United Nations A/CN.9/WG.III/WP.149

General Assembly

Distr.: Limited
5 September 2018

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Thirty-sixth session
Vienna, 29 October–2 November 2018

Possible reform of investor-State dispute settlement (ISDS)

Note by the Secretariat

Contents

V.18-06496 (E)

I. Introduction

1. At its thirty-fifth session, the Working Group requested the Secretariat to prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and thirty-fifth sessions and to set out a possible framework for its deliberations. The Working Group also requested the Secretariat to consider the provision of further information to assist States with respect to the scope of some of its concerns regarding ISDS (A/CN.9/935, para. 100).

2. This Note sets out some main concerns about ISDS raised in the Working Group during its thirty-fourth and thirty-fifth sessions and is supplemented by more detailed discussion of each topic in background reference documents A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153.[1] This Note also contains a suggested framework for considering the question of desirability of reforms. The topics discussed in the background documents are not intended to reflect a comprehensive set of issues regarding ISDS that the Working Group has discussed, or may yet wish to discuss. Additional concerns may have to be addressed.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,[2] and does not seek to express a view on the desirability of reforms, which is a matter for the Working Group to consider.

II. List of concerns about ISDS

A. General remarks

1. Characteristics of the ISDS regime under consideration

4. The international investment regime includes over 3,000 international investment treaties concluded over the last fifty years.[3] These treaties, which are instruments of public international law, were conceived as a means to enhance confidence in the stability of the investment environment. To do so, they provide substantive guarantees to foreign investors and their investments in the form of enforceable obligations placed upon States. For example, in these treaties, States undertake to respect certain standards of investment protection (such as fair and equitable treatment, full protection and security, protection from expropriation, freedom to repatriate funds and non-discrimination in the treatment of the investment).

5. The ISDS regime was developed to allow a foreign investor (whether a natural or legal person) to bring a claim directly against the sovereign State in which it was an investor. The regime provided a significant break from traditional mechanisms under international law, which essentially relied on diplomatic protection or "espousal" by the home State of the investors' claim to resolve disputes relating to investment.

6. While ISDS provisions in investment treaties vary, they generally provide for dispute settlement through arbitration, and include the following features: (i) the claimant-investor may bring a claim directly against the host State; (ii) the dispute is resolved by an arbitral tribunal constituted ad hoc for that particular dispute; and

[1] The Working Group may wish to note that issues regarding the practice of third-party funding will be addressed in a separate Note by the Secretariat, to be issued at a later stage.

[2] See bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html).

[3] The term "investment treaty" in this Note covers broadly any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and ISDS, including any treaty commonly referred to as a free trade agreement, economic integration agreement, or trade and investment framework or cooperation agreement.

(iii) both disputing parties, including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal.[4]

2. Observations on information and data

7. At its thirty-fourth and thirty-fifth sessions, the Working Group noted the importance of a factual underpinning of its deliberations (A/CN.9/930/Rev.1, para. 42; A/CN.9/935, para. 46). Efforts to increase transparency in ISDS have contributed to make more information publicly available not only with regard to its outcomes but also to its procedures. A more comprehensive data pool is available for cases administered by the International Centre for Settlement of Investment Disputes (ICSID), which are considered to represent 75 per cent of investment treaty cases.[5] This Note and the supporting reference documents (A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153) therefore discuss, where available and appropriate, the statistical context of data on ISDS outcomes and procedures.

B. Concerns identified in the Working Group

8. This section provides an annotated list of the main concerns raised at the thirty-fourth and thirty-fifth sessions of the Working Group. They are grouped into three main topics (consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; arbitrators/decision makers; and costs and duration), discussed in detail in documents A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153, respectively. Within those groups, the concerns are further broken down into related elements, for ease of presentation.

1. Concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

9. Concerns expressed regarding the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, which are addressed in detail in document A/CN.9/WG.III/WP.150, relate to the following matters:

- Divergent interpretations of substantive standards; divergent interpretations relating to jurisdiction and admissibility; and procedural inconsistency (A/CN.9/WG.III/WP.150, paras. 14–18);
- Lack of a framework to address multiple proceedings (A/CN.9/915); and
- Limits of the current mechanisms to address inconsistency and incorrectness of decisions (A.CN.9/WG.III/WP.150, paras. 19–26).

10. Regarding the latter point, the Working Group may wish to note that the existing review mechanisms (ICSID annulment procedure, as well as setting aside of awards, and recognition and enforcement proceedings by State courts) address the integrity and fairness of the process rather than the consistency, coherence or correctness of the outcomes (A/CN.9/WG.III/WP.142, para. 39 and A/CN.9/935, para. 23). Because of the notion of finality, remedies against awards are by nature limited.

2. Concerns pertaining to arbitrators and decision makers

11. At its thirty-fifth session, the Working Group approached its consideration of arbitrators and decision makers from two main perspectives: first, whether the existing ISDS regime offers a sufficient guarantee of an independent and impartial tribunal, and secondly, whether the existing approaches to the constitution of tribunals ensure that the tribunal members have the appropriate qualifications and characteristics to decide the cases before them (A/CN.9/935, paras. 45–92).

[4] See A/CN.9/WG.III/WP.142, paras. 5–7.

[5] See ICSID published information on caseload and statistics, available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

Documents A/CN.9/WG.III/WP.151 and A/CN.9/WG.III/WP.152 address these questions in detail.

12. The concerns expressed in the Working Group regarding the independence and impartiality of arbitrators and decision makers relate to the following matters:

- The standards of independence and impartiality required of individual arbitrators, and the observation that those standards might be insufficiently clear in scope and homogeneous in practical application (A/CN.9/WG.III/WP.151, paras. 42–47);
- The existence of issue conflicts such as double hatting and prejudgment of issues (A/CN.9/WG.III/WP.151, paras. 24–38); and
- The challenge mechanism (that is, an application to disqualify an arbitrator on the basis of an actual or perceived lack of independence and impartiality), and its limitations (A/CN.9/WG.III/WP.151, paras. 48–66).

13. The concerns expressed regarding the existing approaches to the constitution of tribunals, and the impact of those approaches on the qualifications and characteristics of tribunal members, relate to the following matters:

- The use of a party-appointment mechanism in cases involving a State, and its limitations including as regards ensuring competence and qualifications of arbitrators (A/CN.9/WG.III/WP.152, paras. 7 and 30–36);
- The impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators on the perception of arbitrator bias (A/CN.9/WG.III/WP.152, paras. 39–41);
- The limited number of individuals repeatedly appointed as arbitrators (A/CN.9/WG.III/WP.152, para. 18) and the possible impact on cost and duration of proceedings (A/CN.9/WG.III/WP.152, paras. 19–29); and
- The lack of diversity in terms of gender, age, ethnicity and geographical distribution of appointed arbitrators, so that professional background of arbitrators, differing legal systems and levels of economic development are not all proportionately represented in tribunals (A/CN.9/WG.III/WP.152, para. 18).

3. Concerns pertaining to cost and duration of ISDS cases

14. At its thirty-fourth session, the Working Group undertook a preliminary discussion on cost and duration of ISDS under the general topic of procedural aspects of the arbitral process (A/CN.9/930/Rev.1, paras. 35–78). States and intergovernmental organizations shared their experiences in connection with ISDS. It was said that deliberations relating to cost and duration should be fact-based, but that perceptions on those issues had an influence on the legitimacy of the ISDS regime (A/CN.9/WG.III/WP.153, paras. 10, and 38–65).

15. The concerns expressed in the Working Group relating to cost and duration relate to the following matters:

- Lengthy and costly ISDS proceedings (A/CN.9/WG.III/WP.153, paras. 7–9, 17–27 and 42–59);
- Allocation of costs by arbitral tribunals in ISDS (A/CN.9/WG.III/WP.153, paras. 14, 28–32 and 60–65);
- Difficulties faced by successful States being unable to recover some or all of their costs from claimant investors and the need for rules on security of costs (A/CN.9/WG.III/WP.153, paras. 15 and 33–37); and
- Lack of a mechanism to address frivolous or unmeritorious claims (A/CN.9/WG.III/WP.153, paras. 33 and 86).

16. During its deliberations, the Working Group identified a number of elements having an impact on cost and duration of ISDS proceedings: complexities of the case,

the underlying treaties and the proceeding; large volume of evidence; quality of factual records; conduct of the proceedings and ineffective case management (including lengthy deliberations and excessive numbers of hearings); and the need to translate documents and evidence into the language(s) of the arbitration. In addition, the Working Group noted that the most time-consuming stages of ISDS proceedings included the appointment of the tribunal members, discovery or document production, and the issuance of awards (A/CN.9/WG.III/WP.153, paras. 76–92).

4. Other concerns

17. At the thirty-fifth session of the Working Group, it was emphasized that States would have the opportunity to raise additional concerns at future sessions of the Working Group (A/CN.9/935, para. 99). The Working Group may wish to consider whether other concerns pertaining to the ISDS regime, not identified above and in documents A/CN.9/WG.III/WP.150 to A/CN.9/WG.III/WP.153 would need further consideration.[6]

III. Framework for discussion

A. General remarks

18. The Working Group may wish to recall that its mandate contains three stages: (i) to identify and consider concerns regarding ISDS; (ii) to consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission. In addition, the mandate focuses on the procedural aspects of dispute settlement rather than on the substantive provisions (A/CN.9/930, para. 20).

19. The Working Group may wish to proceed to consider whether reform is desirable in light of (i) the concerns set out above, and any other concerns it may wish to identify; as well as (ii) the available options of reforms. The options for reform outlined below and in the annex to this document are based on preliminary options identified in the Working Group at its thirty-fourth and thirty-fifth sessions. They are not exhaustive, and the Working Group may wish to consider any further options that could be developed.

20. The Working Group may wish to note that the suggested framework (see paras. 26–70 below) and the tabular presentation of the framework annexed to this document include a list of possible options for reform in light of identified concerns so as to enable the Working Group to consider the desirability of reform. The chart also contains a brief outline of the main possible impact of the reform options on the existing ISDS regime in order to allow the Working Group, should it so wish, also to consider the feasibility of reforms. The suggested framework for discussion does not seek to express a view on the desirability or feasibility of reforms, which are matters for the Working Group to consider.

21. As regards the rationale and desirability for reform of the current ISDS regime, the Working Group may wish to consider the policy objectives that the regime seeks to achieve. In that context, the Working Group may wish to consider the policy objectives of the ISDS regime and of possible reform in light of the 2030 Agenda for the Sustainable Development Goals.[7] It may also wish to note the consideration expressed by States that (i) investment policies should provide legal certainty and

[6] In this regard, the Working Group may wish also to take into consideration the issues raised in papers and statements submitted for its consideration at its thirty-fourth and thirty-fifth sessions (available at http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html), and the materials available at the link entitled “Investor-State Dispute Settlement Reform: On-line Resources”.

[7] See General Assembly resolution 70/1 of 25 September 2015, *Transforming our world: the 2030 Agenda for sustainable Development*.

strong protection to investors and investments, tangible and intangible, (ii) access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures, and (iii) dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.[8]

22. The Working Group may also wish to consider the guiding principles for any reform. It may wish to recall that, at its thirty-fifth session, the need for any ISDS reform to strike a balance between rights and obligations of the States on the one hand and of the investors on the other was stressed (A/CN.9/935, para. 14). Efficiency, flexibility and cost-effectiveness were mentioned as the guiding principles when considering any reform (A/CN.9/935, para. 43).

23. The Working Group may also wish to consider the objectives for reform and main principles identified by UNCTAD, to (i) enhance the legitimacy of the ISDS system, (ii) enhance the contracting parties' control over the interpretation of their treaties, and/or (iii) streamline the process and make it more efficient.[9]

24. As regards the various identified issues, the Working Group may wish to consider that they all constitute elements of an overall regime. At its thirty-fifth session, the Working Group heard suggestions that it would be necessary to strike the right balance between different concerns, and to consider thoroughly the impact of inconsistency on core treaty provisions, and on costs and duration. It was added that other concerns and issues, such as lack of transparency, lack of effective mechanism to address frivolous claims and issues of third-party funding, should be considered as they also had an impact on the overall functioning of ISDS (A/CN.9/935, para. 44). Attention was drawn to the need to consider the issues of duration and costs in the broader context of (a) innovations in arbitration rules and investment treaties (such as early dismissal of frivolous, unmeritorious claims, preliminary objections, security for costs); (b) the need to ensure correctness of decisions; and (c) enhancing the predictability of decisions. It was added that a comprehensive analysis would require nuanced and not merely simple solutions (A/CN.9/930/Rev.1, para. 59).

25. The suggested framework for consideration of the desirability of reform is based on consideration of issues and possible solutions by the Working Group, suggestions for reform by States, as well as the road map for reform proposed by UNCTAD[10] and the OECD scoping paper.[11] The proposals for amendments articulated by the ICSID Secretariat[12] are also mentioned where relevant. The Working Group may wish to note that there are a number of options, that can be undertaken in isolation or in combination. The presentation of options below is preliminary and consequently it does not provide an analysis of each option, nor of what each one of them would entail individually and in relation to the current regime.

---

[8] See Guiding Principle III — G20 Guiding Principles for Global Investment Policymaking (Annex III), G20 Trade Ministers Meeting Statement 9–10 July 2016, Shanghai; The Sustainable Development Goals. See also UNCTAD, World Investment Report 2017, available at http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf.

[9] UNCTAD, World Investment Report 2015, Chapter IV, p. 148, available at https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf.

[10] UNCTAD World Investment Report 2015, Chapter IV, p. 165, available at https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf.

[11] See A/CN.9/918/Add.7, OECD comments; see also Gaukrodger, D. and K. Gordon (2012), *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03, OECD Publishing. http://dx.doi.org/10.1787/5k46b1r85j6f-en.

[12] See ICSID Secretariat, Proposals for Amendment of ICSID Rules — Working Paper, August 2, 2018, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf.

B. Suggested framework for discussion

1. Inconsistency and related matters

26. At the thirty-fourth session of the Working Group, it was indicated that criticism of a lack of consistency and coherence was one of the reasons behind the Commission's decision to embark on work on possible ISDS reform, thereby acknowledging the importance of ensuring a coherent and consistent ISDS regime. It was said that consistency and coherence would support the rule of law, enhance confidence in the stability of the investment environment and further bring legitimacy to the regime. It was also said that inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and its credibility (A/CN.9/930/Add.1/Rev.1, para. 11).

27. The Working Group may wish to consider the questions raised in document A/CN.9/WG.III/WP.150, paras. 28–31, as well as preliminary views expressed by States (see A/CN.9/WG.III/WP.150, paras. 32–36). It may also wish to note the challenge of designing a framework that strikes a careful balance between conflicting demands: on the one hand, the need for an efficient and final dispute settlement mechanism and, on the other, the concern to protect the integrity of the process and the correctness of the decision-making.

28. Possible options for reform to address these concerns would include the following (see also A/CN.9/WG.III/WP.150, paras. 37–47).

(a) Enhancing contracting States' control over their instruments

29. The Working Group may wish to consider as an option for reform tools that would reserve a wider role to States for the interpretation of their investment treaties. A number of provisions found in recent treaties aim at increasing the role of States in various manners, such as by providing for the possibility of joint interpretations, binding on arbitral tribunals, as well as other mechanisms to revise, amend or update investment treaties.[13]

30. In order to make such treaty provisions effective, or to encourage joint interpretation by treaty Parties more generally, this option could entail designing a mechanism at a multilateral level, fostering the use of interpretative tools. The Working Group may wish to consider the study carried out by the OECD on the matter,[14] where it concludes that "with an increasing number of investment treaties covering relationships where governments have more complex and more overlapping interests, joint interpretive agreements are likely to be an increasingly important tool for ensuring that treaties are interpreted in accordance with the treaty parties' intent and achieve their purposes."[15]

(b) Strengthening the involvement of State authorities for preliminary settlement of disputes

31. Recent treaties include provisions aimed at circumscribing investors' access to ISDS (for instance, excluding from the scope of ISDS claims that relate to sensitive

---

[13] See, for instance, Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investments (2005).

[14] See Gaukrodger, D. (2016), *The legal framework applicable to joint interpretive agreements of investment treaties*, OECD Working Papers on International Investment, 2016/01, OECD Publishing, Paris, available at http://dx.doi.org/10.1787/5jm3xgt6f29w-en: see also Gordon, K. and J. Pohl (2015), *Investment Treaties over Time — Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment, 2015/02, OECD Publishing. http://dx.doi.org/10.1787/5js7rhd8sq7h-en.

[15] The OECD studies list various tools available to Governments to influence their positioning in the international investment law system; they include in addition to joint interpretations, unilateral instruments clarifying the meaning of treaty provisions and parties' intent, pleadings filed by the respondent governments and submissions by the non-disputing treaty Party, consultation mechanisms.

policy areas, relating to technical issues such as taxation, or arising from contractual obligations, thereby limiting arbitrable claims). They also include mechanisms for channelling sensitive or technical issues to State-to-State dispute settlement.

32. In that light, an option for reform could aim at designing a mechanism that would allow technical authorities established by treaty Parties to decide whether a claim falls outside the limited scope of claims that are subject to ISDS, as well as substantive matters such as questions relating to violations of national treatment and substantive MFN clauses. This option could entail the development of models for setting up a joint review committee by the treaty Parties together with a review mechanism or State-State appeal body to apply after a given time period, if the claim cannot be settled at the technical level.[16] Such mechanisms may also constitute a means to deal with frivolous or unmeritorious claims.

(c) Guidance to arbitral tribunals, claims commissions

33. There are a number of procedural mechanisms that arbitral tribunals could resort to or be encouraged to use in order to coordinate better their decision-making, including in situations of concurrent proceedings. These tools are described in document A/CN.9/915, paras. 10–33. They are meant to address mainly two categories of situations. The first category is where different entities within the same corporate structure have a right of action against a State or State-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests, as long as all entities qualify as investors under an applicable investment treaty, or have a right of action under a contract or under domestic investment law. The second category is where a measure by a State has an impact on a number of investors which are not related (see A/CN.9/881, paras. 7 and 8).

34. Various options are available to address these situations. Regarding the first category, solutions could include proactive use of consolidation, exchange of information among arbitral tribunals, stay of proceedings, as well as use of the doctrines of lis pendens and res judicata. Regarding the second category, available solutions could range from exchange of information among tribunals, involvement of an administering institution, and increased transparency, including in the conduct of the proceedings and the establishment of claims commissions to deal consistently with the numerous claims. A further option may include broadening the use of ISDS to cover class-actions. The Working Group may wish to note that it has been suggested that while such solutions could ensure consistency within a treaty or specific set of issues, they may not be sufficient to provide harmonization across treaties, if such harmonization is considered desirable.

(d) Introducing a system for prior scrutiny of awards

35. A system allowing for prior scrutiny of arbitral awards could also be considered. Scrutiny of awards is a feature of the Rules of the ICC International Court of Arbitration. That system has often been described as beneficial in that it is said to enhance the quality and thereby the enforceability of awards. A similar system could be designed to ensure consistency, avoid legal mistakes and ensure quality of awards rendered by ISDS tribunals.

(e) Introducing a system of binding precedent

36. From a historical viewpoint, consistency and coherence are not features built into the ISDS regime. Decisions are made by arbitral tribunals established on an ad hoc basis, with no formal obligation with regard to the principle of precedent. Currently, while tribunals seem to agree that there is no doctrine of binding precedent per se, they also concur on the need to consider earlier cases. Nonetheless, this has

[16] See, for instance, Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed on 9 September 2012, in force since 1 October 2014).

not always secured consistency among arbitral awards as this approach is difficult to implement in a decentralized mode of decision-making, composed of ad hoc tribunals only.[17]

37. The Working Group may wish to consider that "consistency", "coherence", and "predictability" of decisions in ISDS could mean that decision makers take into account, as appropriate, relevant pre-existing case law and conform to the extent possible or desirable to the relevant legal interpretations set out therein. The Working Group may wish to consider whether, in a "coherent" and "predictable" system, conflicting decisions should be based upon a consistent interpretative approach to the issues at stake, extending beyond the instant case, and taking into account pre-existing case law in order to contribute to the development of investment law and jurisprudence.

38. The Working Group may wish to note that, despite being primarily responsible for rendering decisions on the matters submitted to them, arbitral tribunals also operate in the framework of a larger adjudicatory context with public relevance. Indeed, investment treaty tribunals are often noted as contributing to articulating and clarifying the meaning of core treaty standards.[18] Therefore, a related question the Working Group may wish to consider is whether arbitrators should be considered as being under a general duty towards an international system of justice, to act in the public interest (A/CN.9/935, paras. 85 and 86), and if so, how to implement such duty.

(f) Setting up a system of preliminary rulings

39. A "preliminary ruling" procedure means that a court may refer a decision on a specific issue arising in pending proceedings to a different court. The purpose of the procedure is to have a provision of law interpreted by the latter court. The proceedings before the court seeking the ruling are normally suspended pending the determination by the other court. The ruling will usually bind the court requesting it, which will then incorporate it into its overall resolution of the dispute before it.[19] An option for reform may include a system of preliminary ruling, allowing arbitral tribunals to refer any question concerning the application and interpretation of a legal matter to a specific body.

(g) Introducing an appellate mechanism

40. A possible reform option may consist in the development of an appellate review mechanism that would go beyond the current limited scope of review as part of an annulment process. The main functions of an appellate mechanism would be to ensure procedural and substantive correctness of decisions, and to increase predictability of treaty interpretation. It could be tasked with a substantive review of decisions and could permit implementation of a system of binding precedent.[20] The appellate mechanism could be tasked with a review of first instance decisions, arbitral awards as well as decisions of international commercial courts. This option could but would

---

[17] By comparison, in the International Court of Justice, there is no de jure *stare decisis* (see Article 59 of the ICJ Statute); there is, however, a strong reliance on earlier judicial decisions, which are listed as "subsidiary means for the determination of rules of law" in Article 38 of the ICJ Statute.

[18] See *Glamis Gold Ltd. v. United States of America*, UNCITRAL Arbitration (NAFTA), Award, 8 June 2009, at para. 7, where the tribunal provided as follows: "this Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. The Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it. Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part." See also *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07.

[19] As an example of such procedure, see Article 267 of the Treaty on the Functioning of the European Union, whereby a court of a Member State of the European Union may, and in certain instances shall request the Court of Justice of the European Union (CJEU) to give a ruling on the interpretation of EU law.

[20] See also ICSID-Secretariat, Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration (22 October 2004), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents.

not necessarily require the establishment of a standing body. It may be noted that illustrations of appellate review mechanisms can be found in certain investment treaties.[21]

41. A matter that would nonetheless deserve consideration is the relationship between an appellate mechanism and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) (see A/CN.9/917, paras. 20–23). Similarly, the relation with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) would need to be considered.[22]

(h) Setting up an appellate body

42. A reform option could consist of the creation of a separate appellate body, which would result in the current ISDS regime maintaining most of its basic features, while being complemented with a standing or at least semi-permanent appellate body. The appellate body could function as a review mechanism for arbitral awards. An appellate body could also function as a second instance of a multilateral investment court if one were to be set up. Further, an appellate body could also function as a second instance to review decisions made by international commercial courts as established by several States. Lastly, it could also provide some degree of international review in claims of denial of justice by domestic courts. The creation of an appellate body is often cited as a possible response to demands for greater consistency in the decisions of ISDS tribunals, as well as legal correctness.

43. The Working Group may wish to note that despite the fact that most arbitration regimes emphasize the finality of the awards thus prohibiting appeals, there are nonetheless examples of institutional arbitration regimes that provide for appellate review of arbitral awards. Under some national arbitration laws, parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration. The questions mentioned in paragraph 41 above would need to be considered also in the context of the establishment of an appellate body.

(i) Setting-up an international court system

44. A reform option could include, as envisaged by certain recent investment treaties, the creation of a court, established as a permanent international institution.[23] The stated rationale is that by sitting permanently and deciding cases over time, judges could deliver consistent decisions. A court could be conceived as a first instance tribunal, with or without an appeal tribunal and be composed of judges, obliged to adhere to underlying ethical standards. The purposes usually mentioned regarding the establishment of an investment court are to address concerns regarding inconsistency and incorrectness of decisions made by ISDS tribunals, as well as concerns regarding ethical requirements and appointment mechanisms for arbitrators and decision makers.

---

[21] See, for instance, the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, 4 November 2005 (entry into force 1 November 2006), Annex E; the Free Trade Agreement between the Government of the Republic of Chile and the Government of the United States of America, 6 June 2003 (entry into force 1 January 2004), Art. 10.19 (10) and Annex 10-H; the Dominican Republic-Central America Free Trade Agreement, 5 August 2004; the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), at article 8.28.

[22] See CIDS report, p. 54 and p. 68, available at http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

[23] See for instance, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA); the European Union-Viet Nam Free Trade Agreement.

2. Arbitrators and decision makers

45. Based on the concerns above and as set out in more detail in documents A/CN.9/WG.III/WP.151 and A/CN.9/WG.III/WP.152, the Working Group may wish to consider reform options as far as arbitrators and decision makers are concerned.

46. The Working Group may wish to note that ICSID has published a comprehensive set of proposed changes to modernize its rules for ISDS, which aims at addressing concerns identified to it. The proposals by the ICSID Secretariat include an enhanced declaration of independence and impartiality for arbitrators, and a new process for challenging arbitrators, including the introduction of an expedited schedule for parties filing a challenge.[24] In addition, it is proposed to remove automatic suspension of the proceedings when a challenge is filed, and to broaden the possible role of the Chairman, the President of the World Bank, in case of challenge.

47. The Working Group may wish to note some questions for consideration in documents A/CN.9/WG.III/WP.151, paras. 72–85 and A/CN.9/WG.III/WP.151, paras. 69–71 as well as preliminary views expressed by States (see A/CN.9/WG.III/WP.152, paras. 45–50 and A/CN.9/WG.III/WP.152, paras. 41–44). Possible options for reform to address concerns regarding arbitrators and decision makers would include the following.

(a) Code of conduct and other ethical requirements

48. The Working Group may wish to consider that the development of a code of conduct for arbitrators and adjudicators (A/CN.9/935, paras. 64 and 81) could aim at (i) ensuring that all stakeholders understand the thresholds for when independence and impartiality would be seen to be impaired (A/CN.9/935, para. 65); (ii) developing requirements for qualifications of arbitrators (A/CN.9/935, para. 65); (iii) providing clarity on arbitrators' roles and requirements regarding diversity or appropriate regional representation.

49. It may be noted that recently concluded investment treaties have included a code of conduct for arbitrators, in order to ensure respect of high ethical and professional standards. It may be noted that such codes define procedures to be followed in order to ensure that any situation with the potential to give rise to real or perceived conflicts of interest would be fully disclosed. Such codes also include concrete steps to determine whether a conflict of interest could arise or has arisen.

50. The Working Group may wish to consider the suggestion expressed at its thirty-fifth session that harmonization could result in a code of ethics for ISDS being developed through possible joint work between UNCITRAL and ICSID secretariats.

(b) Development of further rules and procedures for the challenge mechanism

51. The Working Group may wish to consider the option of developing further rules and procedures on challenge mechanisms, aimed at: (i) harmonizing challenge mechanisms, including timelines; (ii) clarifying who decides on challenge and how; (iii) clarifying the effect of the challenge procedure; (iv) introducing transparency requirements, reasoning requirements and publication of decisions on challenge; and (v) introducing sanctions for frivolous challenges, or non-compliance by arbitrators of the duty to disclose. The Working Group may also wish to consider the provision of additional soft law guidance on the use of rules and procedures for the challenge mechanism.

(c) Establishment of a control system for challenges

52. The Working Group may wish to consider whether a control system for challenges should be considered. Arbitral institutions, or ad hoc bodies could be tasked with a specified role, including with deciding on challenge procedures.

[24] See ICSID Secretariat, Proposals for Amendment of ICSID Rules, footnote 12, supra.

(d) Appointments through alternative methods

53. A reform option could involve adjustment to the appointment process of arbitrators by the parties. For example, whether the parties could agree to refer to a pre-established group of arbitrators under article 37 of the ICSID Convention and its Additional Facility Rules and whether article 6 of the UNCITRAL Arbitration Rules and its system of designating and appointing authorities could allow for adjustments to the appointment process are elements for further consideration. The Working Group may also wish to consider different means of appointing arbitrators, including (i) the increased use of appointing authorities or the use of rosters; (ii) a greater role for arbitral institutions in the selection of arbitrators; (iii) a role in appointments to an independent body, or by a mechanism such as that available in other international courts and bodies (for instance, the WTO Dispute Settlement Body) (A/CN.9/935, para. 67).

54. Another possibility would consist of establishing a new mechanism for appointing arbitrators, which would come closer to a court system, in which the disputing parties do not choose the adjudicators.

55. Yet another possibility could be to depart completely from the adjudication by arbitrators and to submit the disputes to judges appointed according to procedures to be determined (see also para. 64 below).[25]

(e) Training, rosters, and certifications

56. The Working Group may wish to consider whether, in order to address the question of lack of diversity in ISDS, programmes could be developed, aimed at expanding the pool of arbitrators, and providing training. The Working Group may wish to consider the option of developing a broader roster system or exploring various ways of setting up pre-agreed lists of arbitrators/adjudicators.

3. Cost and duration

57. The working Group may wish to note the current efforts to increase the efficiency of the proceedings that have been made by States in the investment treaties, by arbitration institutions through the revision of their rules or other guidance material, and by tribunals with regard to case management based on the discretion provided to them. UNCITRAL also revised its Arbitration Rules in 2010 to enhance the efficiency of arbitration under the Rules and in 2013 to incorporate the UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration. The Working Group may also wish to note that the proposed amendments to the ICSID rules also aim at addressing cost and time of ICSID proceedings.[26]

58. In that context, the Working Group may wish to consider the following reform options to improve the cost- and time-effectiveness of ISDS proceedings.

(a) Dispute prevention

59. Any dispute or even the possibility of a dispute between a State and an investor is a burden on both parties. Such a dispute can be seen as increasing transactional costs of investors including possible loss of business opportunities and entailing economic and social cost for States including a negative impact on its foreign investment inflow. Therefore, development of good practices and sharing of institutional information to prevent disputes could be considered.

(b) Promotion of dispute settlement mechanisms other than arbitration

60. The Working Group may wish to note that despite increasing efforts to promote forms of dispute settlement other than arbitration, such as mediation, they still remain

[25] See CIDS Supplemental Report on various alternative means of appointment for adjudicators, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf.

[26] See ICSID Secretariat, Proposals for Amendment of ICSID Rules, footnote 12, supra.

underused in ISDS. The Working Group may wish to consider ways to enhance the use of such means of dispute settlement.

(c) Expedited arbitration

61. The Working Group may wish to consider developing tools to facilitate the use of expedited arbitration procedures, and uniform principles to improve quality and efficiency of the ISDS proceedings. This would in particular allow for a more effective resolution of disputes that are less complex and/or relate to smaller amounts.

(d) Advisory centres

62. The Working Group may wish to consider the establishment of advisory centres to support developing countries and SMEs in ISDS. Such mechanisms may provide legal services and capacity-building programmes on ISDS.

(e) Third-party funding

63. The Working Group may wish to consider whether third-party funding may be utilized to address the financial burden of the parties to ISDS proceedings. In that context, the need to provide more harmonized rules on the practice of third-party funding may also be considered.

(f) Replacement of ad hoc arbitrators by full-time judges

64. The Working Group may wish to consider whether the costs incurred by the current ad hoc appointment mechanism could be alleviated by having ISDS resolved through a permanent body consisting of full-time judges. Such an option would be based on assumptions that the remuneration of judges would be determined using criteria different from the current fee determination for arbitrators, and that it would therefore be less costly to the parties (see also above, para. 55).

(g) Streamlined procedure and tools to manage costs

65. As a way to reduce the duration of ISDS proceedings, the Working Group may wish to consider the streamlining of procedures and the implementation of stricter timelines for the parties, as well as the tribunal, coupled with compliance mechanisms.[27]

66. As a way to manage the cost of ISDS proceedings effectively, the Working Group may wish to consider requiring parties and the tribunal to establish a budget at the outset of a case; adopting a ceiling for overall costs; and requiring tribunals to provide parties with enhanced, real-time information about the status of a case, including the budget.[28]

67. A further way to address both the cost and time of ISDS proceedings could also be through improved case management. In that context, the Working Group may wish to consider suggesting consultations between the tribunal and parties regarding the organization of the proceedings, including early case management conferences.[29]

(h) Early or expeditious dismissal mechanism

68. In order to address concerns raised about frivolous or unmeritorious claims resulting in increased cost and duration, the Working Group may wish to consider as a reform option effective early or expeditious dismissal mechanisms (or their introduction if not already existing).[30]

---

[27] Ibid.

[28] See also the UNCITRAL notes on Organizing Arbitral Proceedings (2016), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf.

[29] Ibid.

[30] Development of solutions modelled around Rule 41(5) of the ICSID Arbitration Rules could also be envisaged.

(i) Developing principles on allocation of cost and security for costs

69. The Working Group may wish to consider the following reform options: (i) clear and definitive rules on allocation of costs, with tribunals making costs orders on an interim basis so as to keep parties cost-conscious; (ii) urging tribunals to be more active in adjusting costs; (iii) identifying specific factors to be considered in allocating costs, such as outcome, the parties' conduct, the complexity of the issues; and the reasonableness of the costs claimed as well as the use of third-party funding; and (iv) introduction of clear rules or mechanisms on security for costs to ensure recovery of costs of respondent States.

(j) Others

70. The Working Group may also wish to consider whether allowing counterclaims by respondent States, and setting a more streamlined procedure for post-award actions including interpretation, revision and annulment and introduction of stricter timelines, would have a positive impact on cost and duration of ISDS proceedings.

Annex

Tabular presentation of framework for discussion

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
A. Inconsistency and lack of predictability			
Diverging interpretations of substantive standards	**A.1. Enhancing Contracting States' control over their instruments** by setting up mechanism(s) for treaty interpretation and related questions aimed at encouraging a more systematic use of: - Unilateral interpretations, - Joint interpretations, or - Multilateral interpretations and also aimed at ensuring abidance by arbitrators and decision-makers	Setting up of new mechanism(s) for treaty interpretation and related questions, such as: - Ad hoc authoritative interpretation mechanism - Authoritative interpretation by treaty institutions - Mechanism for the release of *travaux préparatoires* - Renvoi mechanism of interpretative questions	The option strengthens and generalizes the existing mechanisms for treaty interpretation (and other related mechanisms) Compatible with the existing ISDS regime The option can accompany any other option for reform
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.2. Strengthening the involvement of State authorities** by establishing/strengthening the framework for State-State preliminary consideration of issues, including: - Technical consultations - Decisions by the respective State authorities - Setting up a joint review committee by the treaty Parties, - Review/Appeal mechanism or State-State body to apply if the claim cannot be settled at the technical level in a given time period	- Development of a new legal standard for inclusion in investment treaties and/or - Setting up of a multilateral framework, also applicable to existing treaties: - An appellate mechanism or - A body to allow for an appeal of joint State authorities' decisions - Can also address Lack of predictability Frivolous claims (see also **C.8.**) Costs, Abuse of process (see also **C.**)	The option strengthens the role of States regarding their treaties, and could limit access to ISDS Compatible with the existing ISDS regime as a pre-dispute mechanism The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Lack of framework to address multiple proceedings	**A.3. Guidance to arbitral tribunals or claims commissions** (i) Where different entities within the same corporate structure have a right of action against a State regarding the same investment/same State measure and for the benefit of substantially the same interests, possibility to consider developing legal standards regarding: - Proactive use of consolidation - Possibility to exchange information between tribunals - Stay of proceedings - Considering the use of *lis pendens* and *res judicata* (ii) In the situation of a concurrent proceeding where a measure by a State has an impact on a number of investors which are not related, possibility to consider: - Systemic approach to recurrent disputes by the creation of claims commissions - System of preliminary rulings by specific bodies (see below, **A.6.**) - Class action for investors	Development of new legal standards (see A/CN.9/915) - Can also address Abuse of process Judicial economy Costs and Duration (see also **C.**)	The role of tribunals is strengthened in options listed under (i), and the role of States is enhanced in options listed under (ii) Possible impact on: - Arbitral institutions, their rules, practices and role - Non-institutional arbitration rules The option can accompany any other option for reform, but may become redundant with option **A.9.**, although some of the features may also apply to the reform option **A.9.**
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.4. Scrutiny system** (mechanism or body) for awards prior to issuance	Setting up of a system (mechanism or body) in charge of scrutiny of awards prior to issuance - Can also facilitate Quality Consistency and control of correctness of decisions Enforceability	Possible impact on the role of arbitral institutions Question of non-institutional arbitration to be considered The option can accompany any other option for reform, but may become redundant with option A.9.
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.5. Introducing a system of binding precedent**	Setting up of a new mechanism to introduce binding precedent and practical application	Compatible with the existing ISDS regime The option can accompany any other option for reform, but may be difficult to implement in an ad hoc ISDS regime

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
		- Can also address Lack of predictability - Can also facilitate Control of correctness of decisions	
	A.6. System of preliminary rulings by specific bodies	Setting up of a system (mechanism or body) allowing preliminary ruling by other international tribunals or domestic courts	The relationship between specific bodies and the ICSID Convention, as it does not foresee preliminary rulings, should be considered The option can accompany any other option for reform
	A.7. Appellate review mechanism, designed for inclusion in investment treaties (ad hoc system), or agreed to by the disputing parties	Development of an appellate review mechanism Questions of flexibility and scope	The relationship between an appellate mechanism and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) would deserve careful consideration The impact on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) should also be addressed The option can accompany any other option for reform
	A.8. Appellate body, set-up as an institutional mechanism, possibly tasked with a review of awards and decisions made by: - Arbitral tribunals - International investment court - Regional investment court - International commercial courts - Domestic courts in case of denial of justice	Setting up of a stand-alone appellate body, which would require preparing status to determine its functioning, and an instrument for disputes arising under existing investment treaties	The relationship between an appellate body and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) would deserve careful consideration The impact on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) should also be addressed The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Limits of the current mechanisms to address inconsistency and incorrectness of decisions	**A.9. International investment court**	Setting-up of a multilateral investment court, which would require preparing status to determine its functioning, and an instrument for disputes arising under existing investment treaties - Can also facilitate Control of correctness of decisions - Can also address Arbitrators and decision-makers appointment (see also **B.**) Ethical requirements (see also **B.**)	The co-existence or articulation with the existing ISDS regime as well as with regional investment courts would need to be considered The option may make a number of other options for reform redundant
Other issues			
B. Arbitrators/Decision-makers			
Lack of clarity regarding standards on independence and impartiality, issue conflicts	**B.1. Development of a code of conduct and other ethical requirements** for - Arbitrators and decision makers, and - Possibly other persons involved in ISDS (for instance, counsels, experts) It would include determining appropriate sanctions in case of non-compliance	Development of a new legal standard, possibly together with an enforcement mechanism aimed at supplementing and harmonizing the existing legal framework, together with soft law guidance on its use	The option strengthens and harmonizes the ethical framework, including the existing soft law framework It could be referred to in investment treaties, and implemented by arbitral institutions, or any newly set up body The option can accompany any other option for reform
Limitations of challenge mechanisms	**B.2. Development of rules and procedures to strengthen existing challenge mechanisms**	Development of a new legal standard, aimed at supplementing and harmonizing the existing legal framework, together with soft law guidance on its use	Strengthen and harmonize the existing legal framework regarding challenge procedures The impact on arbitral institutions' practice and their arbitration rules should be considered The impact on domestic legislation (including the Model Law on International Commercial Arbitration) would also need to be assessed The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Limitations of challenge mechanism	**B.3. Control system for challenges** through arbitration institutions and/or independent body (e.g. international court (first instance), appellate body (first or second instance), other)	Development of a new legal standard aimed at supplementing and harmonizing the existing legal framework	The option strengthens and harmonizes the existing legal framework regarding challenge procedures The impact on arbitral institutions' practice and their arbitration rules should be considered The impact on domestic legislation (including the Model Law on International Commercial Arbitration) would also need to be assessed The option can accompany any other option for reform
Constitution of tribunals (limitations of party appointment mechanisms), impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators, limited number of individuals repeatedly appointed as arbitrators, lack of diversity	**B.4. Appointments through alternative methods**, such as: - Increased use of appointing authorities with more transparent processes - Use of pre-established list of arbitrators/Decision-makers - Mechanisms used in other international courts and bodies, such as WTO DSU (including appellate body)	Setting up of a new system (mechanism or body)	The reform option may have a direct impact on party appointment mechanisms The impact on arbitral institutions' practice and their arbitration rules should be considered The option can accompany any other option for reform
Limited number of individuals repeatedly appointed as arbitrators, lack of diversity, Competence and qualifications of arbitrators	**B.5. Training, rosters and certifications**	- Enhancing cooperation and coordination among existing regional and international programmes - Development of dedicated programmes to: - Train - Renew - Certify arbitrators and decision-makers	The impact on arbitral institutions' practice and their arbitration rules should be considered Cooperation among organizations should also be considered See also reform option **C.4.** in particular the role of advisory centres regarding arbitrators training, certification and selection.
Limited number of individuals repeatedly appointed as arbitrators, lack of diversity, Competence and qualifications of arbitrators	**B.6. Pledge for diversity**	Soft law and principles to enhance diversity	
Other issues			

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
C. Cost and duration			
Lengthy and costly ISDS proceedings	**C.1. Dispute prevention**	Development of relevant good practices and institutional information to prevent disputes Can also address excessive financial burden on the parties – limited resources for respondent States and SMEs	The option strengthens and improves good governance and other regulatory practices of States The options should accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.2. Promotion of dispute settlement** mechanisms other than arbitration (for instance, mediation and ombudsman facilities)	Promotes early settlement of disputes particularly during the cooling-off period Development of relevant rules and establishment of relevant facilities	The option strengthens the existing ISDS mechanisms, currently under used The options should accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.3. Expedited procedures:** - for smaller claims and non-complex cases	Development of relevant rules and practice	The option strengthens the existing mechanisms The options can accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.4. Advisory centres**	Resources for the establishment of relevant facilities to provide support particularly to developing States and SMEs	No impact on the existing ISDS regime The options can accompany any other option for reform
Lengthy and costly ISDS proceedings	**C.5. Third-party funding**	Need for harmonized rules or regulation of third-party funding	Impact on the overall ISDS procedure including transparency requirement, security for costs and allocation of costs
Lengthy and costly ISDS proceedings	**C.6. Replacement of ad hoc arbitrators by full-time judges** (see also option for reform **A.9.** and **B.4.**)	Setting up of a permanent mechanism or body	The reform option may have a direct impact appointment mechanism and would require the introduction of a different remuneration mechanism for decision makers The option can accompany any other option for reform

Concerns identified by the Working Group	*Possible reform options for discussion*	*Main implications*	*Impact on the existing ISDS regime*
Lengthy and costly ISDS proceedings	**C.7. Streamlined procedure and tools to manage costs** - Streamlining the procedure including the introduction and implementation of stricter time line - Requiring parties and the tribunal to establish a budget at the outset of a case - Adopting a ceiling for overall costs; and - Requiring tribunals to provide parties with enhanced, real-time information about the status of a case, including budget	Introduction of stricter timelines and compliance mechanisms More effective management of costs through information-sharing Improved case management by the tribunals	See proposed ICSID Amendments The option can accompany any other option for reform
Lack of a mechanism to address frivolous or unmeritorious claims	**C.8. Availability of an effective early or expeditious dismissal mechanism**	See option for reform **A.2.**	See option for reform **A.2.**
Allocation of cost by ISDS tribunals; difficulties for States in cost recovery and need for rules on security for costs	**C.9. Principles/guidelines on allocation of cost and security for costs**	Development of principles and rules that provide guidance to tribunals in allocating costs and ordering security for costs	
Others	**C.10.** Streamline procedure for post-award actions such as interpretation, revision and annulment Allowing counterclaims by respondent States		
D. Other issues to be considered by the working Group	**Other possible solutions**		