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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, first part (New York, 17–19 February 2025)

Contents

I. Introduction

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

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

3. At its forty-ninth session in September 2024, the Working Group considered articles 7 to 10 of the draft statute of a standing mechanism for the resolution of international investment disputes (A/CN.9/WG.III/WP.239), the categorization of the draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.244) as well as draft provisions 10, 12, 13 and 20 therein, and articles 1 to 4 of the draft multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.246).[6]

4. At its fiftieth session in January 2025, the Working Group continued its consideration of draft provisions 1 to 4 on procedural and cross-cutting issues (A/CN.9/WG.III/WP.244) and articles 10 to 13 and 18 to 21 of the draft statute of a standing mechanism (A/CN.9/WG.III/WP.239).[7] The Working Group also considered the way forward on those reform elements as well as the overall workplan. Based on document A/CN.9/WG.III/WP.248, the Working Group also recommended to the Commission that it request the extension of the resources allocated to it by the General Assembly.[8]

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fiftieth session from 17 to 19 February 2025 (first part) and 7 to 11 April (second part) at the United Nations Headquarters in New York.

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

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

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

[4] Ibid., paras. 168–169. Comments received on the draft toolkit are available at https://uncitral.un.org/en/investmentmediationanddisputeprevention.

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

[6] The deliberations and decisions of the Working Group at its forty-ninth session are set out in document A/CN.9/1194.

[7] The deliberations and decisions of the Working Group at its fiftieth session are set out in document A/CN.9/1195.

[8] A/CN.9/1195, paras. 136–139.

6. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Honduras, Hungary, India, Italy, Iran (Islamic Republic of), Iraq, Japan, Kenya, Kuwait, Malaysia, Mexico, Morocco, Nigeria, Panama, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Somalia, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

7. The session was attended by observers from the following States: Bahrain, Burkina Faso, Cambodia, Egypt, El Salvador, Equatorial Guinea, Estonia, Guatemala, Lesotho, Namibia, Netherlands (Kingdom of the), Pakistan, Paraguay, Philippines, Rwanda, San Marino, Senegal, Sierra Leone, Sweden, United Republic of Tanzania and Zambia.

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

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

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

(b) *Intergovernmental organizations*: African Union (AU) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Académie Africaine de la Pratique du Droit International (AAPDI), African Arbitration Association (AFAA), American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR), ArbitralWomen, Centre for International Environmental Law (CIEL), China Society of Private International Law (CSPIL), Columbia Centre on Sustainable Investment (CCSI), Consumer Unity and Trust Society (CUTS International), Corporate Counsel International Arbitration Group (CCIAG), European Chinese Arbitrators Association (ECAA), Forum for International Conciliation and Arbitration (FICA), Institute for Transnational Arbitration (CAIL/ITA), International Chamber of Commerce (ICC), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), Max Plank Institute for Comparative Public Law and International Law (MPIL), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA) and United States Council for International Business (USCIB).

10. The Working Group elected the following officers:

Chair: Mr. Shane Spelliscy (Canada)

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

11. The Working Group had before it the annotated provisional agenda (A/CN.9/WG.III/WP.250) covering both parts of the fifty-first session.

12. For the first part of the session, the Working Group had before it the following documents: (i) draft multilateral instrument on ISDS reform (MIIR) (A/CN.9/WG.III/WP.246); and (ii) summary of the first meeting on the operationalization of the Advisory Centre on International Investment Dispute Resolution (the "Advisory Centre") submitted by the Government of Thailand (A/CN.9/WG.III/WP.251).

13. For the second part of the session, the Working Group had before it the following documents: (i) a draft statute of a standing mechanism for the resolution of international investment disputes and annotations thereto (A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.240); (ii) draft provisions on procedural and cross-cutting issues and annotations thereto (A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.245); (iii) additional provisions on procedural and cross-cutting issues and resources available to the Working Group (A/CN.9/WG.III/WP.248); (iv) a submission from the

Government of Switzerland (A/CN.9/WG.III/WP.241); and (vi) a summary of the intersessional meeting on ISDS reform submitted by the Government of China (A/CN.9/WG.III/WP.249).

14. In addition, the following informal documents were made available on the Working Group webpage:[9] (i) a corrigendum to the draft provisions on procedural and cross-cutting issues; (ii) an updated compilation of international investment agreement (IIA) provisions and arbitration rules related to procedural and cross-cutting issues; (iii) compilation of IIA provisions and arbitration rules on joint interpretation and submission by a non-disputing Treaty Party; (iv) comments received on the summary of the first meeting on the operationalization of the Advisory Centre, the MIIR, the draft provisions on procedural and cross-cutting issues and the draft statute of a standing mechanism; and (v) an updated versions of the draft provisions on procedural and cross-cutting issues and the draft statute of a standing mechanism reflecting the deliberations so far.

15. The Working Group adopted the following agenda:

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

16. As to the scheduling, it was agreed that the first part of the session be devoted to an exchange of views (without needing to take decisions) on the summary of the first meeting on the operationalization of the Advisory Centre (A/CN.9/WG.III/WP.251) and to the continued deliberation of the MIIR (A/CN.9/WG.III/WP.246).

17. It was further agreed that the second part of the session would be devoted to the consideration of articles 27 to 34 of the draft statute of a standing mechanism (A/CN.9/WG.III/WP.239) followed by discussions on draft provisions 13 to 19 on procedural and cross-cutting issues (A/CN.9/WG.III/WP.244) and draft provisions 21 and 22, time permitting (A/CN.9/WG.III/WP.248).

18. The Working Group expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, the Government of France, the Swiss Agency for Development and Cooperation and the Federal Ministry of Economic Cooperation and Development of Germany, aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group, securing interpretation in informal sessions, and ensuring that the process would remain inclusive and fully transparent.

III. Operationalization of the Advisory Centre on International Investment Dispute Resolution

19. It was recalled that during its fifty-seventh session in 2024, the Commission adopted in principle the Statute of the Advisory Centre on International Investment Dispute Resolution (the “Advisory Centre”). It was further recalled that the Commission had agreed that the operationalization of the Advisory Centre would require further preparatory work and to facilitate that work, it would utilize an informal process involving all States and regional economic integration organizations. It was also recalled that the Commission decided that: (i) an informal meeting would be held in Bangkok from 2 to 4 December 2024; (ii) the summary of

[9] Available at https://uncitral.un.org/en/working_groups/3/investor-state.

that meeting would be presented to the fifty-first session of the Working Group for discussion and exchange of views, without the Working Group needing to take any decisions on the summary; and (iii) the summary of the informal meeting in Bangkok and a summary of the discussions held during the Working Group session on the operationalization of the Advisory Centre would be presented to the Commission at its next session.[10]

20. In that context, the Working Group heard an oral report from Thailand on the first meeting on the operationalization of the Advisory Centre (AC-OP meeting) (A/CN.9/WG.III/WP.251). It was confirmed that no decisions were taken at that meeting.[11] The Working Group expressed its appreciation to Thailand for hosting the first AC-OP meeting and the secretariat for providing the necessary support. General satisfaction was expressed with regard to the summary and progress made.

Exchange of views on the summary

21. It was noted that there would be benefit in establishing the Advisory Centre within the United Nations system, possibly as a related organization.

22. With regard to the criteria to determine the location of the headquarters and regional offices, it was stated that the willingness of the host State to contribute financially and to provide infrastructure could be an important factor. The possibility of host States providing necessary expertise and tailored support was mentioned as an additional factor. It was suggested that affordability should be treated as a factor distinct from accessibility, as the former also related to the costs for operating the Advisory Centre.

23. The Governments of Armenia, Democratic Republic of the Congo, France, Paraguay and Thailand expressed their continued interest to host the headquarters or a regional centre. In relation to paragraph 22 of the summary, the Government of Armenia also expressed its willingness to provide voluntary contributions to cover the installation costs of the Advisory Centre.

24. On the classification of Members, it was clarified that priority to be given to Members and the contribution to be made by those Members to the Centre's budget could be delinked. However, a question was raised regarding how the budget could be allocated among the Members based on the United Nations scale of assessment, as not all member States of the United Nations were expected to become Members of the Advisory Centre.

25. It was noted that annexes I to III of the Statute need not be populated in advance but rather formulated as States became Members of the Advisory Centre. It was noted that the Secretariat was preparing, for further consideration, the classification of the Members in annex II into subcategories based on the classification by the United Nations Conference on Trade and Development (UNCTAD).

26. Regarding the budget and financing, the need to ensure the sustainable operation was highlighted. Support was expressed for preparing budget samples based on different staff configurations. However, doubts were expressed about a small secretariat as that could have a negative impact on the services, particularly relating to representation, which was said to be a core function of the Advisory Centre and be provided from the outset. The need for coordination with other international organizations to avoid overlaps in the provision of services was underlined. The importance of having a road map for the commencement of operations was underscored as this could facilitate budget planning by potential Members as well as host States.

27. Regarding institutional support, it was noted that an interim secretariat could not be tasked with the collection of membership dues. It was suggested that if the

[10] *Official Records of the General Assembly*., *Seventy-ninth Session, Supplement No. 17* (A/79/17), paras. 157, 159 161 and 163.

[11] Ibid., para. 159.

UNCITRAL secretariat were to take on the role of an interim secretariat, it should not have any impact whatsoever on carrying out its mandated functions.

Way forward

28. The Working Group was informed that preparations were underway to hold the second AC-OP meeting in Yerevan from 6 to 8 May 2025. It was also informed that the third meeting might take place in Paris, tentatively from 1 to 3 December 2025. The Government of Paraguay also expressed an interest to host an AC-OP meeting in the near future.

29. It was suggested that efforts could be made during the second AC-OP meeting to further the discussions on points that were examined during the first AC-OP meeting, so that the Commission would be in a position to take decisions on certain issues at its upcoming session. It was said that this could allow future AC-OP meetings to make progress based on those decisions, as a number of the operationalization issues were intertwined. In response, it was cautioned that particularly due to the interconnectivity of the issues, it would not be prudent for the Commission to take decisions at this stage, and that the issues should be better addressed in a holistic manner.

30. It was suggested that the summary of the second AC-OP meeting should first be presented to the Working Group, as this would ensure fairness, transparency and inclusivity. In response, it was said that the summary could be presented directly to the Commission, given that the operationalisation process was an informal one initiated and utilized by the Commission. It was said that this would be in the interest of time as, following the second AC-OP meeting, the Working Group was scheduled to meet only after the Commission in 2025. In light of the divergence in views, it was agreed that the summary of the second AC-OP meeting could be presented to the Commission at its upcoming session, where the Commission could further discuss whether the summaries of AC-OP meetings, would need to be presented to the Working Group every time for an exchange of views (without needing to take a decision) before the Commission takes any decision related to the possible outcomes of those meetings.

IV. Draft multilateral instrument on investor-State dispute settlement (ISDS) reform (A/CN.9/WG.III/WP.246)

31. It was recalled that at its forty-ninth session in September 2024, the Working Group considered articles 1 to 4 of the draft multilateral instrument on investor-State dispute settlement (ISDS) reform (referred to below as the "Convention") (see A/CN.9/1194, paras. 105–121).

Article 5 – Entry into force

32. At the outset, it was noted that the consideration of article 5 would be preliminary in nature, as the Working Group was in the process of developing the reform elements to be embodied in the Protocols, and the exact structure of the Convention was yet to be determined.

33. It was said that not all of the texts prepared by the Working Group could be subject to ratification or accession by States. In response, a preference was expressed for addressing the different reforms in a uniform manner through Protocols. It was said that further work was required, and was already underway by the Secretariat, to transform the texts prepared by the Working Group into instruments subject to ratification or accession by States.

34. Views diverged on whether paragraphs 2 and 4 should provide default rules for the entry into force of Protocols or whether this could be addressed in the respective Protocols.

35. As a matter of drafting, it was suggested that paragraphs 1 and 2 could be merged. It was also suggested that the latter part of paragraph 2 could read: "… instrument of ratification of, or accession to, that Protocol."

36. Views were expressed that the threshold for entry into force of the Convention should be low so as to facilitate the implementation, and that three instruments of ratifications or accessions was appropriate. This would also avoid a situation where a Protocol might not enter into force due to the Convention not having entered into force. It was also said that the threshold for the Protocols might vary, particularly those relating to institutional reforms, which might require a higher threshold.

37. It was suggested that the possible application of a Protocol among the parties to it prior to its entry into force or of the Convention (referred to as "provisional application") could be further clarified.

38. After discussion, the secretariat was requested to revise article 5 based on the above-mentioned observations.

Article 6 – Submission of a list of investment treaties (notification)

39. It was said that the procedure envisaged under article 6 to modify existing investment treaties through notifications, which deviated from articles 30 and 41 of the Vienna Convention on the Law of Treaties (VCLT), might lead to unnecessary complexity.

40. In response to a suggestion that the Convention require joint notification by the parties describing how their rights and obligations in the investment treaty would be modified, it was generally felt that this would run contrary to the aim of the Convention, which was to provide a simple mechanism for its Parties to modify existing treaties by indicating the reforms that they wished to apply. It was noted that under the Convention, while Parties would be able to submit notifications unilaterally, such a notification would only take effect and modify the listed investment treaty when the other party to the treaty submitted a corresponding notification (art. 7, para. 2). It was mentioned that requiring joint notifications could pose practical difficulties and be burdensome as it would, in essence, require a renegotiation of existing treaties with multiple counterparts. It was mentioned that this could significantly delay the desired reforms and efforts should be made to provide an effective framework to amend old generation treaties, which were urgently in need of reform. The Working Group agreed to proceed with its deliberation on the basis of document A/CN.9/WG.III/WP. 246, while leaving open the possibility of revisiting other options, including joint notifications at a later stage.

41. The Working Group considered a proposal to make a distinction among the Protocols based on the nature of the instrument and their application. It was suggested that instruments which were prepared as non-treaty texts could instead be categorized as "model provisions". It was suggested that a joint notification by the Parties identifying such model provisions would indicate the Parties' agreement that claims submitted under the listed investment treaty shall be conducted in accordance with those model provisions. However, concerns were raised that such an approach would add a layer of complexity, and that the nomenclature was misleading. The Working Group decided not to make such a distinction until the drafts of non-treaty texts were prepared, where the issue could be further considered.

Paragraph 1

42. Diverging views were expressed on whether the Convention should include a definition of "investment treaties".

43. On the one hand, it was said that there was no need to include a definition as the Convention foresaw a notification mechanism and the modification envisaged under the Convention occurred only when all parties to the investment treaty submitted notifications with respect to that treaty. It was said that providing a narrow definition might raise uncertainties over whether a treaty listed in the notifications fell within

that scope, including in a situation where a tribunal needed to determine whether the investment treaty had been modified as such.

44. On the other hand, support was expressed for including a definition. While reference was made to article 1, paragraph 2 of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, doubts were expressed over limiting the definition to treaties that provided a right for investors to resort to arbitration. It was suggested that reference could instead be made to treaties that provided for dispute settlement, which would broaden the range of treaties. It was mentioned that the definition should be broad enough to encompass treaties that might not necessarily fall under the category of "investment treaties", should inter se modification of such treaties be envisaged in that Protocol. It was also suggested that the definition could be provided in the respective Protocols.

45. After discussion, the secretariat was requested to formulate a definition and suggest its possible placement(s), which would be without prejudice to whether the definition would be included or not in the Convention. It was widely felt that the definition should exclude investment contracts and include only treaties or agreements between States.

46. It was agreed that paragraph 1 could read as follows: "Within [three] months after its deposit of instrument of ratification or accession to a Protocol pursuant to article 3, paragraphs 4 or 5, the Party shall submit to the secretariat a list of investment treaties to which the Protocol shall apply."

Paragraph 2

47. With regard to paragraph 2, it was generally felt that the Convention should not allow a Party to list future treaties. It was mentioned that for treaties negotiated after the adoption of the Convention, Parties could refer to the Protocols in those treaties to incorporate the reforms and there was no need to provide a mechanism for their modification within the Convention.

48. It was agreed that paragraph 2 could read as follows: "The notification shall relate only to the Protocol(s) that the Party has ratified or acceded to and list only investment treaties to which the Party has signed or is a party."

Paragraph 3

49. It was noted that paragraph 3 aimed to ensure legal certainty on how an investment treaty listed in a notification would be modified, as Parties to the Protocol could make clarifications in their notifications. However, doubts were expressed, particularly as this could lead to confusion arising from inconsistent notifications by Parties to the same investment treaty.

50. It was agreed that in lieu of paragraph 3, the Convention and/or the Protocols should aim to clarify how the investment treaty listed in the notifications were to be modified, particularly in instances where a Protocol introduced options or presented granular approaches to the reforms embodied therein. It was suggested that mechanisms could be introduced in the Convention to allow Parties to clarify the intended modification (for example, through joint interpretations or joint notifications). It was said that the criteria or parameters and the procedure could be outlined in the Convention.

51. It was suggested that similar to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention), the Convention could envisage Parties presenting a consolidated version of the modified investment treaty for reference purposes.

Paragraph 4

52. With regard to paragraph 4, it was agreed that notifications should take effect after a short period of time following the secretariat making the notification public,

rather than after the secretariat's receipt of the notification – in other words, that the first square-bracketed text would be deleted and the second one retained. It was agreed that the same rule should apply to any amendments to an existing notification. It was suggested that the meaning of the notification "taking effect" be clarified.

53. It was agreed that the secretariat should be required to make the notification public as soon as possible and within 30 days of the receipt of the notification. It was agreed that the secretariat could review the notifications for any errors during that period and alert the Party to correct such errors, prior to making the notification public.

Paragraph 5

54. It was agreed that paragraph 5 should indicate a time frame within which a Party would be encouraged to keep the notifications up to date, for example, by including phrases such as "as soon as possible" or "with minimum delay".

Paragraph 6

55. It was suggested that the latter part of the paragraph should be revised as follows: "… including the list of investment treaties in the notifications".

56. It was generally felt that there was need for administrative support to ensure the functioning of the Convention, which was to be performed by the "secretariat" under the Convention. Views differed on whether the secretariat should perform functions beyond publicizing the notifications and reviewing them for any errors (see para. 53 above). It was said that the secretariat could, for example, provide a consolidated list of the modified treaties. It was agreed to further consider the functions to be performed by the secretariat and whether they could be undertaken by existing bodies or institutions. In this regard, it was suggested that instead of having multiple secretariats established under the Convention and the Protocols, there could be merit in sharing some of the functions.

Article 7 – The effect of the notification and application of the Protocols

57. While suggestions were made to clarify how article 7 would operate in practice, there was general support for the approach taken therein. As with article 6, the Working Group agreed to proceed with its deliberation on the basis of document A/CN.9/WG.III/WP. 246, while leaving open the possibility of revisiting the approach taken in article 7 at a later stage.

Paragraphs 1 and 2

58. It was said that if parties to an investment treaty each submitted a notification with an intent to modify that treaty through the mechanism provided for in the Convention, this should generally constitute an "agreement" among those parties to modify the treaty accordingly. It was said that such an agreement would modify an investment treaty even where that treaty contained separate rules on its amendment. It was suggested that the investment treaty as modified would be construed as the latter treaty of the two successive treaties making the rules on amendment in the earlier treaty irrelevant to the modification. In that context, it was suggested that the phrase "deemed to have been modified" might not be accurate. It was also said that in the case of a multilateral investment treaty, corresponding notifications by some of the parties to that treaty would constitute an agreement to modify the treaty among them. It was agreed that paragraph 2 be clarified to reflect this.

59. It was said that greater clarity should be provided on how the agreement of the parties to modify the investment treaty would effectuate an amendment of the investment treaty, for example, by requiring a joint notification or other forms of notification. It was suggested that the scope or extent of modification needed to be clearly set forth, particularly as the way in which the Protocols modified existing investment treaties would differ. It was said that this clarity could be provided in the

Convention, by adapting paragraph 2 for each Protocol, or in the Protocols, by having each Protocol address how it would modify the treaties listed in the notifications.

60. It was further suggested that paragraph 2 should clarify the timing of when the intended modification would take effect, which was understood to be when the latter or subsequent notification by a Party to the investment treaty took effect in accordance with article 6(4).

Paragraph 3

61. It was noted that paragraph 3 aimed to give meaning to a notification by one of the Parties to an investment treaty, where the other party (or other parties, in the case of a multilateral treaty) did not submit a corresponding notification.

62. While paragraph 3 construed such a notification as an "offer" to modify the investment treaty, it was questioned whether the paragraph was necessary at all as it had no legal effect or consequence until the other party or parties submitted a corresponding notification. It was suggested that the word "proposal" might be used instead. It was noted that the "acceptance" of the "offer" should be done only through the mechanism envisaged in the Convention (in other words, a notification) to ensure consistency over how agreements reached between the Parties were captured.

63. Views diverged on whether the phrase "an offer to the other party or parties" could be understood to mean a unilateral and standing offer by that treaty party to apply a Protocol, which could be accepted by a claimant raising a claim under the same treaty (similar to article 2(2) of the Mauritius Convention). It was said that this could be foreseen for certain Protocols, particularly where the agreement of the other treaty party might not be relevant for the purposes of applying the Protocols. In this regard, the secretariat was requested to prepare language to that effect within the relevant Protocol.

Paragraph 4

64. There was general support for paragraph 4, which provided flexibility for a Protocol to define its scope of application and how it would modify investment treaties listed in the notifications (see para. 59 above).

Paragraph 5

65. Doubts were expressed about paragraph 5 as it raised a number of uncertainties also in conjunction with paragraph 2. It was questioned what it meant for Protocols to "complement" the provisions of the investment treaty. In the same vein, it was suggested that careful consideration should be given to the word "modify", which could be understood to mean that the Protocol supplemented, amended, replaced or annulled the provisions in the investment treaty, and this could differ depending on the Protocol. It was stated that if notifications were to be understood as an intention of the Party to apply a Protocol to a dispute under the investment treaty in addition to the provisions in that treaty, it could make sense to refer to "complementarity" of the Protocol and to include a conflict rule to address any instances of incompatibility. In light of those views, it was suggested that the rule in paragraph 5 could be redrafted and considered at a later stage.

66. In addition, it was suggested that if the Convention were to include provisions on substantive obligation of the Parties, paragraph 5 might need to be expanded to apply to conflicts that might arise between those provisions and provisions in the underlying investment treaty.

Paragraph 6

67. Suggestions were made to improve the drafting of paragraph 6, which aimed to limit the retroactive application of Protocols to proceedings that had already commenced. It was said that a Protocol should only apply to such proceedings when both Parties to the said treaty submitted a notification listing the treaty and when both

notifications took effect. In that context, it was said that the phrase "when the Protocol enters into force or take effect in respect of each Party concerned" could be misunderstood to mean when the "Protocol" entered into force in accordance with article 5 and not when the notifications took effect in accordance with paragraph 2. It was questioned how the paragraph would work, for example, if a Protocol establishing a standing mechanism entered into force but the institution itself was not operational. It was also questioned whether the paragraph could limit the Advisory Centre from providing services with regard to a proceeding which had commenced prior to the entry into force of the Statute.

68. In light of the above, it was generally felt that the temporal scope of application might be better addressed in the respective Protocols rather than in article 7.

Paragraph 7

69. While there were concerns about whether this provision should be included in the Convention or each Protocol, there was general support for paragraph 7, modelled after article 2(5) of the Mauritius Convention. It was said that the paragraph would limit claimants from invoking the most favoured nation (MFN) clause in the underlying investment treaty to benefit from or avoid modifications made through the Convention's mechanism. A question was raised whether "respondents" could also invoke the MFN clause as the paragraph referred to "disputing parties", and whether paragraph 7 might need adaptation should the Convention allow for unilateral offers by Parties to claimants (see para. 63 above).

70. It was stressed that paragraph 7 would prevent treaty shopping and ensure that the reforms envisaged under the Protocols were not circumvented by invoking the MFN clause. It was also said that the Protocols could have different rules allowing for the MFN clause to be invoked.

71. After discussion, it was agreed that paragraph 7 could read as follows: "Unless specified otherwise in the Protocol, disputing parties may not invoke the most favoured national provision in the applicable investment treaty to seek to …"

Reflecting revisions or updates to UNCITRAL instruments

72. It was noted that some of the reforms were embodied in instruments adopted by the Commission. In that regard, it was said that there might be a need to distinguish such UNCITRAL instruments from other Protocols that were formulated as treaties (see para. 41 above) or to transform such UNCITRAL instruments into treaty text, so as to be subject to ratification or accession by States (see para. 33 above). It was noted that in the latter case, the nature of the text would likely change, which might make it difficult to reflect any revisions or updates by the Commission.

73. After discussion, the secretariat was requested to prepare language for insertion in the Protocols, which could include a dynamic reference to UNCITRAL instruments, similar to articles 2(3) and 3(2) of the Mauritius Convention and that would make it possible to apply the most recent versions of those instruments.

Article 8 – Reservations

74. There was general support for the approach taken in article 8 that no reservations would be permitted with regard to the Convention, whereas reservations might be permitted under the Protocols. It was, however, noted that this approach might need to be revisited if the Convention were to include provisions on substantive obligations. It was noted that permitting reservations under the Protocols would provide further flexibility to Parties, which could lead to broader participation.

75. It was noted that the possibility for States to make declarations or statements when signing, ratifying or acceding to the Convention (mentioned in paragraph 52 of the A/CN.9/WG.III/WP.249) need not be highlighted, as this could have a negative impact on the harmonized application of the Convention.

76. After discussion, it was agreed that article 8(1) would reflect that no reservations were possible under the Convention or its Protocols, except if a Protocol allows reservations under such Protocol, and only to the extent permitted in that Protocol.

Article 9 – Depositary

77. There was general support for article 9.

Article 10 – Additional protocols and amendments

78. With regard to the structure of the article, it was suggested that amendments to the Convention and the incorporation of additional Protocols could be addressed separately. On the other hand, it was stated that as additional Protocols constituted, and would result in, an amendment to the Convention, they should be addressed in the same article.

79. It was clarified that article 10 envisaged a two-stage process: (i) a decision by the Parties whether to convene a conference of the Parties to consider amending the Convention or incorporating an additional Protocol, followed by (ii) a decision by the conference whether to adopt the amendment or the additional Protocol.

80. While views were expressed that rules on the conference of the Parties could be further developed in the Convention, there was general support for maintaining the current light structure. It was stated that the conference would only convene, when necessary, with the support from the secretariat of the Convention.

81. On the preparation of the amendments or additional Protocols, it was suggested that the process need not necessarily be limited to Parties to the Convention or the Protocol and could be delegated to other bodies or intergovernmental processes where broader participation could be ensured. Reference was made to UNCITRAL and the process that was used to negotiate the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction ("BBNJ Agreement"), which was open to all United Nations Member States.

82. Views diverged on how amendments or additional Protocols should be adopted. One view was that consensus of the Parties to the Convention should be required to ensure uniformity and to prevent complexities that could arise from their potential impact on existing notifications, unless a mechanism similar to Article 40(4) of the VCLT was introduced. Another view was that voting should be allowed when consensus could not be reached as provided for in paragraph 3. Yet another view was that different rules should apply to amendments to the Convention, amendments to the Protocols and the adoption of additional Protocols. It was suggested that amendments to a Protocol should be adopted by the Parties to the Protocol. It was also suggested that, rather than requiring consensus of the Parties to the Convention, a more flexible approach should be taken for the adoption of additional Protocols, so as to facilitate further reforms. It was queried how it would be determined that all efforts at reaching consensus were exhausted. It was also suggested that a fallback be provided in case no quorum is reached at a first meeting of the conference of the Parties.

83. It was clarified that under paragraph 6, a Party would not automatically be bound by an amendment or an additional Protocol until that Party had deposited its instrument of ratification, and that ratification as well as the related notification took effect. It was said that this might lead to complexities where two Parties had submitted a corresponding notification regarding a Protocol with only one of the Parties depositing an instrument of ratification to the amendment of that Protocol. It was agreed that the words "that has already entered into force" be deleted.

84. It was generally felt that paragraph 7 should establish the default rule for amendments, while allowing Protocols to set their specific rules on amendments, which would prevail over paragraph 7. In that context, it was agreed that paragraph 3 should mention that it was subject to the rule in paragraph 7.

85. After discussion, it was agreed that article 10 should be restructured to address: (i) amendments to the body of the Convention; (ii) amendments to the Protocols; and (iii) incorporation and adoption of additional Protocols. With regard to (i), it was said that a Party to the Convention could propose on amendment and decisions would be made by the Parties to the Convention, which should require a higher threshold (for example, two-thirds majority or consensus). With regard to (ii), it was said that a Party to the Protocol could propose amendments and decisions would be made by the Parties to the Protocol by consensus. It was said that if the threshold of consensus could not be achieved, it would be possible to propose the adoption of an additional protocol, which could be done through a lower threshold. With regard to (iii), it was explained that as the Convention required opt-in by its Parties to the Protocols, the threshold need not be so high as for (i) and (ii).

Article 11 – Denunciation

86. It was suggested that article 11 should further address the effects of denunciation in relation to investment treaties that were listed by the Parties in their notifications and whether the modifications through such notifications would become void as a consequence. It was said that considering the multi-layered process within the Convention and a wide range of instruments that might be applicable, the interaction between those instruments and the consequences of denunciation should be clarified, including the impact of any survival clauses in the investment treaties.

87. It was stated that as not all Protocols would apply to international investment dispute resolution proceedings, reference to such proceedings should be deleted from paragraph 3. It was also suggested that the meaning of a proceeding having "commenced" should be further elaborated, for example, by referring to when the proceeding was deemed to have been commenced pursuant to the applicable treaty or rules. In light of the above, it was suggested that there may be merit in developing rules on denunciation for the respective Protocols.

88. On whether a Party would be permitted to denounce the Convention and yet remain a Party to a Protocol, it was said that this would depend on whether a State could become a Party to a Protocol without becoming a Party to the Convention (see A/CN.9/1194, para. 115). However, it was questioned how a Protocol could operate without the mechanism provided for in the Convention, which allowed Parties to modify their investment treaties. In response, it was suggested this possibility could be considered for certain Protocols. It was also said that Protocols should not be considered an integral part of the Convention.

Other aspects of the Convention

89. It was suggested that an article on joint interpretation could be included in the Convention. It was said that the article could provide a mechanism for Parties to the Convention to develop binding interpretations of investment treaties, which could be applied or utilized by parties to those treaties on an optional basis. It was said that the circulation of an intent to issue a joint interpretation to other Parties and relevant entities not party to the Convention could ensure transparency in the development of joint interpretations and allow other Parties, as well as non-parties to the relevant investment treaty, to become aware of and possibly participate in the process. Support was expressed for such a proposal, noting that: (i) investment treaties often included similar standards and language; and (ii) if the involvement of non-parties was permitted, it would create common interpretation of those investment treaty standards. It was noted that draft provision 21 in document A/CN.9/WG.III/WP.248 could be adjusted for that purpose.

90. On the other hand, doubts were expressed on whether it would be appropriate to include such an article in the Convention. It was observed that treaty parties had the power to issue authoritative interpretations of their treaties and also make them binding on tribunals established in accordance with that treaty. In that sense, it was

said that any article on joint interpretation should not deprive the parties of such right nor oblige them to take part in the exercise.

91. In addition, questions were raised over how the joint interpretation exercise would be initiated and which Parties would have the right to, and could be invited to, participate. It was said that such an article on joint interpretation could set a precedent for allowing non-parties to influence treaty interpretations and impose unintended interpretations, and that it could create inconsistencies in treaty interpretation amongst its parties. In response, it was said that the participation of non-treaty parties needed to be carefully considered (including the legal basis for their participation) and that they should be allowed to participate only when so intended by the treaty parties. It was also said that the effect of any joint interpretation on parties not involved in the exercise should be limited. It was queried whether investment treaties modified by the Protocols and the Protocols themselves would be the subject of joint interpretation. It was stated that the purpose of the joint interpretation should be limited to clarifying the meaning of specific terms and the underlying intentions without resulting in amendments to the treaty or standards therein.

92. It was clarified that draft provision 21 would be discussed in the context of the draft provisions on procedural and cross-cutting issues notwithstanding the suggestion to have an article on joint interpretation included in the Convention. The Working Group agreed to give this issue further consideration.

93. It was suggested that the Convention could include a provision requiring Parties to the Convention to act in good faith and not undermine the operation of any Protocols that they were not a party to.

94. It was also suggested that certain provisions on procedural and cross-cutting issues could be included as substantive provisions in the Convention, including the provision on the right to regulate.