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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)

Contents

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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: Reforms of investor-State dispute settlement" (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on investor-State dispute settlement ("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 to allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

3. From its thirty-fourth to thirty-seventh session, the Working Group considered possible reform of ISDS on the basis of the mandate.[2]

4. At its fifty-first session, in 2018, 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.[3] At its fifty-second session, in 2019, it expressed its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process and with the decision of the Working Group to elaborate and develop multiple potential reform solutions simultaneously. The Commission also expressed its appreciation for the support provided by the Secretariat.[4] The Commission further expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, the German Federal Ministry for Economic Cooperation and Development (BMZ), and the Swiss Agency for Development and Cooperation (SDC), aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group as well as in regional intersessional meetings. The Commission was also informed about ongoing efforts by the Secretariat to secure additional voluntary contributions. States were urged to contribute to, and support, those efforts. The Commission also 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.[5]

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

[2] The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1 and A/CN.9/930/Rev.1/Add.1; A/CN.9/935; A/CN.9/964; and A/CN.9/970, respectively.

[3] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 145.

[4] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 169.

[5] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 165 and 166.

II. Organization of the session

5. The Working Group, which was composed of the States members of the Commission, held its thirty-eighth session in Vienna from 14 to 18 October 2019. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lesotho, Malaysia, Mauritius, Mexico, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

6. The session was attended by observers from the following States: Angola, Bahrain, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Central African Republic, Costa Rica, Democratic Republic of the Congo, Egypt, El Salvador, Gabon, Gambia, Georgia, Greece, Guinea, Iceland, Iraq, Kuwait, Kyrgyzstan, Latvia, Montenegro, Morocco, Myanmar, Namibia, Netherlands, New Zealand, North Macedonia, Norway, Papua New Guinea, Paraguay, Portugal, Saudi Arabia, Serbia, Slovakia, Sweden, Uruguay, Uzbekistan, and Yemen.

7. The session was also attended by observers from the European Union.

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

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: African Union, Central America Court of Justice (CCJ), Commonwealth Secretariat, Energy Charter Secretariat, Energy Community Secretariat, Eurasian Economic Commission, European Investment Bank (EIB), Gulf Cooperation Council (GCC), International Development Law Organisation (IDLO), Organization for Economic Cooperation and Development (OECD), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: ACP Legal, African Academy of International Law Practice (AAILP), African Association of International Law (AAIL), American Society of International Law (ASIL), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian Academy of International Law (AAIL), Asociación Americana de Derecho Internacional Privado (ASADIP), Association for the Promotion of Arbitration in Africa (APAA), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Dispute Settlement (CIDS), Center for International Investment and Commercial Arbitration (CIICA), Center for International Legal Studies (CILS), 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), CISG Advisory Council (CISG-AC), Client Earth, Columbia Centre on Sustainable Investment (CCSI), Corporate Counsel International Arbitration Group (CCIAG), 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), Hong Kong International Arbitration Centre (HKIAC), ICourts, Institute for Transnational Arbitration (ITA), Institutio Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International and Comparative Law Research Center, International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), 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), Milan Chamber of Arbitration, Moot Alumni Association (MAA), New York International Arbitration Center (NYIAC), PluriCourts (UiO), Queen Mary University of London School of International Arbitration (QMUL), Russian Arbitration Association (RAA), Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC) Swiss Arbitration Association (ASA), The Law Association for Asia and the Pacific (LAWASIA), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

9. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

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

10. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.165); (b) note by the Secretariat on the reform options (A/CN.9/WG.III/WP.166 and its addendum) as well as notes by the Secretariat respectively on a code of conduct (A/CN.9/WG.III/WP.167), on the establishment of an advisory centre (A/CN.9/WG.III/WP.168), on the selection and appointment of ISDS tribunal members (A/CN.9/WG.III/WP.169); on shareholder claims and reflective loss (A/CN.9/WG.III/WP.170); and on third-party funding (A/CN.9/WG.III/WP.172); and (c) submissions from Governments: Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156); Submission from the European Union and its Member States (A/CN.9/WG.III/WP.159 and Add.1); Submission from the Government of Morocco (A/CN.9/WG.III/WP.161); Submission from the Government of Thailand (A/CN.9/WG.III/WP.162); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163); Submissions from the Government of Costa Rica (A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178); Submission from the Government of Brazil (A/CN.9/WG.III/WP.171); Submission from the Government of Colombia (A/CN.9/WG.III/WP.173); Submission from the Government of Turkey (A/CN.9/WG.III/WP.174); Submission from the Government of Ecuador (A/CN.9/WG.III/WP.175); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176); Submission from the Government of China (A/CN.9/WG.III/WP.177); Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179); Submission from the Government of Bahrain (A/CN.9/WG.III/WP.180); Submission from the Government of Mali (A/CN.9/WG.III/WP.181); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182); and the Summary of the third intersessional regional meeting on ISDS reform submitted by the Government of Guinea (A/CN.9/WG.III/WP.183).

11. 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. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered agenda item 4 on the basis of documents referred to in paragraph 10 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

A. General remarks

13. At the outset of the session, the Working Group heard an oral report of the third Inter-sessional Regional Meeting on ISDS Reform (25 and 26 September 2019, Conakry, Guinea), which was co-organized by the Ministry of Investments and Public-Private Partnerships, Republic of Guinea, the International Organisation of La Francophonie (OIF) and UNCITRAL.

14. The Working Group was informed that the Meeting was attended by government officials from 33 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 Africa, as well as options for ISDS reform. It was stated that the Meeting provided the opportunity to raise awareness 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.183. The Working Group expressed its appreciation to the Government of Guinea, the OIF and the Secretariat for organizing the Meeting.

15. Based on the decision at its thirty-seventh session (A/CN.9/970, para. 83), it was agreed that the Working Group, at its current session, would first focus on developing a project schedule on how to move the reform options forward in parallel, and then consider identified reform options without making a decision at this stage.

B. Project schedule

16. Noting that the Commission had decided to allocate an additional week to the Working Group, it was suggested that the project schedule should cover its current and the subsequent two sessions until the annual session of the Commission in 2020.

17. It was pointed out that document A/CN.9/WG.III/WP.166 and its addendum, which summarized the options for reform to facilitate the discussion of the Working Group, provided a sound basis for the discussion. It was emphasized that the list of reform options provided therein was not exhaustive and the order in which they were presented was not meant to indicate an order of priority.

18. The need to develop ways to work in between sessions and to utilize various possible means of consultation among the participants of the Working Group as well as with other international organizations was highlighted. It was stated that both would aim at increasing the efficiency of the work by the Working Group, also considering budget constraints of member States as well as the United Nations.

19. As to how to structure the project schedule, it was suggested that the amount of time dedicated to the consideration of each reform option should be fixed. Another view was that allocating a fixed time period might not be so productive as a number of the concerns addressed in the reform options were interlinked and that the reform options needed to be discussed in a more comprehensive manner. It was also noted that the Working Group should have sufficient time to consider each of the reform options. In any case, it was underlined that the objective of the preliminary deliberations should be to review relevant issues and to consider how to develop those options further.

20. In determining the sequence of how the reform options would be discussed, the Working Group recalled and reaffirmed the decisions made at its previous session (A/CN.9/970, paras. 80–85).

21. It was generally felt that determining the order in which the reform options would be discussed would be useful for States to prepare their views in advance and to consult with relevant stakeholders. It was stressed that the sequence should be determined based on practical considerations, particularly on how the Working Group could effectively make progress on all possible reform options. In the same vein, it was stated that the sequence would not have any correlation with the priority to be given to any of the reform options and would be without prejudice to the positions of delegations regarding which option to pursue.

22. Different elements that could guide the Working Group in making the determination on the sequence were mentioned, for example:

- Whether work on the reform option was currently being undertaken by another body;
- Whether the reform option was ripe for discussion and it would be possible to deliver tangible results in a short period of time;
- The relationship of the reform option with other reform options in providing "building blocks" for reform;
- Whether there was consensus (or the possibility of consensus) in the Working Group on the need to develop such reform option;
- Whether the resulting work would have a direct impact on the current system; and
- Whether States would be able to take part in the deliberation so that they understood the advantages and disadvantages of the reform option.

23. It was stressed that the list of reform options should not be exhaustive and could be revisited at a later stage of the deliberations, along with the discussions on the final form of the work. It was also suggested that it might be difficult and there might not be much merit in distinguishing reform options of a structural nature and those that were not. It was further emphasized that States would have the flexibility to endorse any of the reform options that would be developed and to decide whether to implement them.

24. A wide range of views were expressed on the reform options set forth in document A/CN.9/WG.III/WP.166, including on an advisory centre, alternative dispute resolution mechanisms, code of conduct, counterclaims, dispute prevention and mitigation, exhaustion of local remedies, means to address frivolous claims, selection and appointment of arbitrators and adjudicators, security for costs, stand-alone review or appellate mechanism, standing multilateral investment court, third-party funding, and treaty interpretation by State Parties (in alphabetical order). It was suggested that there would be merit in discussing the reform options of an appellate mechanism and a multilateral investment court jointly. In addition, it was suggested that the development of a multilateral instrument on ISDS reform (which could provide an opt-in approach) could be an additional matter for discussion. It was further suggested that the calculation of damages and compensation in ISDS could also be included as a topic for consideration.

25. After discussion, the Working Group heard the following proposal for a project schedule:

- The preliminary discussions on identified reform options would take place during the remainder of the current session as well as the next two sessions;
- The order in which the discussions would take place would not reflect any priority to be given to those options. The main objective of the discussions on

the reform options would be to provide guidance on how they could be further developed;

- The remainder of the current session would be allocated to consider the following reform options: (i) multilateral advisory centre and related capacity-building activities (based on document A/CN.9/WG.III/WP.168); (ii) code of conduct (based on document A/CN.9/WG.III/WP.167); and (iii) third-party funding (based on document A/CN.9/WG.III/WP.172). In addition, the Working Group would discuss the proposal for the development of a multilateral instrument on ISDS reform and the preparatory work to be conducted by the Secretariat for the forthcoming sessions;
- The resumed thirty-eighth session (Vienna, 20–24 January 2020) would be allocated to consider the following reform options: (i) stand-alone review or appellate mechanism; (ii) standing multilateral investment court; and (iii) selection and appointment of arbitrators and adjudicators;
- The thirty-ninth session (New York, 30 March–3 April 2020) would be allocated to consider the following reform options: (i) dispute prevention and mitigation as well as other means of alternative dispute resolution; (ii) treaty interpretation by States parties; (iii) security for costs; (iv) means to address frivolous claims; (v) multiple proceedings including counterclaims; and (vi) reflective loss and shareholder claims based on joint work with OECD. In addition, the Working Group would consider how to plan its future work including whether to request additional session time to the Commission depending on the workload.

26. In response to that proposal, the following views were expressed:

- It would be necessary to balance the discussion on structural reforms and other types of reforms in accordance with the decisions made by the Working Group at its previous session (A/CN.9/970, paras. 81 to 83) by allocating the fall session of the Working Group in 2020 to address structural reform options;
- The proposal for the development of a multilateral instrument on ISDS reform could be discussed before other reform options at the current session, as such an instrument could encompass a number of reform options and there might be merit in engaging in a discussion whether to develop, at least in principle, such an instrument. However, caution was also expressed on taking such an approach, particularly as details of the reform options had not yet been discussed;
- There should be some follow-up at the subsequent sessions to address any developments that occurred in between the sessions as well as any progress in the work tasked to the Secretariat and flexibility should be preserved for such discussion;
- The deliberations at this stage should be focused on the desirability and feasibility of each reform option, recognizing that there were certain commonalities in the concerns that each reform option aimed to address;
- To avoid duplication of work currently being undertaken by other organizations, work on those reform options should be postponed (for example, on a code of conduct and on third-party funding), whereas another view was that it would be still prudent to address those reform options as not all States were involved in the work of those organizations and discussions at the Working Group could focus on providing input to such coordination efforts;
- Flexibility should be provided in allocating time so that the Working Group would have sufficient time to consider each of the reform options;
- Deliberations should begin with reform options where the Working Group would be able to reach consensus and deliver results in a short time frame;
- Discussions on an appellate mechanism and a multilateral investment court might be postponed to the thirty-ninth session to allow States to better prepare, whereas views were also expressed that it would be important to begin work on

those reform options at the resumed thirty-eighth session, which would be in line with what was previously agreed by the Working Group; and

- The order of the reform options to be discussed at the current session might be altered so that the code of conduct would be considered first, whereas views were also expressed that the reform option of advisory centre and capacity-building should be discussed first.

Conclusion

27. Taking into consideration the decisions made by the Working Group at its previous session (see para. 20 above) and the wide range of views expressed (see para. 26 above), the Working Group agreed to proceed to develop solutions for ISDS reform based on the project schedule contained in paragraph 25 above (see also para. 104 below).

C. Consideration of reform options

1. Establishment of an advisory centre

28. General support was expressed for establishing an advisory centre on ISDS, which could usefully complement other reform options to be developed by the Working Group. It was noted that an advisory centre could address some of the concerns previously identified by the Working Group, for example, those with respect to the cost of the proceeding, correctness and consistency of decisions as well as access to justice. It was also stated that an advisory centre could contribute to enhancing transparency in ISDS.

29. The Working Group undertook preliminary consideration of questions regarding the establishment of an advisory centre, mainly the potential beneficiaries, the scope of services, and its financing.

Potential beneficiaries

30. On the possible beneficiaries, the following views were expressed:

- States should be the beneficiaries, while preference would be given to least-developed and developing States as well as to States with limited experience in addressing ISDS;
- Developed States could also benefit from certain services;
- In cases where the advisory centre was not able to provide services to all States requesting services, there should be a set of criteria to determine which States would be given priority, for example, those with urgent needs;
- The possibility of the advisory centre providing assistance to amicus curiae and non-disputing parties could be analysed;
- Claimant investors should not be able to access the services of the advisory centre as access by claimant investors could create conflicts of interest and increase the burden of the advisory centre; claimant investors also had access to other supporting resources;
- While it was suggested that access should be provided to small- and medium-sized enterprises (SMEs), it was also said that it would be difficult to set objective criteria on which enterprises would be given access;
- Providing access to claimant investors (including SMEs) to certain services could be considered as long as it would not have any negative impact on costs and create conflicts of interest; and
- More information and analysis of SMEs' access to ISDS and available assistance would be required before deciding on the matter.

Services to be provided

31. As to the scope of services, it was noted that those outlined in document A/CN.9/WG.III/WP.168 (including assistance in organizing the defence, support during the proceedings including in the selection and appointment of arbitrators, general advisory services as well as capacity-building and sharing of best practices) provided a good basis for the discussion.

32. Differing views were expressed on which services should constitute the core function of the advisory centre, particularly in light of the likely limited resources available. It was stressed that the resources available to the advisory centre would inevitably define or limit the scope of services that could be provided, which could also vary depending on who the intended beneficiaries were. It was suggested that, for example, a least-developed country would be able to access all services whereas other countries might need to pay a fee to benefit from some of the services.

33. Some emphasis was put on providing pre-dispute technical assistance geared toward the earlier stages of ISDS. It was said that a key function would be to provide training to government officials, including through possible secondments or interchanges, to increase their awareness on potential investment claims (including on their State's obligations under investment agreements) and to enhance their readiness to respond to such claims. It was said that by being able to comprehend the current ISDS system, States would be more likely to prevent disputes and to resolve disputes amicably. While support was expressed for the advisory centre providing support during the proceedings particularly for States with limited resources, doubts were expressed as regards the role that the advisory centre could play in representing States, in particular in light of the potential resources that it would require, and the potential liabilities and conflicts that it might incur.

34. It was noted that a number of States, international and regional organizations, academic institutions as well as individual practitioners currently provided capacity-building on different aspects of ISDS. In that context, the need to identify any gaps and to coordinate such activities was stressed, which would avoid duplication and allow for the effective use of existing resources. Several institutions expressed their interest in contributing to such activities to be carried out by an advisory centre. It was further noted that these activities could aim at training potential arbitrators and counsel, which could also address the concerns expressed with regard to the lack of diversity.

35. Another aspect that was highlighted was the need for the advisory centre to function as a platform to exchange and share experience and best practices among States. It was also said that the range of services offered by the advisory centre could evolve over time.

36. As to the regional scope of its services, it was suggested that a single advisory centre would be able to provide services globally. Suggestions were also made to possibly consider the establishment of regional advisory centres which would likely broaden the geographical reach.

Possible structure and financing

37. Regarding the possible structure, it was suggested that:

- While the Advisory Centre on WTO Law ("ACWL") could provide a useful model, the structure of the advisory centre should be considered in light of how the centre would interact with the ISDS regime and its reform efforts;
- The advisory centre could be established as an intergovernmental body or through appropriate existing institutions;
- The independence of the advisory centre would need to be maintained to preserve its legitimacy; and
- The staffing of the centre should be carefully considered.

38. Regarding the financing, it was suggested that:

- The advisory centre could be financed through contributions by its member States, which could take into account the level of economic development of its members and through voluntary contributions;
- The users of the service could pay fees which would finance the operation of the advisory centre, and fees charged to States might be adjusted based on their level of economic development and other factors; and
- The advisory centre could be financed by fees, which could be charged to users of structures like the multilateral investment court.

39. In addition to the above, it was said that the following aspects should be considered in establishing an advisory centre:

- Quality and reliability of services rendered and issues of professional liability;
- Providing equal opportunity to all States to defend their interests in ISDS;
- Overall budget of the advisory centre and administrative aspects including staffing and remuneration;
- Potential tensions between various stakeholders, including between contributors to the advisory centre and its beneficiaries and between different potential beneficiaries;
- The establishment of the advisory centre should not lead to unjustifiable increase in the number of ISDS cases; and
- The long-term sustainability of the advisory centre.

Preparatory work on the establishment of an advisory centre

40. After discussion, the Working Group provided the following guidance to the Secretariat in conducting preparatory work on the establishment of an advisory centre (see paras. 41–49 below). It was said that the preparatory work should aim at preparing draft provisions governing the advisory centre and its operation as well as providing information on identified questions.

41. In light of the concerns expressed about granting access to claimant investors (see para. 30 above), the preparatory work should examine potential conflicts of interest and the burden on the advisory centre, noting that certain services might not create any conflicts or burden (for instance, providing access to data repositories). Such preparatory work would allow States to further consider whether access by claimant investors to certain services of the advisory centre would be advisable.

42. Information about services currently provided by States, regional and international organizations should be gathered with a view to identify possible services to be provided by the advisory centre. Efforts should be made to avoid overlaps and to address possible gaps.

43. The preparatory work should explore services that would be available to key beneficiary States based on the identified needs of those States and on objective criteria to be developed. Along the same lines, the preparatory work could set forth services that could be made available more broadly. In that regard, the preparatory work should examine whether and how a sliding scale of services could be implemented for States at different levels of development.

44. Regarding capacity-building, it was emphasized that there was currently an imbalance between investors and least developed or developing States in terms of their capacity to organize and engage in arbitration, particularly with respect to financial and human resources. It was emphasized that capacity-building should aim at increasing the capabilities of the beneficiaries over time, rather than making them dependent on the services of the centre. In that light, preparatory work should examine training of government officials in: (i) treaty negotiations and the interpretation of

investment obligations; (ii) dispute prevention and risk assessment; and (iii) tools and skills related to the proceedings, such as cross examination. The preparatory work should also examine knowledge sharing mechanisms, means to collect data and functions as a centralized repository of information.

45. While it was noted that assistance in the initial stages of organizing the defence (arbitrator selection, best practices on procedural issues, strategy, risk assessment, evidence collection, and the internal organization of governments) might impose a significant burden on the advisory centre, it was highlighted that such assistance might be necessary, particularly for least developed countries and for example, in expedited or emergency proceedings.

46. It was pointed out that a flexible approach should be taken with regard to the services to be provided and the advisory centre should be able to adjust its services to the requests it received.

47. With regard to financing, the preparatory work should develop the following options: (i) the advisory centre being financed by its members, by a fund established by participating developed States or voluntary contributions from other sources; and (ii) the possibility of the advisory centre charging a fee for its services or a fee to the users of the ISDS system. With respect to fees for services, a sliding scale could be employed which would foresee limited or no fees at all for services for least developed countries and increasing fees with a country's level of development.

48. The preparatory work could examine how the centre could be staffed and how it could be structured to keep operation costs low but still provide capacity-building in different regions. It was further suggested to consider means to ensure that the advisory centre remained independent, impartial and non-political and to also address issues of professional responsibility and liability. In addition, it was suggested that issues of confidentiality and handling of information obtained by the advisory centre could also be addressed in the preparatory work.

49. The preparatory work could consider how the centre might accommodate interchanges that would allow government officials to undertake training for short periods of time at the centre. Information could be provided on similar capacity-building employee interchanges that had been organized by other international organizations.

Intersessional work

50. It was suggested that intersessional work could be undertaken, in cooperation with interested States and other stakeholders, in the form of meetings organized using technological means (such as webinar) in order to provide information on the existing initiatives in the field.

2. Code of conduct

51. General support was expressed for developing a code of conduct for ISDS tribunal members, which could usefully complement other reform options to be developed by the Working Group. It was recognized that a code of conduct could address some of the concerns identified by the Working Group, but most importantly, the lack or apparent lack of independence and impartiality of ISDS tribunal members, which often gave rise to criticism about the legitimacy of the ISDS system. It was mentioned that the preparation of a code of conduct could be done in a rather short period of time. It was noted that document A/CN.9/WG.III/WP.167, prepared in cooperation with ICSID, provided a good basis for the discussion.

52. As to the nature of a code of conduct, it was generally felt that the code should be binding and mandatory and, therefore, preference was expressed for providing concrete rules rather than guidelines. At the same time, it was noted that more detailed application of such rules to certain situations might be better contained in guidelines.

Scope of application

53. As to the possible scope, it was suggested that the code of conduct should provide for a uniform approach in ISDS and thus should aim to have universal application. It was, however, recognized that arbitrators and adjudicators would be bound by diverse and more than one standard depending on their nationality, affiliation and the applicable law. It was mentioned that the proliferation of codes of conduct had led to a certain level of fragmentation and overlaps and that providing a harmonized approach would be desirable. It was also cautioned that the preparation of another code of conduct should not result in further fragmentation.

54. While some suggested that the code of conduct would apply only to future investment treaties and disputes, it was also suggested that a multilateral instrument on ISDS reform could make it possible to incorporate the code of conduct into existing treaties. The possibility of the code of conduct applying not only to ISDS tribunal members, but also to other actors in ISDS was mentioned (for example, counsel and other representatives, tribunal secretaries or any support personnel involved in the drafting of the award, administering institutions and appointing authorities).

55. It was mentioned that relevant distinctions might need to be made between the rules in a code of conduct for ad hoc arbitrators and for adjudicators/judges in a permanent body. It was stated that it would likely be easier to ensure compliance in a permanent body (for example, with regard to double-hatting, post-award remedies, pre-appointment contacts and parity of fees). It was suggested that the Working Group should, in any event, make efforts to develop in parallel standards applicable to arbitrators and adjudicators/judges.

Content of a code of conduct

56. As to the possible content of a code of conduct, it was noted that the requirements outlined in document A/CN.9/WG.III/WP.167 (including independence and impartiality, integrity, diligence and efficiency, confidentiality, competence or qualifications, and disclosure) could constitute the main elements. It was generally felt that the code of conduct would need to be comprehensive and, at the same time, provide clear, objective and strict standards, which would also ensure uniform application. However, it was also mentioned that flexibility should be preserved, in light of the party appointment mechanism underlying arbitration.

57. With regard to independence and impartiality, the need to address double-hatting was generally emphasized and statistics were provided. The experience of States in recently concluded investment treaties on how they addressed that matter was shared. It was said that arbitrators, upon appointment, should generally refrain, and be prevented, from acting as counsel or party-appointed expert or witness in any pending or new ISDS cases. Differing views were expressed on the extent to which double-hatting should be regulated and a number of solutions were presented (complete ban, introducing a transitional period after which the arbitrator would be prevented from acting as counsel or expert, limiting the number or type of cases that an arbitrator could take, and requiring declarations). The need to develop a definition and scope of double-hatting was mentioned.

58. While the necessity of regulating double-hatting was shared, it was also noted that a balance should be sought between restricting double-hatting and ensuring an adequate pool of qualified arbitrators which would also contribute to addressing the lack of diversity in gender, geography, age group and ethnicity. It was also stated that any regulation on double-hatting should not unduly limit parties' autonomy to make appointments.

59. With regard to diligence, integrity and efficiency, it was said that arbitrators, upon appointment, should be bound by their obligations and carry out their duties with diligence. In that context, it was suggested that there should be limitations as well as sanctions regarding resignation of arbitrators (for example, only upon authorization), as it could delay the proceedings significantly. It was also stated that

arbitrators should have the duty to thoroughly review all the circumstances of the case and all evidence presented to the tribunal. The duty to expedite and conduct the proceedings in an efficient manner was also noted along with the duty not to be bound by external instructions or other influence. It was also stated that arbitrators should be required to keep a record of the time spent on a case and related costs, which should form the basis for calculating their fees.

60. With regard to disclosure obligation, it was noted that arbitrators should be required to promptly disclose circumstances that could give rise to doubts as to their impartiality and independence and that that obligation should be applied throughout the entire proceedings and possibly onwards. It was stated that the disclosure obligation would need to be strictly complied with. It was suggested that the IBA Guidelines on Conflicts of Interest in International Arbitration could provide some guidance and could be further considered with respect to their application and adjustments which might be required in the ISDS context.

61. It was further suggested that a code of conduct could also address the following aspects: (i) clear language on the principles or core values so that it would be purpose-based; (ii) issue conflicts, which could take into account existing studies on the topic; (iii) relationship between ISDS tribunal members and disputing parties; (iv) repeat appointments; (v) limitations on the number of cases to which an arbitrator can take part and on the number of cases for which an arbitrator could be appointed by a specific party or law firm; (vi) confidentiality and the survival of obligations after the proceedings; (vii) competence and the need to ensure that too stringent qualification requirements would not result in narrowing the list of potential arbitrators; (viii) rules that would deter false and undue accusations against arbitrators on their independence and impartiality; and (ix) standardized fees for arbitrators.

Enforcement mechanism

62. Throughout the deliberations, it was stressed that an enforcement mechanism would constitute a key component of a code of conduct and there was support for a mechanism which would ensure compliance with the standards therein. It was generally felt that it would not be prudent to rely on voluntary compliance and that the consequences for non-compliance (sanctions) would need to be clearly set forth. Questions were raised on how the enforcement mechanism would be triggered and who would be responsible for such determination.

63. In that context, suggestions were made to develop concrete rules on challenges to arbitrators and their disqualification. However, it was suggested that a more in-depth study beyond challenges/disqualification would be required to establish an effective sanctions mechanism, which may include sanctions linked with remuneration scheme, disciplinary measures, reputational sanctions and notifications to professional associations. It was, however, mentioned that the introduction of higher standards and their strict enforcement might have unintended consequences (for example, hesitancy to undertake the role of an arbitrator and limited instances of enforcement).

64. It was suggested that a centralized system or body for monitoring compliance as well as a database on challenges and sanctioned arbitrators could increase transparency, which would effectively assist in the enforcement of the code of conduct. It was mentioned that such role could be tasked to an advisory centre.

Other issues

65. The need for the work to take into account treaties concluded by States that included a code of conduct (for example, treaties mentioned in footnote 7 of A/CN.9/WG.III/WP.167 as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and other recent bilateral investment treaties) was stressed. It was said that efforts by arbitral institutions in introducing codes of conduct and enforcing them would also need to be considered. Reference was also made to relevant discussions in the United Nations General Assembly with regard to the

United Nations Dispute Tribunal (UNDT) and United Nations Appeals Tribunal (UNAT). Furthermore, it was generally felt that providing a comprehensive and comparative study of the core elements of those codes of conduct as well as the compliance mechanism therein could assist the Working Group making a more informed decision.

66. It was also mentioned that it would be necessary to address situations where the non-compliance was found only after the award was rendered. This is because even when the parties challenged an award, the refusal of the enforcement of the award under article V of the New York Convention would not provide any sanction on the arbitrator. In that context, it was mentioned that the development of a code of conduct with an efficient compliance mechanism along with the mechanism already provided for in the New York Convention could provide a solution to such situations.

Preparatory work on a code of conduct

67. Based on the general support for the development of a code of conduct and the wide range of views expressed on the topic (see paras. 51–66 above), the Working Group provided the following guidance to the Secretariat in conducting its preparatory work on drafting provisions in a code of conduct (see paras. 68–77 below). It was agreed that the contents in document A/CN.9/WG.III/WP.167 would provide a sound basis for preparing a code of conduct, while discretion should be provided to the Secretariat to suggest additional options as well as to pose policy questions.

68. With respect to the scope of application of a code of conduct, the preparatory work should: (i) consider how the code of conduct could be applied in a binding manner to all ISDS disputes; (ii) identify aspects that would apply commonly to ISDS tribunal members as well as those that would be distinct for ad hoc and permanent members and accordingly, provide different options; (iii) provide detailed and clear provisions which could be consistently applied; (iv) ensure flexibility to address any unforeseen circumstances; (v) consider whether the code of conduct could possibly apply to support personnel employed by the tribunal, particularly those participating in deliberations and involved in drafting the award and, if so, include provisions on disclosure, delegation and non-compliance measures; and (vi) consider whether the code of conduct could possibly apply to counsel and arbitral institutions or whether separate codes would need to be prepared.

69. With respect to independence and impartiality, the preparatory work should: (i) provide options so that the obligation would apply throughout the proceedings; (ii) include possible definition and scope of double-hatting; and (iii) provide options for banning double-hatting or regulating the practice, which could include disclosure requirements, limits on the types or different roles that an arbitrator could have, and rules on a time period during which an arbitrator might or might not act in other roles.

70. With respect to issue conflicts, the preparatory work should: (i) take guidance from existing work done in the area, including the ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration; and (ii) include possible options, while ensuring that they would not inadvertently prevent qualified academics and others from serving as ISDS tribunal members.

71. With respect to integrity, the preparatory work should: (i) aim at addressing concerns expressed about bias and improper influence on arbitrators based on personal, financial and professional interests; (ii) noting that the notions of bias and integrity might be understood differently depending on the sociocultural context, ensure that the provisions would be able to be applied universally; and (iii) take into account that biases and inappropriate interests might stem not only from relationships between parties and tribunal members, but also from those between tribunal members and counsel or other participants in the dispute settlement proceedings.

72. With respect to diligence and efficiency, the preparatory work should: (i) highlight the importance of those requirements, particularly in light of the

consequences on costs and on the legitimacy of the proceedings, when tribunal members were not adequately available or efficient, or when they resigned inappropriately; and (ii) include requirements for tribunal members to decide and proceed within the prescribed time frames, and not to take on other commitments which would interfere with their ability to proceed efficiently, as well as to provide that the tribunal members should not resign during the proceedings or to subject resignation to a control and approval mechanism.

73. With respect to confidentiality, the preparatory work should: (i) introduce clear rules, including on confidentiality of the deliberations; and (ii) address how those obligations should continue after the termination of the proceedings.

74. With respect to competence, the preparatory work should: (i) identify certain core competencies for handling ISDS cases, including at a minimum knowledge of public international law, specific subject matter knowledge depending on the circumstances of the case, and relevant language skills; (ii) ensure that those competencies were required throughout the course of the proceedings; (iii) ensure that the requirements would not become an obstacle to diversify and to expand the pool of arbitrators; and (iv) consider how those requirements would interact with any work to be conducted by the Working Group on the selection and appointment of arbitrators.

75. With respect to disclosure obligations, the preparatory work should: (i) include clear provisions that would guide the arbitrators and parties; (ii) strike a balance between the needed breadth of disclosure and the burden that such disclosure imposed; and (iii) provide how the disclosure obligations would continue during the proceedings.

76. The preparatory work should also provide clear rules or guidelines on issues identified in paragraph 55 of document A/CN.9/WG.III/WP.167 including: (i) pre-appointment contacts with arbitrators; (ii) remuneration and fees; and (iii) requirements for detailed accountings and records to ensure accountability and credibility.

77. With respect to the enforcement of the code of conduct, the preparatory work should ensure that: (i) the code of conduct should be binding and enforceable; (ii) the code of conduct should include sanctions that were sufficiently strict to have a deterrent effect, while noting that if sanctions were too strict, enforcing bodies might be reluctant to apply them; (iii) depending on the type of non-compliances, different types of sanctions would be provided including those mentioned in paragraph 63 above; (iv) different options on how the enforcement mechanism would operate would be provided, including the enforcing authority, the standards of determination and the timing (including before the constitution of the tribunal and after the termination of its duties); and (v) means would be introduced so that the enforcement mechanism would not be used inappropriately as a way to delay the proceedings.

Intersessional work

78. The Working Group requested the Secretariat to work with ICSID as well as interested delegations and institutions to prepare a draft code of conduct for its consideration. In preparing the draft, the Secretariat was requested to undertake a comparative analysis of existing codes of conduct, resource permitting.

3. Third-party funding

79. The Working Group recalled its decision at its thirty-seventh session on the desirability of developing reforms in relation to third-party funding, particularly in light of the current lack of transparency and regulation (A/CN.9/970, para. 25) and considered the topic further on the basis of document A/CN.9/WG.III/WP.172.

Concerns about third-party funding

80. Concerns previously expressed with regard to third-party funding were reiterated: (i) those regarding the impact of third-party funding on the proceeding

(including conflicts of interest arising out of third-party funding; impact of third-party funding on costs and on security for costs, disclosure of information to third-party funders not subject to confidentiality obligations, control or influence of third-party funders over the arbitration process, negative impact on amicable resolution of disputes and the availability of third-party funding mainly for investors); and (ii) those regarding the impact of third-party funding on the ISDS system as a whole (including the increase in the number of ISDS cases, in frivolous claims as well as in the amount of damages claimed, the underlying rationale for providing protection to foreign investors and the right of States to regulate).

Regulation of third-party funding

81. Noting that third-party funding in ISDS remained largely unregulated, there was general support for developing means to regulate third-party funding. While some support was expressed for prohibiting third-party funding, it was generally felt that flexibility should be provided as third-party funding could permit access to justice to those with insufficient resources, particularly SMEs and, in limited instances, to States. In that context, it was suggested that further research might need to be conducted on the extent to which SMEs had used third-party funding. It was further said that prohibition of third-party funding could lead to the development of other forms of funding which might not be subject to regulation.

82. It was, however, suggested that third-party funding could be prohibited for certain types of claims, such as frivolous claims, claims made in bad faith or without legitimate reasons and claims with political purposes. It was also suggested that there could be a prohibition on speculative funding, funding provided on a non-recourse basis in exchange for a success fee, and other forms of monetary renumeration or reimbursement wholly or partially dependent on the outcome of a proceeding or portfolio of proceedings. It was noted that a prohibition of third-party funding along with exceptions could provide an appropriate approach for regulating the practice.

83. Another suggestion was that third-party funding should be permitted only in certain circumstances, such as where the claim was not frivolous, the funding was not speculative or contingent on an outcome, the funding was not part of a portfolio funding against a particular State, or the claimant demonstrated impecuniosity. Regarding the suggestion that third-party funding should only be available to impecunious claimants, it was mentioned that there should be no such limitation as third-party funding could also be taken for legitimate business purposes and it would be difficult to demonstrate impecuniosity of claimants.

84. While it was said that the regulation on third-party funding should apply to both claimants and respondents, it was pointed out that respondent States should not be subject to such regulation as they were subject to disclosure requirements under domestic law and did not have the same motives to bring claims as investors did. It was also suggested that it would be useful to consider whether and how recently concluded investment treaties, domestic legislation and practices dealt with third-party funding and addressed relevant issues.

85. It was said that any work on third-party funding should seek to balance a number of different aspects of ISDS, including but not limited to addressing abuse of process, transparency and confidentiality requirements, integrity of the proceeding as well as access to justice. It was said that the regulation of third-party funding should be examined taking into account the view that over-regulation of such practice should be avoided.

Definition and scope of third-party funding

86. It was generally agreed that developing a clear definition of third-party funding was needed in order for any regulation to be effective. It was mentioned that the scope of regulation would depend on how third-party funding would be defined, while it was acknowledged that defining that practice could be challenging.

87. Views were expressed on how to define third-party funding. One view was that the definition should be comprehensive to cover a wide range of arrangements, while another view was that the definition should not be so broad. For example, it was suggested that pro bono assistance, funding for non-profit purposes, contingency arrangements and inter-corporate financing should not fall under the definition of third-party funding.

88. It was suggested that the definition of third-party funding in investment treaties and domestic legislation as well as that proposed in the ICSID Regulations and Rules amendment process could provide useful guidance.

Disclosure of third-party funding

89. It was generally felt that the existence of third-party funding and the identity of the third-party funder should be disclosed at an early stage of the proceedings or as soon as the funding agreement was concluded. It was also felt that the requirement should continue throughout the proceedings. It was further suggested that not only the identity of the funder but also that of any ultimate beneficial owner of the funder should be disclosed.

90. It was said that the terms of the funding agreement should also be disclosed to reveal the nature of the third-party funder's involvement. It was widely felt that the arbitral tribunal should be left with the discretion to determine the extent of disclosure beyond the existence and identity of the third-party funder based on the circumstances of the case.

91. In that context, it was questioned whether the disclosure requirement should apply to mediation, as third-party funding could also have an impact on such proceedings. It was also questioned whether the relationship between counsel and the third-party funder would be subject to disclosure requirements. And a suggestion was made that the third-party funding disclosure requirements would need to be linked with the arbitrator's disclosure requirements in the code of conduct. With respect to whom the disclosure would be made, it was suggested that the disclosure should be made to both the opposing party and to the tribunal.

92. It was generally felt that non-compliance with disclosure obligations should lead to sanctions, in order to ensure the effective enforcement of those obligations. It was noted that sanctions should be clearly set forth and applied in light of the circumstances of the case and in proportion to the level of non-compliance. Suspension or termination of the proceedings, annulment of the award and cost allocation were mentioned as examples of such sanctions.

Impact of third-party funding on cost allocation

93. It was suggested that costs related to third-party funding should not be considered as recoverable costs. It was further suggested that the existence of third-party funding might increase the likelihood that a respondent State might not be able to recover costs and that this could be addressed by requiring the third-party funder to be liable for any costs allocated to the claimant.

Security for costs

94. During its deliberations on third-party funding, the Working Group also discussed whether third-party funding should have an impact on the ordering of security for costs. It was generally felt that while the existence of third-party funding would be an element that the tribunal could take into account, its mere existence would not be sufficient to justify ordering security for costs. Others expressed the view that the existence of third-party funding could be sufficient to justify ordering security for costs. It was noted that the existence of third-party funding did not necessarily mean that the claimant was impecunious as third-party funding could be used to manage costs and risk associated with ISDS. It was said that such an approach would generally be in line with the approach taken in the ICSID Regulations and

Rules amendment process. Some policy and practical considerations on whether and under what circumstances ISDS tribunals should order security for costs were discussed.

Form of work

95. It was suggested that work on third-party funding could result in rules or model clauses that could become binding by incorporation in arbitration rules, investment treaties or a multilateral instrument on ISDS reform.

Cooperation with ICSID

96. It was also suggested that the current work undertaken by ICSID in the area of third-party funding should be taken into account to provide for a harmonized approach. While noting that discussions on that topic had advanced in the ICSID Regulations and Rules amendment process, it was stated that the postponement by ICSID of the adoption of the third-party funding-related provisions could be envisaged for the same purpose, if so decided by its Member States.

Preparatory work on third-party funding

97. After discussion, the Secretariat was requested to prepare draft provisions on third-party funding reflecting the deliberations, which would contain options for consideration. It was said that the draft provisions, once finalized, could be deployed by States in their treaties, used in arbitration rules, or incorporated in a multilateral convention which could apply to all treaties and allow for a harmonized approach.

98. The Secretariat was requested to work closely with ICSID and other institutions to avoid fragmentation, particularly in that area. It was also suggested that a comparison of existing treaties and rules as well as domestic legislation that contained provisions on third-party funding could be useful in guiding the Working Group and allowing it to make informed decisions. Acknowledging the lack of concrete empirical data on the use of third-party funding and its impact on ISDS, and the difficulty in obtaining such data, the Secretariat was requested to work closely with the Academic Forum, the Practitioners' Group, investors and third-party funders to collect relevant data, including on the frequency of its use, the relative success rates of third-party funded claims, the amounts claimed in third-party funded claims in comparison to non-funded claims, and the reasons why third-party funding was used.

D. Other issues

Sustainable development goals and climate change

99. Attention of the Working Group was drawn to the obligations of States to take action under the Sustainable Development Goals and against climate change under the Paris Agreement. The need to ensure that ISDS did not undermine such actions and deter States from pursuing those goals was underlined. It was also highlighted that current ISDS reform efforts had to be aligned with the Sustainable Development Goals and objectives against climate change.

Future preparatory work by the Secretariat

100. The Working Group discussed the topics on which the Secretariat could conduct further work in addition to work on reform options on the agenda for the next two sessions (see paras. 25 and 27 above).

101. One suggestion was that the Secretariat could outline how a multilateral instrument on procedural aspects of ISDS could be structured to incorporate a number of different reform options that would be developed by the Working Group including any structural reforms. It was stated that such work could focus on how the current reform efforts could be incorporated into existing investment treaties. Reference was made to comparing the approaches taken in the Mauritius Convention on

Transparency in Treaty-based Investor State Arbitration as well as in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting prepared under the auspices of OECD. It was suggested that the possibility of phased entry into force of the multilateral instrument could be examined to facilitate the expedited entry into force of some of the reform options. While support was expressed for the Secretariat undertaking such work, it was pointed out that it would be prudent to examine the reform options currently on its agenda first before commencing background work on a multilateral instrument.

102. Another suggestion was that the Secretariat could be tasked with conducting research on damages, the methodologies for calculating such damages and underlying legal principles. In support, it was said that it would be useful to carefully examine the phase when the tribunal calculated damages, evidentiary requirements, untested applicable accounting and financial standards, and the relationship with cost allocation. However, it was questioned whether such matters would fall under the mandate of the Working Group to address procedural aspects of ISDS.

103. The Working Group acknowledged that some of the studies that the Secretariat was requested to undertake in providing a comparative tabular presentation of the different approaches in different texts, might not be made available in all official languages of the United Nations and could be presented as informal documents for the Working Group's reference.

104. After discussion, the Working Group requested the Secretariat to prepare a paper on a multilateral instrument on ISDS reform, possibly for its consideration at the thirty-ninth session in 2020. Noting the question in relation to its mandate (see para. 102 above), the Working Group requested the Secretariat to consider how possible work on damages could be undertaken in light of its limited resources and to inform the Working Group when such work could be undertaken.