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Possible reform of investor-State dispute settlement (ISDS)

Note by the Secretariat

Contents

V.19-08195 (E)

I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.[1] The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1 and its Addendum, A/CN.9/935, A/CN.9/964 and A/CN.9/970, respectively. At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

2. At its thirty-seventh session, the Working Group agreed that it would discuss, elaborate and develop multiple potential reform solutions simultaneously (A/CN.9/970, para. 81). In that light, the Secretariat was requested to update the tabular presentation of reform options in annex 1 to document A/CN.9/WG.III/WP.149, taking into account proposals received so far as well as those to be provided to the Secretariat.

3. Accordingly, this note and its addendum aim at presenting the decisions reached by the Working Group regarding desirability of reform, as well as the proposals for reform received from Governments.[2] The tabular presentation in annex 1 to document A/CN.9/WG.III/WP.149 focused on concerns identified by the Working Group, and listed possible reform options, outlining interactions between them. As the Working Group has now reached the third phase of its mandate, this note and the tabular presentation in the addendum focus on reform options. However, this note and the tabular presentation are based solely on reform proposals received so far and may not be exhaustive. The Working Group may wish to consider any further options that could be developed.

II. Reform options

A. Decisions by the Working Group

4. At its thirty-sixth and thirty-seventh sessions, after having completed its consideration of identified concerns regarding ISDS, the Working Group decided that reform was desirable to address such identified concerns. Paragraphs 5 to 8 below reproduce decisions made by the Working Group in that respect. These decisions constitute the basis for the implementation of phase three of the mandate of the Working Group, i.e., the development of relevant solutions to be recommended to the Commission.

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[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264. (The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s)).

[2] This note contains reference to submissions received from Governments up to the date of this note. Any additional submissions will be reflected in further updates, if needed.

5. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address the concerns related to the following:

Lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

(i) Unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals (A/CN.9/964, para. 40);

(ii) Lack of a framework for multiple proceedings that are brought pursuant to investment treaties, laws, instruments and agreements that provide access to international dispute settlement mechanisms (A/CN.9/964, paras. 52 and 53);

(iii) Absence of, or limited mechanisms in many existing treaties to address inconsistency and incorrectness of decisions (A/CN.9/964, paras. 62 and 63);

Arbitrators and decision makers

(iv) Lack or apparent lack of independence and impartiality of arbitrators and decision makers in ISDS (A/CN.9/964, paras. 82 and 83);

(v) Adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules (A/CN.9/964, paras. 89 and 90);

(vi) Lack of appropriate diversity among arbitrators and decision makers in ISDS (A/CN.9/964, paras. 97 and 98);

(vii) Mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules (A/CN.9/964, paras. 107 and 108);

Cost and duration of ISDS proceedings

(viii) Cost and duration of ISDS proceedings (A/CN.9/964, paras. 122 and 123);

(ix) Allocation of costs by arbitral tribunals in ISDS (A/CN.9/964, para. 127);

(x) Security for cost (A/CN.9/964, paras. 132 and 133);

Third-party funding

(xi) Definition of third-party funding in ISDS (A/CN.9/970, paras. 17 and 25); and

(xii) Use or regulation of third-party funding (A/CN.9/970, paras. 17 and 25).

6. The Working Group also engaged in a discussion to identify possible additional concerns not already addressed in its deliberations and, in that context, the following matters were considered: (i) Means other than arbitration to resolve investment disputes as well as dispute prevention methods; (ii) Exhaustion of local remedies; (iii) Third-party participation; (iv) Counterclaims; (v) Regulatory chill; and (vi) Calculation of damages (A/CN.9/970, paras. 29–38). It was noted that it would be important to take into account those matters as the Working Group developed tools to address identified concerns.

7. It was mentioned that there might be existing concerns about substantive standards in investment agreements, which were also of significant importance. It was, however, reiterated that the mandate of the Working Group was to work on the possible reform of ISDS rather than reform of substantive standards in international investment agreements and that the focus of its work should be on the procedural aspects of ISDS, though taking due note of the interaction with underlying substantive standards (A/CN.9/970, para. 27). It was further noted that any work by the Working Group would need to take into account developments in investment agreements including with regards to the substantive standards therein and that solutions to be

developed by the Working Group should be flexible enough to adapt to these developments (A/CN.9/970, paras. 39 and 40).

8. After discussion, the Working Group agreed that no additional concern could be identified with regard to ISDS at the current stage of its deliberations because the additional topics discussed related to concerns that had already been identified, to tools to be considered by the Working Group in phase three of its mandate, or to guiding principles for developing reforms. It was reiterated that this conclusion did not preclude other concerns to be identified and dealt with at a later stage of the deliberations (A/CN.9/970, paras. 39 and 40).

B. Reform proposals

1. Reform proposals received by the Secretariat

9. The Working Group may wish to note the following list of submissions received as of the date of this note from States regarding proposals for reform:

- A/CN.9/WG.III/WP.156 – Submission from the Government of Indonesia (9 November 2018)
- A/CN.9/WG.III/WP.159 and Add.1 – Submission from the European Union and its Member States (24 January 2019)
- A/CN.9/WG.III/WP.161 – Submission from the Government of Morocco (4 March 2019)
- A/CN.9/WG.III/WP.162 – Submission from the Government of Thailand (8 March 2019)
- A/CN.9/WG.III/WP.163 – Submission from the Governments of Chile, Israel and Japan (15 March 2019)
- A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178 – Submissions from the Government of Costa Rica (22 March and 30 July 2019)
- A/CN.9/WG.III/WP.171 – Submission from the Government of Brazil (11 June 2019)
- A/CN.9/WG.III/WP.173 – Submission from the Government of Colombia (14 June 2019)
- A/CN.9/WG.III/WP.174 – Submission from the Government of Turkey (11 July 2019)
- A/CN.9/WG.III/WP.175 – Submission from the Government of Ecuador (17 July 2019)
- A/CN.9/WG.III/WP.176 – Submission from the Government of South Africa (17 July 2019)
- A/CN.9/WG.III/WP.177 – Submission from the Government of China (18 July 2019)
- A/CN.9/WG.III/WP.179 – Submission from the Government of the Republic of Korea (31 July 2019)
- A/CN.9/WG.III/WP.180 – Submission from the Government of Bahrain (29 August 2019)

10. The Working Group may wish to note that the documents listed in paragraph 9 above (“referred to below as “Submission(s)”) contain various proposals for reform, on which the presentation below of possible reform options and their implementation

as well as the tabular presentation in the addendum to this note are based.[3] This note and its addendum focus on reform options designed to address procedural matters. In addition to these reform options, the Working Group may wish to consider the suggestion to move away from ISDS altogether.[4]

2. Guiding principles

11. In considering the reform options below, the Working Group may wish to take into account the policy objectives of the ISDS regime and of possible reform in light of the 2030 Agenda for the Sustainable Development Goals (SDGs).[5] A view expressed in a Submission[6] is that promoting and attracting investment should be a step towards realizing the broader objectives of SGDs. These objectives include reducing poverty and hunger, empowerment of indigenous peoples, promoting decent work, access to affordable energy and water, and reversing environmental degradation and climate change. The Working Group may also wish to note the consideration expressed by States that (i) investment policies should provide legal certainty, as well as effective and equal 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, and decisions-makers should reflect the geographical, cultural and gender diversity.[7]

3. Presentation of possible reform options

(a) Tribunals, ad hoc and standing multilateral mechanisms

12. The Working Group may wish to note that the reform option regarding the establishment of a multilateral advisory centre (see reform option under (i) below) is addressed in document A/CN.9/WG.III/WP.168, as requested by the Working Group at its thirty-seventh session (A/CN.9/970, para. 84). The Working Group may wish to consider whether to task the Secretariat with further research on the reform options referred to in (ii) and (iii) below.

(i) Multilateral advisory centre

13. The Working Group heard preliminary proposals for the establishment of an advisory centre (A/CN.9/964, para. 119). The proposals are also addressed in Submissions.[8]

14. It is suggested in a Submission to establish an advisory centre following the model of the Advisory Centre on WTO Law (ACWL). Under that proposal, the advisory centre would be tasked to provide legal advice on investment law before a dispute arises and act as counsel when there is a dispute. The centre could also

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[3] The Working Group may wish to note that submissions from international organizations can be found on the website of UNCITRAL at: https://uncitral.un.org/en/library/online_resources/investor-state_dispute.

[4] A/CN.9/WG.III/WP.171, Submission from the Government of Brazil (State-to-State mechanisms, see also paras. 33–36); A/CN.9/WG.III/WP.176, Submission from the Government of South Africa (raising the question whether ISDS mechanisms are desirable or necessary in the first place).

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

[6] A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[7] 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.

[8] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea.

help States in capacity-building and the sharing of best practices.[9] In yet another Submission, it is suggested that it would be highly desirable to establish a mechanism for supporting and assisting developing and least developed countries in dealing with ISDS cases so as to enable them to better prepare for, handle and manage disputes relating to international investment.[10] It is further suggested in another submission that an advisory centre could be tasked with providing low cost legal advice and advocacy support particularly for developing and least developed countries and small and medium-sized enterprises.[11]

15. The Working Group may wish to note that document A/CN.9/WG.III/WP.168 outlines questions that would need to be considered, such as the possible form of an advisory centre (for instance, as a stand-alone body, as part of an institution, as an intergovernmental or non-governmental organization, or as a trust fund, established with a seat in one location or on a regional basis), its possible functions and services (including assistance in organizing the defence, support during dispute settlement proceedings, advisory services, alternative dispute resolution (ADR) services, as well as capacity-building and sharing of best practices), as well as the beneficiaries (which could consist of all or some States and/or small and medium-sized enterprises).

16. The Working Group may wish to consider that this reform option could be implemented as a stand-alone reform or in conjunction with any other reform options.[12]

(ii) Stand-alone review or appellate mechanism

17. The Working Group heard preliminary proposals regarding the reform option that would consist in setting-up a review or appellate mechanism (A/CN.9/935, para. 43). The proposals are also addressed in Submissions.[13]

18. In a Submission, it is indicated that most rules used in investment arbitration do not provide for a quality control procedure whereby an award can be reviewed before it becomes final. It is therefore suggested to establish a procedure for the prior scrutiny of arbitral awards, similar to the procedure used by the International Court of Arbitration of the International Chamber of Commerce (ICC). It is indicated in the Submission that such a procedure would allow the parties to a dispute to submit written comments to the arbitral tribunal on all aspects of the award before it becomes final. A further suggestion is that the prior scrutiny of arbitral awards could be carried out by an independent body under one of the existing arbitration organizations.[14] It may be noted that review mechanisms usually do not imply review of the merits of the case.

19. In the Submissions, it is also proposed to consider the creation of a stand-alone appellate mechanism.[15] In a submission, it is indicated that such mechanism would be regarded as a higher judicial authority tasked with ensuring consistency in the interpretation of the provisions of bilateral investment treaties and rectifying errors

[9] A/CN.9/WG.III/WP.162, Submission from the Government of Thailand.
[10] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco.
[11] A/CN.9/WG.III/WP.174, Submission from the Government of Turkey.
[12] For example, there could be an interaction with the question of third-party funding reform option (see A/CN.9/WG.III/WP.168 and A/CN.9/WG.III/WP.172).
[13] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States (Appellate body); A/CN.9/WG.III/WP.161, Submission from the Government of Morocco (Prior scrutiny of the award and standing appellate mechanism); A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan (Treaty-specific appellate review mechanism); A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador (Standing review and appellate mechanisms); A/CN.9/WG.III/WP.177, Submission from the Government of China (Stand-alone appellate mechanism).
[14] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco.
[15] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.177, Submission from the Government of China.

in awards that could have a significant impact on public funds.[16] This reform option is also referred to in a Submission as a means to enhance the legitimacy of ISDS.[17]

20. A review or appellate mechanism may be set-up to be effective in conjunction with different reform frameworks. For instance, an appellate mechanism could be tasked to review awards and decisions made by arbitral tribunals, a standing investment court (see below, paras. 21–23), regional investment courts, international commercial courts, and domestic courts in case of denial of justice. It may be noted that the question of enforcement of decisions made under the review or appellate mechanisms would need to be considered.

(iii) Standing first instance and appeal investment court, with full-time judges

21. The Working Group heard preliminary proposals regarding the reform option that would consist in setting-up an investment court (A/CN.9/935, para. 43). The proposal to establish a standing first instance and appeal investment court is also made in a Submission.[18] It is based on the view that the different concerns identified by the Working Group are intertwined and are systemic, and that addressing specific concerns in a piecemeal approach would leave some concerns unaddressed.[19]

22. According to the Submission, a standing mechanism with full-time adjudicators should have two levels of adjudication. A first instance tribunal would hear disputes. It would conduct, as currently done by arbitral tribunals, fact finding and then apply the relevant law to the facts. It would also deal with cases remanded to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure. An appellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal could be error of law (including serious procedural shortcomings) or manifest error in the appreciation of the facts. It should not undertake a *de novo* review of the facts. Mechanisms for ensuring that the possibility to appeal is not abused should be included such as requiring security for cost. The features of the proposal and questions to be considered as part of this proposal are detailed in the Submission.[20]

23. This reform option would cover a number of other suggestions for reform and might make them redundant. It could also be combined with other options, for example, the appellate mechanism referred to in paragraphs 17–20 above.

(b) Arbitrators and adjudicators appointment methods and ethics

24. The Working Group may wish to note that the reform option on ISDS tribunal members' selection and appointment (see reform option under (i) below) is addressed in document A/CN.9/WG.III/WP.169, and that the reform option on a code of conduct (see reform option under (ii) below) is addressed in document A/CN.9/WG.III/WP.167, as requested by the Working Group at its thirty-seventh session (A/CN.9/970, para. 84).

(i) ISDS tribunal members' selection, appointment and challenge

25. The Working Group considered the methods of selecting and appointing ISDS tribunal members at its thirty-sixth session (see A/CN.9/964, paras. 84–90 and 101–108). This question is also addressed in Submissions.[21]

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[16] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco.
[17] A/CN.9/WG.III/WP.177, Submission from the Government of China.
[18] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States.
[19] Ibid.
[20] Ibid.
[21] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador; A/CN.9/WG.III/WP.177,

26. The reform options that can be found in the Submissions include a variety of approaches,[22] including the regulation of the current party-appointment mechanism, the establishment of a roster, the involvement of institutions (appointing authorities) and/or the creation of a standing first instance and appeal investment court. A further mechanism that may also have an impact on the method for selecting and appointing adjudicators is an appellate mechanism (see above, paras. 17–20). These options are outlined in document A/CN.9/WG.III/WP.169. The reform options on the selection, appointment and challenge of ISDS tribunal members might need to be considered in light of the framework within which they would be developed.

(ii) Code of conduct

27. The Working Group heard preliminary proposals for the preparation of a code of conduct as a means to address issues regarding members of ISDS tribunals' independence and impartiality and to more generally address ethical standards required from adjudicators (A/CN.9/964, paras. 74–79). The reform option is also mentioned in Submissions.[23] The Working Group may wish to note that document A/CN.9/WG.III/WP.167 outlines the possible content of a code of conduct (referring to independence and impartiality, integrity, diligence and efficiency, confidentiality, competence, general disclosure obligations, other possible requirements), the consequences of failure to meet the obligations of the code of conduct, and the means of implementation of the reform.

(c) Treaty Parties' involvement and control mechanisms on treaty interpretation

28. The Working Group may wish to consider whether to task the Secretariat with further research on the reform options referred to below.

(i) Enhancing treaty Parties' control over their instruments

29. At its thirty-sixth session, the Working Group heard examples of how States were currently addressing the concerns of unjustifiably inconsistent treaty interpretation in their investment treaties, such as by including in their treaties provisions on joint, unilateral or multilateral interpretative declarations, providing more guidance to arbitral tribunals on the meaning of certain terms and standards or adopting binding interpretations of the underlying investment treaty obligations, and

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Submission from the Government of China; A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain.

[22] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States (the proposal is for full-time judges as part of a standing first instance and appeal investment court); A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica (in these three Submissions, the proposal is for a reform to the arbitrators' selection and appointment mechanism, as well as mechanism for challenge); A/CN.9/WG.III/WP.174, Submission from the Government of Turkey (the proposal is to develop a comprehensive illustrative list of arbitrators and a database indicating the workload and timeframe of those arbitrators for use by both claimants and respondents as well as to address challenge of arbitrators); A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador (the proposal outlines the need for substantive standards on challenge of arbitrators, and clear guidelines on conflict of interest); A/CN.9/WG.III/WP.177, Submission from the Government of China (the proposal underlines the importance of the parties' appointment mechanism, and the need to improve regulations on qualifications and conflict of interest).

[23] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States (for full-time judges); A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.177, Submission from the Government of China; A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain.

establishing joint committees on treaty interpretation (A/CN.9/964, para. 38; see also A/CN.9/935, para. 43). Similar suggestions are also found in Submissions.[24]

30. A possible reform option would consist in ensuring that the treaty interpretation tools referred to in paragraph 29 above are maintained and indeed expanded to cover investment treaties that do not explicitly provide for them. Such reform option would aim at encouraging a more systematic use of unilateral interpretations, joint interpretations, and multilateral interpretations, as well as ensuring abidance thereof by arbitrators and decision-makers.

31. This could be implemented through various means, for example, by setting up mechanism(s) for treaty interpretation in a multilateral framework, authoritative interpretation by treaty institutions, the release of travaux préparatoires, renvoi of interpretative questions, and the development of a legal standard for inclusion in investment treaties.

32. This reform option could be implemented as a stand-alone reform or in conjunction with any other reform options, such as reforms aiming at strengthening the involvement of State authorities (see below, paras. 33–36), or at establishing review or appellate mechanisms (see above, paras. 17–20).

(ii) Strengthening the involvement of State authorities

33. The Working Group heard preliminary proposals regarding the strengthening of the involvement of State authorities, with the aim to address the concerns of unjustifiably inconsistent interpretations of investment treaty provisions, the absence of, or limited, mechanisms in many existing treaties to address inconsistency and incorrectness of decisions, as well as the cost and duration of ISDS proceedings, including frivolous claims and abuse of process (A/CN.9/935, para. 43). Similar proposals can also be found in Submissions.[25]

34. This reform option might consist in establishing or 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, a review or appellate mechanism or a State-State body to which application could be made if the claim cannot be settled at the technical level in a given time period.

35. The reform could be implemented through various means, such as the development of a legal standard for inclusion in investment treaties and/or the setting up of a multilateral framework, also applicable to existing treaties, such as an appellate mechanism or a body to allow for an appeal of joint State authorities' decisions.

36. It could be implemented as a stand-alone reform or in conjunction with any other reform options, such as reforms aiming at enhancing treaty Parties' control over their investment treaties (see above, paras. 29–32), or at establishing review or appellate mechanisms (see above, paras. 17–20).

[24] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[25] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.171, Submission from the Government of Brazil; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain.

(d) Dispute prevention and mitigation

37. The Working Group may wish to note that the questions of indirect claims, claims by shareholders and reflective loss are addressed in document A/CN.9/WG.III/WP.170, as requested by the Working Group at its thirty-seventh session (A/CN.9/970, para. 84). The Working Group will also have before it document A/CN.9/915 on multiple proceedings (see point (iv) below). The Working Group may wish to consider whether to task the Secretariat with further research on the other reform options below.

(i) Strengthening of dispute settlement mechanisms other than arbitration (ombudsman, mediation)

38. The Working Group heard preliminary proposals for strengthening alternative dispute settlement mechanisms, such as mediation and the institution of the ombudsman (A/CN.9/964, para. 118). Similar proposals are also addressed in Submissions.[26]

39. Alternative dispute settlement mechanisms are described in a Submission as a means to reduce duration and cost of proceedings and to prevent a dispute from escalating into a legal dispute.[27] It is further referred to in another Submission as a means to identify mutually acceptable solutions to the dispute.[28] In a Submission, it is suggested that particular value-added could be brought through the provision of institutional support, for example through maintaining a list of conciliators or mediators and above all providing support in efforts to bring about amicable settlements.[29] In yet another Submission, it is suggested to develop alternative dispute resolution rules that could also encompass a procedural framework for combining adjudicative and non-adjudicative processes, referred to as hybrid or mixed-mode dispute resolution.[30]

40. The Working Group may wish to note the efforts of UNCITRAL to strengthen the mediation framework, following the adoption of different instruments,[31] including the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation).[32] It may be noted that ICSID is also currently preparing mediation rules.[33]

41. In addition to the promotion of the existing mediation framework, reform options may include the development of relevant standard clauses for investment treaties, and the establishment of relevant facilities for mediation as part of existing or new mechanisms, if necessary.

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[26] A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia; A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.171, Submission from the Government of Brazil; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.177, Submission from the Government of China; A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea.

[27] A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia.

[28] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco.

[29] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States.

[30] A/CN.9/WG.III/WP.162, Submission from the Government of Thailand.

[31] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, the UNCITRAL mediation rules (under preparation) and the UNCITRAL mediation notes (under preparation).

[32] See information on the website of UNCITRAL, at https://uncitral.un.org/en/texts/mediation.

[33] See also ICSID Proposals for stand-alone ISDS Mediation Rules (ICSID Working Paper No. 2, pp. 765–839, and Working Paper No.1, p. 747), available at https://icsid.worldbank.org/en/amendments.

42. This reform option could be implemented as a stand-alone reform or in conjunction with any other reform options.

(ii) Exhaustion of local remedies

43. The Working Group heard preliminary proposals for requiring investors to exhaust local remedies before bringing their claims to ISDS (A/CN.9/970, para. 30; and A/CN.9/935, para. 43). The proposals are also addressed in Submissions.[34]

44. Under this proposal, the investor who has allegedly suffered a violation would need to first turn to domestic authorities with its claim, thus allowing them to decide the matter. It may be noted that certain investment treaties include a mandatory requirement to pursue or exhaust local remedies for the settlement of investment disputes. This provision is meant to empower domestic legal systems and avoid their by-passing.

45. The Working Group may wish to consider that this reform option could be implemented as a stand-alone reform, or in conjunction with any other reform options. For instance, it could take the form of model clauses for treaties.

(iii) Procedure to address frivolous claims, including summary dismissal

46. The Working Group heard preliminary proposals regarding reform options to address frivolous or unmeritorious claims as well as to include limitations, such as statute of limitations for bringing claims, or summary dismissal of claims (A/CN.9/964, para. 118). Such suggestions are also addressed in Submissions.[35]

47. In a Submission, it is suggested to develop a guideline, containing a check-and-balances mechanism for claims, as well as an established method for valuation of businesses in accordance with internationally recognized standards in financial reporting.[36] Another submission refers to the possibility of setting up a preliminary review mechanism for unfounded or frivolous claims. The establishment of such a mechanism would include the possibility for ISDS tribunals to order the claimant to pay all costs associated with such claims. Further, the Submission suggests the expedited processing of unfounded or frivolous claims and the consolidation of claims in order to reduce arbitration costs.[37]

48. This reform option could be implemented jointly with any other reform options. It could take the form of rules, guidelines, model clauses for treaties, or specific procedure within a new mechanism.

(iv) Multiple proceedings, reflective loss and counterclaims by respondent States

49. The Working Group may wish to note that the question of multiple proceedings, which it considered at its thirty-sixth session (A/CN.9/964, paras. 41–53) is also addressed in Submissions.[38] It is suggested in a Submission that, to avoid multiple

[34] A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[35] A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[36] A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia.

[37] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco.

[38] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

proceedings, soft law instruments may be introduced to deter claimants from filing the same claim at different arbitral, judicial or administrative institutions. [39]

50. Suggestions have been made in Submissions aiming to enable a host State to submit a counterclaim to the ISDS tribunal if an investor fails to comply with one or more of its obligations under the investment treaty.[40] This matter has also been considered by the Working Group at its thirty-fourth session (A/CN.9/930/Add.1/Rev.1, paras. 3–7).[41]

(e) Cost management and related procedures

51. The Working Group may wish to consider whether to task the Secretariat with further research on the reform options referred to below.

(i) Expedited procedures

52. The Working Group heard preliminary proposals regarding the establishment of expedited procedures in order to reduce the duration and costs of ISDS and deal more efficiently with certain categories of claims (A/CN.9/964, paras. 116 and 118). The proposals are also addressed in Submissions.[42]

53. The reform option may consist in strengthening the application of relevant rules, procedures and practices for smaller claims and non-complex cases, as well as the development of rules to streamline the procedures and expedite certain of its aspects.

54. It may be noted that both ICSID (current reform process) and UNCITRAL (current work on expedited arbitration by Working Group II) are working on the development of expedited procedures.

55. This reform option could be implemented as a stand-alone reform or in conjunction with any other reform options. It could take the form, for instance, of specific rules to complement the current ISDS framework or of special procedures within a new mechanism.

(ii) Principles/guidelines on allocation of cost and security for cost

56. The Working Group may wish to consider mechanisms that would contribute to streamlining the ISDS procedure, including the preparation of principles or guidelines on allocation of cost and security for cost, as indicated in its previous deliberations. The matter is also addressed in Submissions.[43]

57. Regarding allocation of costs, the Working Group had noted that guidance to tribunals on allocating cost would be useful on, for instance, when to depart from the default rule, and how to take into account party behaviour and third-party funding (A/CN.9/964, paras. 124–127). It is suggested in a Submission to establish a

[39] A/CN.9/WG.III/WP.174, Submission by the Government of Turkey. It may also be noted that as part of the current reform process at ICSID, two specific mechanisms are being considered: consolidation and coordination (see ICSID Working Paper No. 2, pp. 207–210; see also Working Paper No. 2, schedule 7 on consolidation and concurrent proceedings and proposal at pp. 832–854, available at https://icsid.worldbank.org/en/amendments).

[40] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[41] The Working Group may wish to note that ICSID and UNCITRAL rules foresee the possibility of counterclaim (see ICSID Convention, art. 46 and Rules of Procedure for Arbitration, art. 40; see also ICSID Working Paper No.2, pp. 216 and Working Paper No.1, pp. 236, for updated proposals on these; see UNCITRAL Arbitration Rules, arts. 4(e), 21, 22, 23 and 30).

[42] A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission by the Government of Turkey.

[43] A/CN.9/WG.III/WP.161, Submission by the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

cost-sharing mechanism between the parties to the dispute so as to include the loser-pays rule, according to which the losing party must bear all the costs.[44]

58. Regarding security for cost, the Working Group had noted that ISDS tribunals seldom ordered security for cost and had done so in very exceptional circumstances, despite the fact that certain arbitration rules provided for that possibility. It was also suggested during those deliberations that the availability of security for cost might assist in the early dismissal of frivolous claims (A/CN.9/964, paras. 128–133; see also A/CN.9/935, para. 92). It is suggested in a Submission that the security for cost should be proportionate and reasonable, taking into account a number of factors, such as the amount of the claim. It is further suggested that requirements for security for cost could dissuade claimants from initiating meritless, abusive and frivolous claims, and should be a mandatory requirement in cases funded by third parties.[45]

(iii) Other streamlined procedures and tools to manage costs

59. The Working Group may wish to consider other mechanisms that would contribute to streamline the ISDS procedure. The matter is also addressed in Submissions.[46]

60. In a Submission, it is suggested that the tribunal could be required to consult with the parties in order to establish a fixed/acceptable budget for the proceedings. In addition, parties could decide to cap the fees of ISDS tribunal members at the outset before the appointment. It is further suggested to explore options as to whether counsel's fees could be regulated in some way.[47] In yet another submission, it is suggested that streamlined processes and procedures, prescribed timeframes, and a transparent fee structure would enable efficient and effective case management, thereby reducing costs.[48]

(f) Third-party funding

61. The Working Group may wish to note that the reform options on third-party funding are outlined in a note by the secretariat referenced A/CN.9/WG.III/WP.172, as requested by the Working Group at its thirty-seventh session (A/CN.9/970, para. 84).

62. At its thirty-seventh session, the Working Group heard preliminary suggestions that the topic of third-party funding should be part of the reform efforts (A/CN.9/970, paras. 17–25). Suggestions for a reform of third-party funding can also be found in Submissions.[49] It may be noted that the question of third-party funding is also currently under consideration by ICSID, as part of its reform process.[50]

63. In a Submission, it is suggested that contracts between the claimant and the funder should be open to the review by counsels and arbitrators, and the amount of

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[44] A/CN.9/WG.III/WP.161, Submission by the Government of Morocco.

[45] A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[46] A/CN.9/WG.III/WP.161, Submission by the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[47] A/CN.9/WG.III/WP. 162, Submission by the Government of Thailand.

[48] A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[49] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163; Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission by the Government of Turkey; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.177, Submission from the Government of China; A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea.

[50] See new proposal at ICSID Working Paper No. 2, pp. 118–123 and at Working Paper No. 1, pp. 129–138, available at https://icsid.worldbank.org/en/amendments.

the return that would be taken by the funder should be limited to a reasonable portion of compensation.[51] In another Submission, it is suggested that third-party funding should be banned. If not banned, then, to avoid conflicts of interest, the existence and identity of third-party funders as well as the funding agreement should be disclosed, and there must be sanctions in case of violation of disclosure obligations. There must be security for cost where there is third-party funding involved.[52] It is also suggested in a Submission that rules and procedures should be established to regulate such funding so that it cannot be used in a speculative or abusive manner by investors.[53] The need for more transparency on third-party funding is underlined in a Submission.[54]

4. Implementation of reform options

64. The Working Group may wish to recall its decision that it would discuss, elaborate and develop multiple potential reform solutions simultaneously (A/CN.9/970, para. 81). As highlighted in Submissions,[55] the Working Group may therefore wish to consider whether to implement various reform options simultaneously, through an opt-in convention that could be modelled after the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The purpose of such an opt-in convention would be to ensure application of the reforms to the existing investment treaties. Such a mechanism may be needed in addition to other specific instruments to be developed in respect to reform options.[56] The Working Group may wish to note that indeed, most, if not all, of the proposals for reform may require the development of specific instruments or mechanisms, that could then be implemented through this model.

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[51] A/CN.9/WG.III/WP.174, Submission by the Government of Turkey;

[52] A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

[53] A/CN.9/WG.III/WP.161, Submission from the Government of Morocco.

[54] A/CN.9/WG.III/WP.162, Submission from the Government of Thailand;

[55] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.173, Submission from the Government of Colombia; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador.

[56] The proposal for an opt-in convention has also been analysed in the CIDS research paper on whether the Mauritius Convention can serve as a model for further reforms. See Gabrielle Kaufmann-Kohler, Michele Potestà, “Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap”, 3 June 2016, Section VII, pp. 75–93, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf.