workstreams. It was also suggested that the work to be conducted by each workstream should be guided by concerns identified rather than by specific solutions.

78. More generally, it was suggested that the Working Group could focus on the substance of reform and set aside the issue of the form of any solution until a later stage. Such an approach would allow the Working Group to make progress on “building blocks” that could address reforms from a functional perspective. It was mentioned that prioritizing work of the Working Group in the workplan should not be understood as excluding a certain reform option, but rather as an effort to identify a starting point of the work and to sequence the work on all possible reform options. It was said that prioritization could allow the Working Group to develop solutions where reform was urgently needed and where there was consensus for that solution. It was said that by taking that approach, the Working Group would, in fact, be able to look at the entire ISDS regime and as such, it would be wrong to characterize that approach as being incremental in contrast to a systemic reform of ISDS. Lastly, it was also noted that prioritization would not necessarily prejudge the outcome of the work as it could lead to any type of instrument that the Working Group would decide to prepare, which would also be eventually left to States to adopt.

79. It was recalled that the Working Group was discharging the third phase of its mandate, which was to develop solutions for ISDS reforms. Therefore, it was stressed that all possible reform options should first be presented before developing the workplan. In that context, it was noted that the table in the annex to document [A/CN.9/WG.III/WP.149](#) provided a good basis and that the table should be updated to reflect different proposals made by States regarding possible reform options. Further, it was suggested that a thorough discussion on the advantages and the disadvantages of the respective reform options was necessary. It was suggested that once all the options had been tabled, the Working Group could then be in a position to determine the solutions to be developed further.

#### *Decisions by the Working Group*

80. After discussion, the Working Group agreed that a distinction between incremental and systemic reform was not necessarily a useful one to make. However, it was noted that there were fundamental differences in some of the reform solutions that were being proposed – some were more structural in nature, some involved reforms within the current system and some straddled that line. The Working Group agreed that there was no need to have a discussion about which solutions might fit into which category for the purpose of its work.

81. It was agreed that the Working Group would discuss, elaborate and develop multiple potential reform solutions simultaneously. For that purpose, it was agreed that a project schedule should be prepared to move the proposed solutions forward in parallel, to the maximum extent of the Working Group’s capacity and in light of the tools available.

82. It was agreed that one of the potential solutions that would move forward in phase three of the Working Group’s mandate at the start of the project schedule would be how to develop structural reforms. It was also agreed that other potential solutions that could be included in the project schedule would need to be identified, in terms of what those solutions could be and how many the Working Group would have the capacity to include at particular points in the project schedule.

83. In order to further develop the project schedule to include the discussions on solutions in addition to the discussions on the structural reforms, the Working Group agreed to move forward with the following steps, with the allocation of time between such discussions following the general principle of balanced time allocation, though with flexibility to ensure that the Working Group’s time was effectively used:

- Step 1: Submissions to the Secretariat would be made by 15 July 2019 on what other solutions to develop and when such solutions might be addressed in terms of the project schedule. In terms of what those solutions could be, it was recalled that some were listed in document [A/CN.9/WG.III/WP.149](#) and its annex. However, the Working Group agreed that other solutions could also be proposed.

- Step 2: At its next session, the proposals would be discussed, and the project schedule would be created. That project schedule would indicate which and how many of the other solutions the Working Group wished to discuss and when, as a matter of capacity and scheduling, it would be able to do so. Such decisions would be made in light of all the available means and tools that the Working Group had agreed to use.
- Step 3: After the creation of the project schedule, the Working Group would begin, at that session, the further elaboration and development of potential solutions to be recommended to the Commission pursuant to its mandate.

84. In preparation of the next session, the Secretariat was requested to update the tabular presentation of reform options in the annex of document A/CN.9/WG.III/WP.149, taking into account proposals received so far as well as those to be provided to the Secretariat. In addition, the Secretariat was requested to undertake preparatory work on the following topics:

- Code of conduct (jointly with ICSID) – This could cover how such a code could be implemented in the current ISDS regime and also in the context of a structural reform, and how obligations in such a code would be enforced, particularly when the function or term of an arbitrator or adjudicator was terminated;
- Indirect claims, claims by shareholders and reflective loss – This could take into consideration the work carried out by the OECD and complement the work already undertaken on the topic of multiple proceedings (see document A/CN.9/915);
- Selection and appointment of adjudicators – This could include compiling, summarizing and analysing relevant information as one of the important topics for structural reform, in cooperation with the Academic Forum;
- Third-party funding – This would be based on document A/CN.9/WG.III/WP.157 and could suggest possible solutions in light of the various policy questions; and
- The establishment of an advisory centre on international investment law – This could include information on what kind of assistance could be provided to developing States and questions to be addressed in establishing such an advisory centre as part of structural reform.

85. It was suggested that in undertaking preparatory work, the Secretariat should seek to continue its cooperation with the Academic Forum and Practitioners' Group as well as interested stakeholders to obtain a wide range of different perspectives, including those of investors and the civil society.

#### *Recommendations to the Commission*

86. Recalling its deliberations on the Request (see paras. 43 to 48 above), the Working Group agreed to request the Commission to consider allocating an additional week of conference time available in 2019 to the Working Group in light of its anticipated workload. The Working Group further agreed to request that, if and when additional conference time were to become available in the future, the Commission at that point would consider allocating that time to the Working Group.

87. Recalling its deliberations on suggesting to the Commission that it request to the General Assembly conference time in addition to the fifteen weeks currently allocated to it (see para. 49 above), the Working Group decided not to make such a request at the current stage.

## V. Other Business

88. The Working Group welcomed a proposal from the Government of Guinea to organize an intersessional regional meeting on ISDS reform with the objectives of raising awareness in Africa on the current work of the Working Group and providing input to the current discussions. It was clarified that the meeting would be purely informational and that no decisions would be made. It was noted that the intersessional regional meeting would be organized jointly with the Secretariat as well as other interested organizations. It was further mentioned that, while the focus of the intersessional meeting would be to provide a forum for high-level government representatives from Africa, it would be open to all those invited to the Working Group. It was also mentioned that the agenda of the intersessional regional meeting would be made available to States in advance and a summary report would be submitted to the Working Group for its consideration.

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