United Nations A/CN.9/1194

General Assembly

Distr.: General
16 October 2024

Original: English

United Nations Commission on International Trade Law
Fifty-eighth session
Vienna, 7–25 July 2025

Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-ninth session (Vienna, 23–27 September 2024)

Contents

V.24-18853 (E) 181024 211024

I. Introduction

1. At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). From its thirty-fourth to thirty-seventh session, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.[1] From its thirty-eighth to forty-eighth session, the Working Group considered concrete solutions for ISDS reform.[2]

2. At its fifty-seventh session in 2024, the Commission adopted the Statute of an Advisory Centre on International Investment Dispute Resolution in principle and further acknowledged that the operationalization of the Advisory Centre would require further preparatory work.[3] The Commission also took note of the current status of work on the draft toolkit on prevention and mitigation of international investment disputes (A/CN.9/1185) and called on all States and other organizations to share information on existing practices for inclusion in the draft toolkit and to verify the correctness of information contained therein.[4] Expressing its satisfaction with the progress made by the Working Group, the Commission requested the Working Group to continue its work in an effective manner and encouraged it to present the outcome of its work relating to procedural and cross-cutting issues and a draft statute on a standing mechanism at its next session in 2025.[5]

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-ninth session from 23 to 27 September 2024 at the Vienna International Centre.

4. The session was attended by the following States members of the Working Group: Afghanistan, Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mauritius, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Thailand, Türkiye, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

5. The session was attended by observers from the following States: Albania, Azerbaijan, Bahrain, Burkina Faso, Costa Rica, Denmark, Egypt, El Salvador, Estonia, Gambia, Guatemala, Haiti, Lebanon, Lesotho, Libya, Lithuania, Malta, Myanmar, Namibia, Netherlands (Kingdom of the), New Zealand, Oman, Pakistan, Paraguay, Philippines, Portugal, Romania, Rwanda, San Marino, Sierra Leone, Slovakia, Sri Lanka, Sweden, Tunisia, Uruguay and Zambia.

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

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

[2] The deliberations and decisions of the Working Group at its thirty-eighth to forty-eighth session are set out in documents A/CN.9/1004*; A/CN.9/1004/Add.1; A/CN.9/1044; A/CN.9/1050; A/CN.9/1054; A/CN.9/1086; A/CN.9/1092; A/CN.9/1124; A/CN.9/1130; A/CN.9/1131; A/CN.9/1160; A/CN.9/1161 and A/CN.9/1167.

[3] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17* (A/79/17), paras. 21, 157–167.

[4] Ibid., paras. 168–169.

[5] Ibid., paras. 246 and 247.

7. 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, Commonwealth Secretariat, Gulf Cooperation Council (GCC), Organisation for Economic Co-operation and Development (OECD), Organisation internationale de la Francophonie (OIF), Organization of the Petroleum Exporting Countries (OPEC), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: ACP LEGAL, Academic Forum, American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), ArbitralWomen, Asian Academy of International Law (AAIL), Association for the Promotion of Arbitration in Africa (APAA), Belgian Centre for Arbitration and Mediation (CEPANI), British Institute of International and Comparative Law (BIICL), Centre for International Law, National University of Singapore (CIL), Centre of Excellence for International Courts (iCourts), Chartered Institute of Arbitrators (CIArb), China International Economic and Trade Arbitration Commission (CIETAC), Climate Change Counsel, Columbia Centre on Sustainable Investment (CCSI), Comité Français de l'Arbitrage (CFA), Compliance Politics and International Investment Disputes (COPIID), Corporate Counsel International Arbitration Group (CCIAG), Europa-Institute at Saarland University (EI), European Chinese Arbitrators Association (ECAA), European Federation for Investment Law and Arbitration (EFILA), Forum for International Conciliation and Arbitration (FICA), Geneva Center for International Dispute Settlement (CIDS), Institute for Transnational Arbitration at the Center for American and International Law (CAIL/ITA), Instituto Ecuatoriano de Arbitraje (IEA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International and Comparative Law Research Center (ICLRC), International Law Association (ILA), Islamic Chamber of Commerce, Industry and Agriculture (ICCIA), Korean Commercial Arbitration Board (KCAB), Max Plank Institute for Comparative Public Law and International Law (MPIL), New York City Bar Association (NYCBAR), New York State Bar Association (NYSBA), Russian Arbitration Association (RAA), School of International Studies at the University of Trento (SIS), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration Institute), Swiss Arbitration Association (ASA), Tehran Chamber of Commerce, Industries, Mines and Agriculture (TCCIMA), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

8. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

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

9. The Working Group had before it the following documents: (i) annotated provisional agenda (A/CN.9/WG.III/WP.243); (ii) a draft statute of a standing mechanism for the resolution of international investment disputes and annotations thereto (A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.240); (iii) draft provisions on procedural and cross-cutting issues and annotations thereto (A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.245); (iv) a draft multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.246); and (v) a submission from the Government of Switzerland (A/CN.9/WG.III/WP.241). In addition, a corrigendum to the draft provisions on procedural and cross-cutting issues[6] and an updated compilation of IIA provisions and

[6] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/corrigendum_to_the_draft_provisions_on_procedural_and_cross.pdf.

arbitration rules related to procedural and cross-cutting issues[7] were made available for reference purposes.

10. 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.

11. As to the scheduling of the session, it was agreed that the discussions during the first two days would begin with the draft statute of a standing mechanism for the resolution of international investment disputes, which would be followed by two days of discussion on the draft provisions on procedural and cross-cutting issues. It was further agreed that the last day of the session would be devoted to the draft multilateral instrument on ISDS reform.

12. The Working Group expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, the Government of France, and the Swiss Agency for Development and Cooperation, aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group as well as securing translations for informal sessions, so as to ensure that the process would remain inclusive and fully transparent.

III. Draft statute of a standing mechanism for the resolution of international investment disputes and annotations thereto (A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.240)

A. General remarks

13. The Working Group recalled that, at its forty-eighth session (New York, 1–5 April 2024), it had completed a first reading of articles 2 to 6 and 14 to 17 of the draft statute of a standing mechanism (A/CN.9/WG.III/WP.239) in the context of a first-tier standing mechanism (referred to as the "Dispute Tribunal"). At the current session, the Working Group began consideration of the articles in section B of the draft statute also in the context of an appellate mechanism (referred to as the "Appellate Tribunal" and jointly with the Dispute Tribunal as "Tribunals").

14. It was stated that the participation in the discussions on a standing mechanism was without prejudice to the respective States' views on the desirability or the possible models of a standing mechanism (including whether the Dispute Tribunal and Appeals Tribunal would be separate reform elements and how they could be incorporated into the multilateral instrument on ISDS reform) as well as whether they would become a party to any such mechanism.

B. Selection and appointment of the members of the Tribunals

Article 7 – Qualifications and requirements

15. Noting that article 7 set forth the minimum qualifications required of members of the Tribunals, it was suggested that paragraph 1 could put more emphasis on professional expertise, for example, by including the word "and expertise" after the

[7] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp244_comparison_chart_iias_icsid_uars.pdf.

word “integrity”, by referring to “high level of” competence or by requiring minimum years of experience (for example, 10 or 15 years). However, it was also mentioned that imposing additional and stricter requirements in paragraph 1 could unduly limit the pool of qualified candidates.

16. Although there was general support for retaining “public international law” and “international investment law” as areas where competence would be needed, doubts were expressed about “private international law”, as it was considered less relevant.

17. Views diverged on whether the competencies listed at the end of paragraph 1 should be cumulative requirements. While support was expressed that they need not be cumulative, it was suggested that the experience in different areas and functions (for example, as an arbitrator, judge, mediator or counsel) should be considered holistically to ensure diversity in the composition of the Tribunals. Another suggestion was that while the areas of competencies could be disjunctive, experience in the resolution of international investment disputes should be a separate requirement. However, concerns were expressed that such a requirement might unduly limit the pool of candidates and should only be considered as one of the experiences qualifying an individual. In that regard, suggestions were made to refer to experience in handling international disputes and not necessarily international “investment” disputes.

18. On whether additional criteria should be mentioned, it was suggested that experience working in or dealing with governments, including as part of the judiciary or the foreign or civil service, could be included, to ensure that the members have an understanding of public policy and States’ decision-making. In that regard, it was mentioned that an understanding of investors’ business operations might equally be desirable. It was generally felt that while these areas of experience would be desirable, they should not be required of all the members. It was also said that adjudicatory experience might be more relevant for members of the Appeals Tribunal. It was suggested that in nominating candidates, States could consider other types of relevant expertise, for example, in financial services or in industries frequently subject of investment disputes. It was also mentioned that some treaties required adjudication of certain cases by individuals with specialized expertise.

19. It was observed that the draft statute (articles 8 and 11) envisaged that the overall composition of the Tribunals, including the balance to be achieved among the members, were to be addressed by the Conference of the Contracting Parties (the “Conference”) in its appointment process. In that context, it was suggested that flexibility could be provided to the Conference to agree on additional criteria or expertise as deemed necessary or desirable for the composition of the Tribunals.

20. While it was noted that candidates and members would be subject to the Code of Conduct for Judges in International Investment Dispute Resolution, which required their independence and impartiality, it was said that those criteria needed to be expressly mentioned in paragraph 1.

21. On whether the requirements for the members of the Appeals Tribunal should be different from those of the Dispute Tribunal, views diverged. One view was that they should be the same in substance. Another was that the qualifications should differ because the tasks of the two Tribunals differed. In support, it was said that the members of the Appeals Tribunal should possess extensive or significant adjudicatory experience as they would be mainly tasked with the review of legal correctness of a decision, whereas members of the Dispute Tribunal would need to also consider factual aspects. However, views were expressed that such criteria should be elements for the Conference to consider in composing the Appeals Tribunal and not necessarily a minimum requirement (see para. 19 above).

22. After discussion, the Working Group agreed that paragraph 1 could be revised along the following lines: “The members of the Tribunals shall be independent and impartial and shall be persons of high moral character, enjoying the highest reputation for fairness and integrity with recognized competence in public international law or

international investment law as well as in the resolution of international disputes. They shall also meet any other criteria that may be set forth in the regulations adopted by the Conference of the Contracting Parties."

23. The Working Group agreed that the draft statute need not stipulate language proficiency requirements, paragraph 2 should be deleted, and the official and working languages could be specified in the regulations or defined by the Conference.

24. Views diverged on whether members of the Tribunals would need to be nationals of a Contracting Party. One view was that this was often the practice of international adjudicatory bodies ensuring that the Contracting Parties were represented in the Tribunals and could incentivize States to become Contracting Parties. However, it was generally felt that there should not be such a requirement, to ensure a broader pool of qualified candidates with diverse backgrounds. It was mentioned that this would be particularly important in the early stages of the standing mechanism, where the number of Contracting Parties might be limited and there was a need to reflect equitable geographical distribution and representation of principal legal systems. After discussion, it was agreed that paragraph 3 should be deleted.

25. In this regard, it was suggested that if the nationality requirement were to be removed from the draft statute, it should be possible for a Contracting Party to object to the assignment of a case involving that Contracting Party. Different views were expressed with regard to whether Contracting Parties should have such a right, including whether the same right should be provided to claimant investors. It was suggested that the issue could be addressed during the case assignment phase or that a mechanism similar to that found in the WTO Multi-Party Interim Appeal Arbitration Arrangement (MPIA) could be sought whereby upon the request of a disputing party, a member of the Tribunals who is not a national of a Contracting Party could be excluded from being assigned the case involving the disputing party. In response, it was noted that the MPIA applied to disputes between States and each disputing party would have the right to object to such assignment.

26. It was suggested that nationality of the members would in any case need to be taken into account to ensure balanced geographical representation and to prevent the member from being assigned a dispute involving the State of which it has nationality or nationals of that State (see articles 16(3) and 20(3)). In that context, the need to stipulate a rule similar to that found in the second sentence of article 7(3) determining the dominant nationality of a member with more than one nationality was suggested.

Article 8 – Composition of the Tribunals

27. It was widely felt that article 8 should be placed in article 11, which dealt with appointments by the Conference. The principles outlined in paragraph 1, similarly found in statutes of other international adjudicatory bodies, generally received support. However, suggestions were made that the terms therein might need to be clarified, possibly in the regulations to be adopted by the Conference. It was also suggested that the language would need to be adjusted if placed in article 11 either as setting forth the obligations of the Conference or as guiding principles.

28. Regarding geographical distribution, it was questioned whether it referred to global distribution (for example, based on the United Nations regional groups) or distribution among the Contracting Parties. In that context, the need to ensure a minimum number of Contracting Parties including from different regions for the entry into force of the statute was emphasized. It was clarified that reference to "principal legal systems" did not pertain to specific national systems but legal traditions or systems more broadly.

29. It was questioned whether the principles in paragraph 1 should apply to the Tribunals as a whole or respectively to the Dispute Tribunal and the Appeals Tribunal. The same question applied to paragraph 2.

30. A suggestion was made that Contracting Parties should be able to object to the appointment of a member who is a national of a non-Contracting Party, yet under

limited grounds. It was said that granting such power would run contrary to the rationale of a standing mechanism composed of permanent members. Therefore, it was suggested that the decision-making rule of the Conference should govern the appointment process and that Contracting Parties should not have a right of veto.

31. Regarding paragraph 2, it was stated that the provision could lead to the exclusion of highly qualified candidates simply because of their nationality, which could undermine the effectiveness and credibility of the Tribunals. Additionally, it was said that if the number of Contracting Parties were to be limited, it should be possible to appoint members from the same State to address cases. Hence, it was suggested that paragraph 2 be deleted. On the other hand, it was argued that there was merit in retaining paragraph 2, which would promote diversity and in the event paragraph 2 was retained, the need for a rule to determine the dominant nationality was again stressed.

32. On the rule to determine the dominant nationality of an individual with more than one nationality, views diverged on whether to use the habitual residence or the place where civil and political rights were exercised. Views also diverged on whether to use the customary rule for determining the dominant and effective nationality. It was said that the various criteria would not clearly resolve the individual's relevant nationality. It was mentioned that the rule could differ depending on its objective, for example, whether it was to achieve diversity of the members or to address the perception of bias. It was stated that for the latter case, all nationalities should be considered. However, it was also stated that nationality should not be a proxy for bias.

33. After discussion, general support was expressed for retaining in paragraph 1 the principles of equitable geographical distribution based on the United Nations regional groupings, the representation of the principal legal systems and equal gender representation. It was said that those principles should be stated generally, thereby allowing the Conference to determine how to implement them in the composition of the Tribunals. It was also agreed that an additional paragraph would list the elements which the Conference could take into account in composing the Tribunals (see para. 19 above). It was further agreed to retain paragraph 2 to apply to each of the Tribunals.

Article 9 – Nomination of candidates

34. Noting that article 9 addressed nomination as a separate phase, it was agreed to include the word "nomination" in the heading of section B.

Paragraph 1

35. There was general support for paragraph 1, which provided for the nomination of candidates by Contracting Parties. However, it was suggested that the number of nominees need not be set forth to cater for flexibility on the part of the Conference. It was questioned whether the number would be set for each of the Tribunals or both. It was suggested that the number should be sufficiently large to ensure gender balance and diversity in the nominees' qualifications and perspectives. It was said that the number could range from 1 to 5, or that a maximum number could be stipulated.

36. Regarding the second sentence, it was agreed that the nominee need not be a national of "a" Contracting Party reflecting the decision of the Working Group to delete article 7(3) (see para. 24 above).

37. With regard to the third sentence, it was noted that equitable geographical representation and the representation of the principal legal systems should be considered by a Contracting Party in its nomination process, in addition to gender representation. However, questions arose regarding how such principles could be taken into account in a domestic process and it was suggested that this balancing should take place at the composition phase. Emphasis was put on the nomination process needing to be transparent with the aim of identifying the most qualified candidates.

38. Regarding the need for the Contracting Party to "make all efforts to consult", it was observed that the third sentence aimed to encourage Contracting Parties to seek the views of relevant stakeholders and did not imply the need to obtain their agreement and that it did not necessarily prescribe the scope or means of consultations, including who to consult and the need to show proof of such consultations. Accordingly, it was suggested that the sentence could be deleted or revised (for example, by deleting the word "all" or including the words "as appropriate" after the word "shall"). It was, however, said that there was merit in retaining the sentence as it had a signalling effect and could safeguard the legitimacy of the nomination process. It was clarified that the list of bodies or organizations in that sentence was not exhaustive. It was also clarified that reference to "business associations" should be understood broadly to include chambers of commerce, investors or groups thereof. It was also suggested that transparency could be enhanced by publishing the list of candidates to enable feedback and by making information about the process public.

39. After discussion, it was agreed that paragraph 1 should be revised as follows: "A Contracting Party may nominate up to four individuals as candidates for appointment as members of the Tribunal. The candidate need not be a national of a Contracting Party. In nominating the candidates, the Contracting Party shall take into account gender representation and, as appropriate, make efforts to consult relevant stakeholders, including representatives of the judiciary, civil society organizations, bar associations, business associations and academic organizations."

Paragraph 2

40. Views diverged on whether there should be a process for individuals to be nominated without the involvement of a Contracting Party, for example, through a nomination by an organization or self-nomination (referred to as "open call for nominations").

41. One view was that only Contracting Parties should be able to nominate candidates as envisaged under paragraph 1. It was stated that this would ensure that Contracting Parties had control over the list of candidates ensuring that they were qualified and free of any conflict of interest. It was suggested that the default rule should be that nominations would be made only by Contracting Parties, unless the Conference decided to have an open call for nominations.

42. Another view was that the open call for nominations would increase the legitimacy of the standing mechanism and its public reception. It was also said that it would enlarge the pool of suitable candidates to choose from, which could further enhance the diversity of Tribunal members. It was further mentioned that nominations through an open call process might be based more on expertise and integrity, rather than on political or nationality considerations and that business and civil society organizations might identify candidates that might not be known to governments. It was suggested that there could be a default rule on open call for nominations unless the Conference decided otherwise.

43. However, doubts were expressed that an open call for nominations might result in complexities due to nationals of a Contracting Party being nominated through that process in addition to nationals being nominated by the Contracting Party. It was said that the consent of the Contracting Party should be sought prior to nominating its national.

44. In relation, a number of questions were raised including whether the open call should be initiated by the Conference at its own discretion one-off or should be automatic, such as in the event of vacancies. It was suggested that an open call should only be sought by the Conference in limited circumstances, for example, when there were not enough suitable candidates to achieve equitable geographical distribution. It was mentioned that the recommendation by the Selection Committee under article 10(5) could be a basis for the open call. It was also said that the Conference should have the discretion to initiate an open call without such a recommendation.

45. After discussion, it was agreed that paragraph 2 would read along the following lines: “The Conference may carry out an open call for candidates, in which individuals may be nominated as candidates for appointment as members of the Tribunal. The Conference shall adopt …”.

46. Another question was whether the open call should follow the initial nominations by Contracting Parties or be done simultaneously. The content of the regulations to be adopted by the Conference (whether it would be adopted for each open call or more generally and whether the regulations would identify the organizations or the types of organizations that could make nominations) and whether the consultations envisaged under paragraph 1 would also apply to the open call process were questioned.

47. The Working Group agreed to consider this issue further in relation to the review to be conducted by the Selection Committee in accordance with article 10(5) and (6), including whether candidates nominated by Contracting Parties could be disqualified by the Selection Committee.

Paragraphs 3 and 4

48. The Working Group approved paragraphs 3 and 4 unchanged.

Article 10 – Selection Committee

49. The Working Group first considered whether it would be necessary to establish a Selection Committee.

50. Noting that the envisaged role of the Selection Committee was limited to review and verification of the qualifications and other requirements of candidates required in article 7, it was suggested that those functions could be handled by the Executive Director. Concerns were expressed regarding whether and how the Selection Committee would assess criteria that could be interpreted subjectively. It was said that the Selection Committee should not have the authority to disqualify candidates nominated by a Contracting Party, which would further limit the need to establish a Selection Committee. It was also said that difficulties that might arise in composing the Selection Committee could result in a failure to compose the Tribunals or cause delays in their composition. Questions were also raised about the criteria and procedure to choose the members of the Selection Committee.

51. On the other hand, the benefits of establishing the Selection Committee were identified. It was pointed out that the experience of other international tribunals in utilizing a similar screening panel illustrated added value by enhancing the vetting process and resulting in the nomination of more qualified candidates. It was also pointed out that the Selection Committee could play a more active role with regard to nominations received following an open call, and that the existence of a screening process would deter the nomination of candidates who did not meet the requirements. Moreover, it was said that an independent screening process could reduce political influence and promote fairness in the composition of the Tribunals. It was also mentioned that the Selection Committee could be tasked with other functions, such as requesting further information about or interviewing candidates.

52. In further considering the functions of the Selection Committee, it was generally felt that the nomenclature was misleading, and that reference could be made instead to a screening, verification or advisory committee.

53. Regarding paragraph 2, it was widely felt that the composition of the Selection Committee should be diverse and represent the views of all stakeholders including investors as well as other non-State stakeholders. It was suggested that the number of its members could range from five or more. It was said that paragraph 2 should outline the pool of potential candidates for appointment to the Selection Committee. It was clarified that the Executive Director would serve *ex officio*, but not as a member of the Selection Committee with voting rights, if there was to be a voting procedure. A

question was posed regarding who would function as the Executive Director or in lieu thereof if the standing mechanism was administered by an existing arbitral institution.

54. After discussion, it was agreed that paragraph 2 could be revised along the following lines: "The [Screening] Committee shall be composed of [seven] individuals reflecting the principles of equitable geographical distribution, the representation of the principal legal systems and equal gender representation. The members of the [Screening] Committee shall be chosen from among former members of the Tribunals, current or former members of international or national supreme courts and lawyers or academics of high standing and recognized competence. The Executive Director shall serve *ex officio* in the [Screening] Committee."

55. Regarding paragraphs 3 and 4, it was suggested that means to ensure the accountability of the members of the Selection Committee and to address any conflict of interest could be further outlined either in those paragraphs or in the regulations to be adopted by the Conference. For example, it was said that the members of the Selection Committee should be subject to independence and impartiality as well as disclosure requirements. It was said that the Selection Committee should be able to set its own rules of procedure with the members being remunerated and reimbursed for any costs arising from their functions.

56. After discussion, it was agreed that the following words would be added at the end of paragraph 3: "and which outline the procedure to ensure their independence and impartiality". It was further agreed that the second sentence of paragraph 4 should be revised to read: "… may not be appointed as a member of, or serve as counsel or expert before, the Tribunals during their term and for a period of […] …".

IV. Draft provisions on procedural and cross-cutting issues and annotations thereto (A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.245)

A. Introduction

57. The Working Group recalled that at its forty-seventh session (22–26 January 2024, Vienna), it had requested the Secretariat to classify the provisions on procedural and cross-cutting issues largely into three categories: (i) those that aim to achieve harmonization with existing procedural rules (including the 2022 ICSID Arbitration Rules, referred to below as the "ICSID Rules") and could form a supplement to the UNCITRAL Arbitration Rules; (ii) those that build on existing procedural rules and provisions found in recent investment agreements; and (iii) those addressing cross-cutting issues (A/CN.9/1161, paras. 113–116).

58. It was noted that the draft provisions contained in A/CN.9/WG.III/WP.244 were prepared based on the deliberations of the Working Group and comments received on document A/CN.9/WG.III/WP.231, including at the seventh intersessional meeting in March 2024. It was clarified that the classification of the draft provisions did not imply any prioritization among them, but was aimed at clarifying the characteristics of the draft provisions.

59. The Working Group expressed its general satisfaction with the classification and discussed how to advance its work further. A wide range of views were expressed on possible reclassification, introduction or exclusion of certain provisions as well as the methods of work.

Section A

60. It was generally felt that the provisions in section A could usefully supplement and achieve harmonization among procedural rules applicable to ISDS. It was noted that the draft provisions in section A had been closely aligned with the ICSID Rules, which had been prepared through extensive negotiations among a broad membership.

However, doubts were expressed about using the ICSID Rules as a basis for the exercise as not all States were members of ICSID and did not participate in the Rules amendment process.

61. It was stated that the contents of the draft provisions would determine their appropriate placement. For example, it was suggested that elements of draft provision 12 requiring the disclosure of third-party funding in line with Rule 14 of the ICSID Rules could be placed in section A. It was said that parts of the provision further regulating third-party funding could be considered in section B. Similarly, it was suggested that elements of draft provision 11 on voluntary consolidation could be placed in section A, while a provision addressing consolidation and coordination of proceedings under different procedural rules or administered by different institutions could be considered in section B. Draft provisions 10 and 15 were raised as further examples.

62. A suggestion was made that draft provision 4 could be supplemented by a provision in Section B that addressed the standard for the preliminary dismissal of a claim for which there was no legal basis for rendering an award.

Section B

63. Noting that the draft provisions in section B built on the existing procedural rules and provisions found in recent investment agreements, it was generally felt that they could be developed in the form of treaty provisions.

64. Support was expressed for a provision addressing joint interpretations and another addressing submissions by non-disputing treaty parties (NDTP) in section B, with the latter based either on article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules") or recent international investment agreements. It was, however, questioned whether it would be necessary to prepare a provision on NDTP submissions in light of article 5 of the Transparency Rules, and whether a provision on joint interpretation was necessary as treaty parties had a standing right to do so. In addition, it was suggested that section B could include draft provisions on interim/provisional measures, early dismissal, frivolous claims and the presumption of bifurcation of jurisdictional issues. On the other hand, it was suggested that draft provision 17 should not be developed as it touched upon substantive obligations in investment treaties.

Section C

65. Support was expressed for continuing work on the draft provisions in section C. Work on the calculation of damages was said to be particularly crucial. However, it was said that, when examining those provisions, the Working Group should be reminded that it had been clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement rather than on the substantive provisions (A/CN.9/930/Rev.1, para. 20). A suggestion was made that draft provision 19 need not be developed. On a different note, it was suggested that draft provisions in section C and those in section B would both require treaty amendments and it might not be necessary to maintain two separate categories.

Other provisions

66. In response to a suggestion that a provision on State-to-State dispute settlement (SSDS) should be developed, it was recalled that the Working Group had decided not to develop such a provision as a matter of procedural and cross-cutting issues (A/CN.9/1160, para. 119). This was because the consent of the treaty parties to the different forms of dispute resolution was addressed in the underlying investment agreement and the draft provisions were intended to be forum neutral. However, it was said that the Working Group may wish to consider SSDS as an option to be included in the multilateral instrument on ISDS reform.

Way forward

67. To facilitate the discussions on the draft provisions in section A, it was suggested that delegations be invited to submit written comments in advance of the next session to streamline the deliberations. While there was general support for that suggestion, concerns were expressed that such method of work was not appropriate. It was, however, clarified that the call for written comments would not replace the Working Group's formal deliberations on those draft provisions during its sessions.

68. After discussion, the Working Group agreed that, with regard to the draft provisions in section A (draft provisions 1 to 9), draft provision 11 and draft provisions 12 (paragraphs 1 to 5 and 7), delegations could submit written comments. Delegations were encouraged to submit their comments to the secretariat by 29 November 2024, to be posted on the Working Group web page in the language received. It was noted that those provisions would be drafted to supplement the UNCITRAL Arbitration Rules, and that their final form (for example, as an appendix for investment disputes) would be discussed at a later stage.

69. With regard to the draft provisions in sections B and C, it was agreed that the Working Group would consider them collectively as treaty provisions for use by parties. It was further agreed that draft provisions on NDTP submissions and joint interpretations would be developed and whether they would fit better into section A or should be developed as a treaty provision would be considered at a later stage.

70. The Working Group agreed to focus its deliberations at the current session on the draft provisions in sections B and C, with time allocated separately to further consider draft provision 20.

B. Draft provisions on procedural and cross-cutting issues

Draft Provision 10: Counterclaim

71. There was support for developing draft provision 10 addressing counterclaims. It was stated that counterclaims could enhance procedural efficiency and avoid multiple proceedings. It was also stated that counterclaims could address the asymmetry between respondent States and claimants. However, concerns were raised that allowing for counterclaims could potentially lead to delays and additional costs, including a risk of parallel proceedings. Concerns were also raised regarding the source and scope of investors' obligations that could be the basis for counterclaims.

72. Regarding paragraph 1, views diverged on whether the subparagraphs should provide a cumulative or disjunctive list of requirements for the submission of a counterclaim. One view was that a counterclaim should be allowed when it met the requirements in subparagraph (a) or (b) and met the requirement in subparagraph (c). It was also said that there was some overlap between subparagraphs (a) and (b) and retaining either one would suffice.

73. Regarding subparagraph (b), it was said that requiring a connection with the legal basis of the claim could unduly restrict counterclaims and that a connection with either the factual or legal basis should suffice. Yet another suggestion was that the word "close" should be added before "connection" to achieve a similar degree of connection as that required in subparagraph (a) (arising "directly" out of).

74. Regarding subparagraph (c), there were divergent views on whether failure to comply with "domestic law" could be the basis of a counterclaim. In favour, it was said that foreign investors were obliged to respect the legal framework of the host State. It was also said that investors used umbrella clauses to elevate contractual breaches to treaty violations, and counterclaims would provide States with a proper tool to respond. It was observed that arbitral tribunals had the capacity to address issues of domestic law, as was often the case, in investment arbitration. It was said that States would not always pursue counterclaims based on such a ground as it would

likely be costly and might delay the proceedings; furthermore, they could always resort to local courts.

75. On the other hand, concerns were expressed that including such a ground for counterclaims would unduly expand the scope of counterclaims, particularly if the requirements in subparagraphs (a) or (b) need not be met. Concerns were also expressed that such a ground could increase the costs and delay proceedings, and the arbitral tribunal might not have the expertise or capacity to address such claims. It was said that the proper forum for deciding issues of domestic law was local courts, as they might be better placed to hear from all affected parties and those having an interest in the proceedings. It was questioned whether a tribunal's determination of issues relating to domestic law would be acceptable as they might infringe on national sovereignty and the jurisdiction of local courts, possibly leading to constitutional questions.

76. It was also suggested that, should States be able to raise counterclaims based on the grounds of non-compliance with domestic law, it should be required to waive its right to pursue domestic proceedings to avoid multiple proceedings. It was, however, questioned whether a State could give such a waiver, whether such a waiver would be enforceable and how issues concerning applicable time limitations would be addressed.

77. It was said that the phrase "any other instrument binding on the claimant" included in subparagraph (c) was vague. In response, it was said that the phrase was included to reflect the possibility of such instruments being developed in the future.

78. It was suggested that paragraph 2 should be revised to clarify that a claimant's consent to the counterclaims would be deemed from its submission of the claim. A proposal to include a condition that such consent be consistent with the law of the home State and other applicable law did not receive support.

79. Given the time States need to coordinate among the multiple stakeholders and to identify the basis for any counterclaims, it was suggested that the time frame for submitting counterclaims should be extended beyond the statement of defence. However, it was generally felt that paragraph 3, which was based on article 21(3) of the UNCITRAL Arbitration Rules, was acceptable as it provided the flexibility as long as the State could justify the delay.

80. After discussion, the following text was presented for further consideration:

> "1. Where a claim is submitted for resolution, the respondent may make a counterclaim:
>
> (a) Arising directly out of the subject matter of the claim or in [close] connection with the factual or legal basis of the claim; and
>
> (b) That the claimant has failed to comply with its obligations under the Agreement, domestic law, any relevant investment contract or any other instrument binding on the claimant.
>
> 2. The submission of a claim by the claimant constitutes its consent to any submission of a counterclaim by the respondent in accordance with paragraph 1.
>
> 3. A counterclaim shall be made no later than in the statement of defence, unless the Tribunal considers that the delay in the submission of the counterclaim was justified under the circumstances."

81. In addition, the secretariat was requested to include a "fork in the road" rule, which would require the respondent to waive its right to initiate any adjudicatory dispute resolution proceeding regarding the same claim as the counterclaim.

Draft Provision 12: Third-party funding

82. It was recalled that a wide range of views had been expressed on ways to regulate third-party funding, which ranged from absolute prohibition to simply

requiring disclosure. While the wide range of views continued to be held, it was generally felt that draft provision 12, which reflected the discussions during the forty-third session in September 2022 (A/CN.9/1124, para. 143), could be a basis for the deliberations.

83. Noting that delegations were called upon to submit written comments on paragraphs 1 to 5 and 7, the Working Group engaged in discussions on paragraph 6 and 8.

84. The deliberations focused on whether third-party funding should be regulated beyond requiring disclosure. Different views were expressed.

85. One view was that third-party funding promoted access to justice, particularly for small or medium-sized enterprises (SMEs). As such, regulation of third-party funding should be limited to addressing potential conflicts of interest, as other potential abuses were already addressed in relevant provisions. It was said that the overregulation of third-party funding might interfere with legitimate contractual relationships. It was also said that the assumption should not be that third-party funders operated in bad faith and the aim should not be to regulate the market or the business model, but rather misconduct and abusive practices.

86. Another view was that third-party funding posed a significant problem as it led to increased costs for respondent States and the risk of regulatory chill. It was said that third-party funding created an incentive not to settle and the potential for undue influence by the funder in the proceedings. It was further said that third-party funding created an asymmetry as the respondent State was not able to enforce an award against the third-party funder, whereas the claimant could enforce against the respondent State to the benefit of the third-party funder. It was said that the sources of third-party funding as well as the utilization of any returns required scrutiny due to possible corruption and potential money-laundering concerns.

87. Views diverged over whether the circumstances listed in paragraph 6 were of the types that were particularly problematic and should be restricted. It was suggested that paragraph 6 should be deleted as it was unclear how it would be administered. In that regard, it was said that a tribunal would not be in a position to make the necessary assessment, and would not have any authority to intervene in the contractual relationship between a disputing party and its third-party funder. It was also pointed out that attempts to make determinations under paragraph 6 could significantly delay the proceeding and incur extra costs. It was reiterated that tribunals had the discretion to conduct their proceedings in an effective manner and could regulate unwarranted conduct of the parties via other procedural means such as ordering security for costs, reflecting it in the allocation of costs or dismissing claims that were manifestly without legal merit, all of which could address abusive practices of third-party funding. The possible development of a code of ethics for third-party funders was also mentioned.

88. Another view was that paragraph 6 should be retained with the text clarified. It was queried what “reasonable” meant, and whether a tribunal would have sufficient guidance to exercise its discretion in applying that standard. It was suggested that subparagraph (a) could instead specify a percentage (for example, where the expected return exceeded 50 per cent of the compensation) and subparagraph (b) could refer to a concrete number of cases. In response, it was said that any specific percentage or number would be arbitrary. It was also suggested that the phrase “with regard to the same measure” in paragraph (b) be deleted to better address the concern over a third-party funder targeting a specific respondent State. While support was expressed for retaining only subparagraph (b), it was also said that the number of cases funded should not necessarily be a problem if the claims were meritorious.

89. It was suggested that paragraph 6 could also include situations where the funded party provided false information or concealed information as well as when the third-party funder controlled or influenced the conduct of the funded party or the proceedings. In response, it was stated that the former situation was addressed by

paragraph 7. It was stated that the overall circumstances of the funding would need to be assessed by the tribunal including the reason for the funding and the potential impact of any restriction (for example, if the funded party was an SME). In that regard, it was suggested that broad discretion should be given to the tribunal to restrict third-party funding which it found to be abusive and to provide objective standards in doing so.

90. It was said that the tribunal should be able to suspend the proceeding until such a situation was rectified. It was generally felt that the disputing party could not be ordered to terminate the funding agreement, which was outside the jurisdiction of the tribunal. It was, however, suggested that the tribunal should be able to require the third-party funder to agree to cover any damages as well as costs awarded against the funded party. It was said that the tribunal should comply with due process requirements when taking measures pursuant to paragraph 8, and such requirements should be listed in the paragraph.

91. It was suggested that the provision on third-party funding could be an optional clause in the MIIR.

92. After discussion, it was agreed that disclosure requirements for third-party funding would be developed as a separate provision under section A. It was also agreed to further consider paragraphs 6 and 8 under section B including why each circumstance listed therein would be abusive or problematic, so that the draft provision did not result in eliminating meritorious claims. In addition to the circumstances listed in paragraph 6, it was suggested that the following circumstances could also be considered:

- Where the third-party funder had control or influence (direct or indirect) over the management of the claim or the proceedings including the decision to terminate, settle or otherwise resolve the dispute or the decision on the legal representative of the funded party;
- Where the third-party funder was able to terminate the funding arrangement without prior notice; and
- Where the award or the eventual return was provided entirely to the third-party funder.

93. It was also agreed that there should be further consideration of the extent to which other provisions such as security for costs, manifest lack of legal merit, early dismissal of frivolous claims, or allocation of costs could address some of the concerns regarding third-party funding.

Draft Provision 13: Amicable settlement

94. There was general support for draft provision 13 as promoting the amicable settlement of disputes. It was widely felt that amicable settlement should be encouraged but not imposed on the parties and that parties should be able to withdraw from the process at any time. It was generally felt that the availability of amicable settlement throughout the dispute resolution process should be emphasized.

95. Doubts were expressed about phrases such as “shall” and “all reasonable efforts” and it was suggested that “may”, “could” or “should” be used instead, to emphasize the voluntary nature of amicable settlement. In this regard, reference was made to the UNCITRAL Model Provisions on Mediation for International Investment Disputes.[8]

96. There was support for introducing a cooling-off period of six months as a condition for raising a claim, with that period commencing upon the receipt of an invitation to amicable settlement (consultation in particular). However, it was said that a mandatory cooling-off period might result in delays and increased costs. Concerns were also expressed about the possible conflict that could arise with

[8] Available as an annex at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2401497e_mediation_guidelines_-ebook_eng.pdf.

relevant provisions in the underlying instrument, which might contain different cooling-off periods, specific procedures for bringing claims to arbitration and other obligations such as to litigate the matter before local courts.

97. It was suggested that the parties should be able to determine the cooling-off period in their instrument of consent and that the conduct of the parties in engaging in amicable settlement should be taken into account by the tribunal in allocating costs.

98. After discussion, the Working Group agreed that draft provision 13 could be revised as follows for further consideration:

> "1. The parties should seek to settle their dispute amicably through consultation, negotiation, mediation or any other means.
>
> 2. A party may invite the other party to engage in means of amicable settlement referred to in paragraph 1. The other party should make all reasonable efforts to accept such invitation.
>
> 3. Unless otherwise provided in the Agreement, no claim may be submitted to the Tribunal for resolution until 6 months have elapsed from the date of receipt of the invitation in paragraph 2."

Draft Provision 20: Assessment of damages and compensation

99. Acknowledging the significance of and the number of requests to address the topic, the Working Group decided to continue its discussion on the assessment of damages and compensation. It was noted that draft provision 20 had been prepared based on the discussions during the forty-sixth session in October 2023, which had been based on draft provision 23 in document A/CN.9/WG.III/WP.231.

100. Support was expressed for draft provision 20 as a compromise, because it accurately reflected the deliberations at that session (A/CN.9/1160, paras. 99–115) and balanced the divergent views on various elements of damages, including whether the topic was within the Working Group's mandate.

101. However, views were also expressed that draft provision 20 did not accurately represent the compromise, and did not adequately address concerns over excessive compensation awarded by tribunals. Consequently, it was suggested that draft provision 23 in document A/CN.9/WG.III/WP.231 should form the basis of the deliberations instead. In that context, a number of the points were raised, including those that had been raised at the forty-sixth session:

- The draft provision should prescriptively address the concerns regarding excessive damages awarded by tribunals;
- The draft provision should properly reflect customary international law on the forms of reparation for injury;
- Regarding paragraph 1, the tribunal should be able to award (a) or (b) separately and not in combination to avoid the risk of double recovery;
- Regarding paragraph 1, "any applicable interest" should be deleted, fair market value should be understood as referring to accounting value, and orders for restitution in cases of expropriation would interfere with sovereign decision-making and should not be permitted;
- Regarding paragraph 2, only simple interest should be awarded (particularly for the pre-award period), the meaning of "reasonable" rate as well as the authority making that determination should be clarified, and the rate to be awarded should either be specified (for example, not in excess of a risk-free rate) or agreed to by the parties;
- Regarding paragraph 3, it should be clarified that claimant's non-compliance with obligations under domestic laws would be considered "contributory fault" or a separate element to take into account;

- Regarding paragraph 3, the factors to be considered by the tribunal should be broadened by requiring a consideration of all relevant factors;
- Regarding paragraph 4, speculative damages should be expressly prohibited;
- Tribunals should be prohibited from awarding monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment (sunk costs) and from awarding monetary damages in excess of the amount claimed;
- The use of certain calculation methods, such as discounted cash flow, should be prohibited or limited to circumstances where there was a proven track of profitability and not extend beyond the time of incurred damages;
- The language on causality should be further clarified;
- Tribunals should be further required to take into account the following factors: the economic situation of the respondent State, project risk and country risk-assessments at the time the investment was made, corruption in the making of the investment, whether the investment was fully realized, and the potential crippling effect of the award on the respondent State and its people;
- Tribunals, to deter inflated claims, could further reduce the compensation, if the amount claimed was in excess of, or disproportionate to, the amount awarded;
- Tribunals should be able to appoint experts for the assessment of damages;
- Tribunals should draw attention to compensable damage and the principles of assessment to be applied in quantification, with an aim to reach an equitable and acceptable outcome; and
- The mere fact that a State took or failed to take an action that might be inconsistent with an investor's expectations should not constitute a basis for damages.

102. In response, it was stated that draft provision 20 accurately reflected the internationally recognized principle of full reparation, and reference was made to the International Law Commission ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts, in particular articles 36 and 38. However, it was also questioned whether the draft provision accurately reflected customary international law, as it merely reflected the current practice of ISDS tribunals and not necessarily the principle of full reparation as it should be understood. Reference was also made to possible work by ILC on the topic of compensation.

103. Concerns were expressed about taking a prescriptive approach to damages, which might not obtain consensus in the Working Group. In support, it was mentioned that draft provision 20 provided tribunals with the discretion to make adjustments depending on the circumstances of each case. In this regard, it was suggested that the phrase "separately or in combination" should be added at the end of the chapeau in paragraph 1 and the possibility for the tribunal to award "compound interest" should not be ruled out.

104. It was said that guidelines could be prepared to assist tribunals in deciding on damages and compensation and it was suggested that such guidelines could be developed in parallel with draft provision 20.

V. Draft multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.246)

105. The Working Group proceeded to consider the draft multilateral instrument on ISDS reform (MIIR) contained in A/CN.9/WG.III/WP.246. It was explained that the draft had been prepared based on previous deliberations of the Working Group as well as consultations with public international law and treaty experts. The Working Group

expressed its appreciation to the secretariat for preparing the first draft of the MIIR, which was considered to be a useful basis for initial discussion.

106. At the outset, the utility of the MIIR was questioned as States were already able to refer in their treaties to the reform elements adopted by the Commission or to become a party to each instrument containing the reform elements. In response, it was said that the MIIR, envisaged as a mechanism to modify existing treaties and to implement the various elements, could provide flexibility to States to select the reforms of their choice. It was stated that such a mechanism would avoid the need to renegotiate multiple treaties individually and make it possible to apply the reforms in a broad manner more efficiently.

107. The need to preserve the autonomy of States to choose the reform elements was reiterated. It was emphasized that the opt-in mechanism would allow States to address their concerns as well as their needs and was preferable to the opt-out approach. It was further suggested that the MIIR should be structured to achieve coherence in the application of the reforms while also being able to accommodate future reforms. It was stressed that the participation in the MIIR would likely increase if flexibility was provided to the extent possible.

108. It was noted that the MIIR might require institutional support. For example, article 6 envisaged a body designated to compile and maintain the notifications, which was not a typical task carried out by the United Nations functioning as the depositary. It was further noted that institutional support might be required to assist the Conference of the Parties, particularly if they were to negotiate new protocols, and to coordinate the work among institutions that could potentially be established under the protocols (for example, the secretariats of the Advisory Centre and the standing mechanism). While the possibility of relying on existing institutions to provide such support was mentioned, it was also said that the MIIR could foresee the establishment of a small secretariat to carry out those functions. In this regard, the need to ensure the effectiveness of the institutions and to avoid any overlap of the activities was highlighted.

109. In light of the ongoing efforts by the Working Group to reform ISDS, it was suggested that the MIIR should contain substantive obligations binding on all contracting parties (referred to as “core provisions”). In that regard, it was suggested that the core provisions may be placed in the body of the MIIR or the contracting parties would be required to become a party to at least one protocol composed thereof. It was agreed that further discussions would be required in light of the divergence in views on which provisions could form the core provisions and the need to preserve the flexibility and optionality in the MIIR.

Article 1 – Objectives and scope

Paragraph 1

110. It was suggested that paragraph 1 should be further developed to clarify the objectives of the Convention and that it resulted from “reform investor-State dispute settlement”, as currently captured in the preamble. It was also said that reference to ISDS in paragraph 1 should not preclude other means to resolve investment disputes (for example, SSDS) being addressed in the Convention.

111. Questions were raised with regard to the phrase “to apply or to be bound by Protocols”. It was explained that the phrase aimed to capture the diverse ways in which each Protocol would operate – for instance, some of the Protocols included obligations binding on the Parties while others would reflect an agreement to apply certain rules to proceedings or adjudicators based on consent by the Parties. It was suggested that the phrase be replaced with “to implement” or other appropriate language.

112. While a suggestion was made to broaden the scope of paragraph 1 to provide flexibility to capture reforms that may be undertaken in different forums in the future,

it was also suggested that the scope of the Convention should focus only on ISDS reform.

Paragraph 2

113. In response to a suggestion to delete paragraph 2, it was explained that each of the Protocols might have its own provisions on objective and scope of application, which might be more detailed.

Article 2 – Protocols

114. It was generally felt that article 2 should be revised to emphasize the flexibility provided to States in opting in to the Protocols, subject to the identification of any core provisions by the Working Group (see paras. 107 and 109 above). On whether there could be further flexibility provided to States within a Protocol, concerns about the complexities that might arise and possible introduction of fragmentation were raised.

115. It was said that a State would need to become a Party to the Convention in order to become a Party to the Protocol, as this would increase the number of accessions to the Convention, promote consistency and also ensure that the burden of financial support to institutions (see para. 108 above) was shared among the Parties. Another view was that a State should be able to become a Party to a Protocol without becoming a Party to the Convention.

116. Questions were raised over the need for and the meaning of the phrase "integral part of the Convention". It was suggested that, if such a phrase was necessary, formulations found in article II (3) of the Agreement Establishing the World Trade Organization or article 37(3) of the United Nations Convention against Transnational Organized Crime could be considered.

117. It was clarified that the list of Protocols in paragraph 1 was notional. It was suggested that the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution could also be listed as a Protocol, while another view was that there was no need to do so as the Protocol on the standing mechanism or statutes of other standing bodies would likely include the Code by reference.

118. Regarding the Transparency Rules, diverging views were expressed on whether to include it as a Protocol. The need to carefully examine the benefits of doing so (for example, providing an additional tool for States to agree to their application) and the complexities that might arise (because the Mauritius Convention already provided a pathway for States to apply the Rules to existing treaties with the possibility to make reservations) were stressed.

119. It was noted that paragraph 1 could be expanded to include other instruments. It was suggested that the implementation of each of the Protocols would need to be further examined and clarified in the Convention. It was also said that if paragraph 1 included non-legally binding instruments (for example, the Code of Conduct for Arbitrators) with the aim of making them legally binding, such protocols would need to include provisions on potential amendments of the relevant instruments. It was also said that decisions taken by the Parties of a Protocol, if allowed, would only be binding on those Parties and not on other Parties to the Convention.

Article 3 – Signature, ratification, accession

Article 4 – Participation by regional economic integration organizations

120. With regard to article 3, it was stated that:

- The multi-stage process of acceding to the Convention, acceding to the Protocols in article 3 and then depositing the notification as foreseen in article 6 could be simplified in light of the steps usually taken by the Parties in their domestic process when joining a treaty;

- Some of the Protocols listed in article 2(1) were not legally binding international instruments to which States could ratify or accede to and that an approach similar to the Mauritius Convention might be more appropriate so that the Parties could declare the application of those Protocols. Similarly, it was suggested that some Protocols might need to be adjusted to include language indicating such an intention or be formulated as annexes to the Convention;
- A conflict clause similar to that in paragraph 7 could be prepared to address any potential conflicts arising between the provisions of the Convention and those of the Protocols; and
- Regarding paragraph 6, it should not be necessary for the Parties, when joining the Convention, to indicate the Protocols that it intended to ratify or accede to, as such an indication would not have any binding effect. However, it was noted that such an indication could be useful when the establishment of an institution was foreseen and the Protocol required a minimum number of Parties.

121. It was suggested that article 4 should be deleted entirely as not being necessary and that instead article 3 should include regional economic integration organizations. A view was also expressed to add other entities that had the competence or capacity to conclude international investment treaties as Parties to the Convention. However, it was said that whether such entities could become Parties to the Convention as well as the rules in article 4, particularly with regard to voting, would need to be further examined.

VI. Other business

122. The Working Group heard an update about the use of the additional resources granted to it by the General Assembly, which was scheduled to expire at the end of 2025. It was noted that due to ongoing resource constraints, one of the three additional posts continued to be vacant, which was placing pressure on the secretariat's ability to service the Working Group.

123. The Working Group was informed that the Commission had called on Governments to provide feedback and comments on the draft toolkit on prevention and mitigation of international investment disputes in A/CN.9/1185, which should be submitted to the secretariat by 20 December 2024.

124. The Working Group was further informed that the fiftieth session of the Working Group was scheduled to take place on 20–24 January 2025 in Vienna, and that the fifty-first session would be held in two parts, with the first part taking place on 17–18 February 2025 and the second part taking place on 7–11 April 2025, both in New York. It was mentioned that while efforts were being made to hold the first part of the session in hybrid format, that would be subject to resources available and decisions by the United Nations at large on the holding of official meetings in such a format.

125. The Government of China informed the Working Group that preparations were under way for the eighth intersessional meeting to be held on 24 and 25 October 2024 in Chengdu, China, on the topic of an appellate mechanism and a multilateral instrument on ISDS Reform.

126. The Working Group was informed that due to unforeseen circumstances, the intersessional meeting scheduled to take place in Seoul in March 2025 could not be held (A/CN.9/1161, paras. 120–121). The Working Group also heard a proposal by the Government of Chile to host an intersessional meeting in Santiago during the second half of 2025 (possibly two days in October and in a hybrid format). The Government expressed flexibility with regard to the topics to be discussed, which would largely depend on the progress made by the Working Group. After discussion, the Working Group welcomed the Government of Chile's proposal.

127. The Working Group also heard a proposal by the Government of Armenia to host the second meeting on the operationalization of the Advisory Centre on International Investment Dispute Resolution in Yerevan in the first half of 2025. It was recalled that the Commission had asked the secretariat to consult and coordinate with Governments to host additional informal meetings on the operationalization following the first meeting in Bangkok in December 2024 (see A/79/17 paras. 156–166). The Working Group expressed its appreciation to the Government of Armenia for its willingness to host the informal meeting.

128. The Working Group agreed that it would continue to work on the standing mechanism, the procedural and cross-cutting issues and the MIIR at its session scheduled in January 2025.

129. With regard to the first part of the fifty-first session scheduled to take place in New York on 17 and 18 February 2025, it was recalled that the Commission had decided that the results of the first meeting on the operationalization of the Advisory Centre would be reported at that session and that the Secretariat was requested to facilitate full online participation. The Working Group was informed that the holding of official meetings in hybrid format was currently being discussed by the General Assembly and that the resource constraints of the United Nations Secretariat at large might not allow for full online participation of the meetings in all official languages of the United Nations. Expressing a strong preference that the first part of the fifty-first session be held in hybrid format with full online participation, the Working Group requested the Secretariat to continue to look into possible options and provide updates, which would allow the Working Group to make an informed decision on the feasibility of and the agenda for the session.

130. Considering that the additional resources allocated to the Working Group by the General Assembly would expire at the end of 2025, the Secretariat was requested to consider the possible implications and present options on how the Working Group could further its work, including within existing resources.