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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020)

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I. Introduction

1. At its fiftieth session, the Commission had before it notes by the Secretariat on "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration" (A/CN.9/915); on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916), and on "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)" (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on the ISDS Framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

3. From its thirty-fourth to thirty-seventh session, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

4. At its fifty-second session, in 2019, the Commission expressed its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process and for the decision of the Working Group to elaborate and develop multiple potential reform solutions simultaneously.

5. At its thirty-eighth session (Vienna, 14–18 October 2019), the Working Group agreed on a project schedule and commenced with the consideration of the reform options regarding the establishment of an advisory centre, a code of conduct for adjudicators and the regulation of third-party funding. At the resumed thirty-eighth session (Vienna, 20–24 January 2020), the Working Group considered the appellate and multilateral court mechanisms as well as the selection and appointment of ISDS tribunal members. The thirty-ninth session (New York, 30 March-3 April) had been postponed following the outbreak of the COVID-19 Pandemic.

6. At its fifty-third session, in 2020, the Commission considered the reports of the Working Group on the work of its thirty-eighth and resumed thirty-eighth sessions (A/CN.9/1004 and A/CN.9/1004/Add.1) and reiterated its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process, and for the support provided by the Secretariat. The Commission took note of the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent. It also took note of informal webinars and other informal events and consultations organized or facilitated by the Secretariat following the global outbreak of COVID-19 pandemic and the postponement of the thirty-ninth session of the Working Group, including on the topics on the agenda of the postponed session (dispute prevention and mitigation as well as other means of alternative dispute

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

resolution; treaty interpretation by States parties; reflective loss and shareholder claims based on joint work with the Organization for Economic Cooperation and Development; and the development of a multilateral instrument on ISDS reform). The recording of the webinars organized jointly with the ISDS Academic Forum as well as the presentations made were available on the website of UNCITRAL. The Commission further noted the series of webinars organised jointly with the International Centre for Settlement of Investment Disputes (ICSID) on the draft code of conduct for adjudicators in ISDS.[2]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its thirty-ninth session in Vienna from 5 to 9 October 2020 in accordance with the decision on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease (COVID-19), adopted on 19 August 2020 by the States members of UNCITRAL (contained in document A/CN.9/1038). Arrangements were made to allow delegations to participate in person and remotely.

8. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Burundi, Cameroon, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mali, Mauritius, Mexico, Nigeria, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

9. The session was attended by observers from the following States: Angola, Bahrain, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Bulgaria, Burkina Faso, Cambodia, Costa Rica, Cyprus, El Salvador, Egypt, Jamaica, Lao, Latvia, Lithuania, Madagascar, Maldives, Morocco, Netherlands, Norway, Paraguay, Portugal, Senegal, Slovakia, Sweden, Tunisia, Turkmenistan and Uruguay.

10. The session was also attended by observers from the European Union and the Holy See.

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

(a) *United Nations System*: Economic Commission for Latin America and the Caribbean (ECLAC), and International Centre for Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organizations*: African Union, Commonwealth Secretariat, Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS), Energy Charter Secretariat, Eurasian Economic Commission, Organization of the Petroleum Exporting Countries (OPEC), Mexican section of the T-Mec Secretariat, Permanent Court of Arbitration (PCA), Secretaria de Integración Económica Centroamericana (SIECA) and South Centre;

(c) *Invited non-governmental organizations*: African Academy of International Law Practice (AAILP), African Association of International Law (AAIL), American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR), American Society of International Law (ASIL), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian Academy of International Law (AAIL), Association pour la Promotion de l'Arbitrage en Afrique (APAA), British Institute of International and Comparative Law, Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International

[2] Ibid., *Seventy-fifth session, Supplement No. 17* (A/75/17, Part II), paras. 31–36.

Investment and Commercial Arbitration (CIICA), Centre for International Legal Studies (CILS), Centre de Recherche en Droit Public (CRDP), Centre for International Law (CIL), Columbia Centre on Sustainable Investment (CCSI), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIArb), China International Economic and Trade Arbitration Commission (CIETAC), Centre for Research on Multinational Corporations (SOMO), Corporate Counsels' International Arbitration Group (CCIAG), European Federation for Investment Law and Arbitration (EFILA), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), iCourts, Institute for Transnational Arbitration (ITA), Instituto Ecuatoriano de Arbitraje (IEA), Inter-Pacific Bar Association (IPBA), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Dispute Resolution Institute (IDRI), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), International Mediation Institute, International Telecommunication Union (International T), International Trade Union Confederation (ITUC), Organisation of Islamic Cooperation Arbitration Centre (OIC-AC), Max Planck Institute for Comparative Public Law and International Law, Pluricourts, Queen Mary University of London School of International Arbitration (QMUL), Russian Arbitration Association (RAA), Singapore International Arbitration Centre (SIAG), Singapore International Mediation Centre, The Law Association for Asia and the Pacific (LAWASIA), The Moot Alumni Association (MAA), The New York City Bar Association (NYCBAR), Third World Network, Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

12. According to the decision made by the State members of the Commission (see para. 7 above), the following persons continued their offices:

Chairperson: Mr. Shane Spelliscy (Canada)

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

13. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.198); (b) note by the Secretariat on the reform options (A/CN.9/WG.III/WP.166 and its addendum) as well as notes by the Secretariat respectively on shareholder claims and reflective loss (A/CN.9/WG.III/WP.170); on dispute prevention, mitigation and mediation (A/CN.9/WG.III/WP.190); on treaty interpretation by States parties (A/CN.9/WG.III/WP.191); on security for costs and frivolous claims (A/CN.9/WG.III/WP.192); on multiple proceedings and counterclaims (A/CN.9/WG.III/WP.193); and on multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.194); (c) submissions from Governments: Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156); European Union and its member States (A/CN.9/WG.III/WP.159 and Add.1); Morocco (A/CN.9/WG.III/WP.161 and (A/CN.9/WG.III/WP.195); Thailand (A/CN.9/WG.III/WP.162); Chile, Israel and Japan (A/CN.9/WG.III/WP.163); Costa Rica (A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178); Brazil (A/CN.9/WG.III/WP.171); Colombia (A/CN.9/WG.III/WP.173); Turkey (A/CN.9/WG.III/WP.174 and A/CN.9/WG.III/WP.197); Ecuador (A/CN.9/WG.III/WP.175); South Africa (A/CN.9/WG.III/WP.176); China (A/CN.9/WG.III/WP.177); the Republic of Korea (A/CN.9/WG.III/WP.179); Bahrain (A/CN.9/WG.III/WP.180); Mali (A/CN.9/WG.III/WP.181); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182); Kuwait (A/CN.9/WG.III/WP.186); Kazakhstan (A/CN.9/WG.III/WP.187); Russian Federation (A/CN.9/WG.III/WP.188 and Add.1); The Netherlands, Peru and Thailand (A/CN.9/WG.III/WP.196); and Turkey (A/CN.9/WG.III/WP.197).

14. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Possible reform of investor-State dispute settlement (ISDS).
4. Workplan and other issues.

III. Possible reform of investor-State dispute settlement

15. Based on a decision at its thirty-eighth session (A/CN.9/1004, paras. 25 and 104), the Working Group undertook consideration of the following reform options: (i) dispute prevention and mitigation as well as other means of alternative dispute resolution; (ii) reflective loss and shareholder claims; (iii) multiple proceedings including counterclaims; (iv) security for costs and means to address frivolous claims; (v) treaty interpretation by States parties; and (vi) multilateral instrument on ISDS reform.

16. In considering those reform options, the Working Group agreed to adopt the same approach as it had done at its thirty-eighth and resumed thirty-eighth sessions and undertook a preliminary consideration of the relevant issues with the goal of clarifying, defining and elaborating such options, without prejudice to any delegations' final position. It was clarified that the Working Group would not be making any decision on whether to adopt a particular reform option at the current stage of the deliberations.

A. Dispute prevention and mitigation as well as other means of alternative dispute resolution

1. Dispute prevention and mitigation (A/CN.9/WG.III/WP.190)

17. The Working Group took note of the submissions made by States in preparation for the third phase of its mandate ("Submissions") on dispute prevention and mitigation measures developed at the national level, in investment treaties, as well as dispute prevention initiatives and programmes available at the international level as outlined in document A/CN.9/WG.III/WP.190. At the outset, it was highlighted that the focus of reforms in that area would be on the-pre-dispute phase, rather than after a dispute has been brought to arbitration. It was underlined that dispute prevention and mitigation measures contributed to create a stable and predictable climate for investment and played a significant role in both attracting and retaining investments.

At the national level

18. During the discussion, information was provided on measures taken at the national level to prevent disputes from arising, including awareness-raising activities, policies to prevent disputes from escalating, and frameworks for the management of ISDS cases. The Working Group took note that various models had been developed to gather information about investors' complaints and to channel them to the relevant governmental entities. Reference was made to the identification of a lead agency, which would function as the channel of communication between the investor and the State and which would coordinate internally with other agencies in the government. Reference was also made to investment ombudspersons and institutions responsible for both the prevention and management of disputes.

19. It was also pointed out that information-sharing among the government agencies was important for dispute prevention so that stakeholders at various levels of a State were well-informed, and that coherence in the implementation and administration of investment-related matters could be achieved. It was mentioned that tools to ensure

consistency between domestic legislation and investment treaties that contain international obligations undertaken by States were important. It was suggested that procedures could be established, such as inviting interested stakeholders to comment on draft legislation before enactment. The purpose of such procedures, it was further explained, was to ensure that government officials and legislators would become aware of potential consequences of their decisions and better understand the underlying investment framework. It was said that access to relevant information was provided through shared platforms, handbooks, or training events. The need for guidance on those matters was underlined and reference was made to the APEC Handbook on Obligations in International Investment Treaties, which contained guidance for government officials.

In investment treaties and at the international level

20. It was suggested that States, when negotiating investment treaties, should consider providing for dispute prevention and mitigation as well as pre-arbitration consultation procedures. Diverging views were expressed on the need for mandatory pre-arbitration procedures. It was also said that there would be merit in having duly established mechanisms, preferably in domestic legislation, that would allow disputing parties to make the most use of the cooling off periods (see below, para. 28).

21. Further, it was suggested that lack of awareness about, and capacity for, dispute prevention and mitigation should be addressed at the international level, for instance through technical assistance and capacity-building activities. It was underlined that government agencies responsible for handling ISDS matters in many developing countries still lacked the know-how to identify looming disputes and ways to manage them. As a means for cooperation, it was suggested that States would greatly benefit from the development of a systematic method of sharing knowledge and practices on dispute prevention. Reference was made to the development of guidelines, of a platform for States to share good practices and know-how, and of dispute prevention provisions. It was pointed out that such technical assistance and capacity-building activities, which would have a positive impact on dispute prevention, could be set up in an efficient way without burdening States. References were made to the Mechanism for the Cooperation and Discussion on Defense and Prevention of Investment Arbitration of the Pacific Alliance, and the Model Instrument on Investment Dispute Management developed by the Energy Charter Conference. A suggestion was made to undertake the development of a multilateral declaration by States on dispute prevention.

Link to other reform options

22. The Working Group noted that the question of dispute prevention and mitigation was closely connected to the reform option of establishing an advisory centre, which could possibly be tasked with dispute prevention and capacity-building activities. It was also noted that the question of dispute prevention and mitigation was closely connected to the topic of treaty interpretation by States parties as disputes might be prevented where investment treaties were coherently interpreted and administered. It was also said that the reform option of a multilateral standing body or mechanism would include features aimed at preventing disputes. It was said that the notion of alternative means to resolve settlement could encompass a discussion of issues, in addition to mediation and conciliation, including, for example, options such as resorting to domestic courts and State-to-State led mechanisms.

Preparatory work on the topic of dispute prevention and mitigation

Introductory remarks

23. The Working Group noted the general interest in having the Secretariat pursue further work on the question of dispute prevention and mitigation. It was noted that States ought to remain free to regulate in the public interest and any solution developed to address dispute prevention and mitigation should not be encouraging

them in any way to avoid doing so with the sole goal of avoiding disputes. Capacity building activities and ensuring the flow of information to those who needed it to make decisions were seen as key aspects of dispute prevention. In that light, four questions were underlined: (i) who would need to be better informed (reference was made to officials who acted on the States behalf and to investors); (ii) what they would need to be informed of (for States, international obligations and for investors, relevant rules, policy interests, bureaucratic structures and State perspectives); (iii) how they could be informed; and (iv) by whom they would be informed.

24. It was underlined that best practices, guidelines or even a model text on dispute prevention or mitigation could be developed that would assist States in their efforts to prevent disputes. In that regard, it was noted that work on best practices had already been done by States and inter-governmental organizations, including by the World Bank, and by non-governmental organizations. Therefore, it was said that in developing what the best practices were, the Secretariat would be mainly responsible for identifying and compiling the relevant information into guidelines, or a model text which may form part of a potential multilateral instrument on ISDS reform.

25. Regarding the suggestion to consider how it might be possible to have an international institution such as the proposed advisory centre take a greater role in assisting States in the implementation of these best practices, it was noted that some delegations considered information-sharing and capacity-building as a key function of the advisory centre, whereas others questioned whether an advisory centre should be more focused on the dispute context.

Way forward

26. After discussion, the Working Group requested the Secretariat to work with interested delegations and organizations to collect and compile relevant and readily available information on the best practices for States on dispute prevention and mitigation in light of the discussions of the Working Group. The Secretariat was requested to examine how such best practices could be applied by States in a more consistent manner and was asked to return to the Working Group with a suggestion of possible means to implement these best practices, such as the development of guidance or model texts. The Secretariat was also requested to consider how any advisory centre which might be developed as a part of these reforms could assist States in that area, as well as to examine the resources that might be required for any advisory centre to do so.

2. Alternative dispute resolution methods (A/CN.9/WG.III/WP.190)

27. The Working Group considered mediation, conciliation and other forms of alternative dispute resolution (ADR) methods. It was pointed out that such methods, which were less time- and cost-intensive than arbitration, also offered a high degree of flexibility and autonomy to the disputing parties, allowing the preservation and improvement of long-term relationships and the protection of foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts.

Cooling-off period

28. The Working Group noted that investment treaties foresaw a time frame (ranging from three to eighteen months) during which the disputing parties were required to attempt amicable settlement before arbitration (commonly known as the “cooling-off” period). It was said that the cooling-off period should provide an opportunity for a claimant investor and a State to avoid arbitration by solving the dispute through negotiations, consultations or mediation. It was emphasised that, for the cooling-off period to be a successful tool, it needed to be sufficiently long, more than six months. In that context, it was underlined that guidance was needed on how to make effective use of the cooling-off period.

Fostering use of mediation

29. The Working Group considered how ADR methods could be promoted and more widely used. To that end, the Working Group considered the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement to a dispute, the legal certainty required for officials to be involved in such settlement and how to ensure that the necessary approval process was set up, including that those negotiating the settlements had the necessary authority to agree to a settlement. It was said that policies as well as the legal framework for encouraging mediation would be necessary. In that context, it was highlighted that the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") provided for a useful instrument also in the context of ISDS.

30. In addition, it was clarified that ADR methods were a means to be considered not just before but also during a dispute and it was suggested that guidelines should be developed to encourage arbitral tribunals and disputing parties to explore such methods proactively. In that regard, the International Bar Association's Rules on Investor-State Mediation, and the Guide on Investment Mediation endorsed by the Energy Charter Conference, were mentioned. Further, the Working Group considered how to make stakeholders aware of mediation and how to incentivize both investors and States to actively engage in alternative dispute settlement methods. It was said that capacity-building and training of potential mediators and other stakeholders was a key aspect, and examples of specialized courses were mentioned. It was suggested that the home State should encourage the investor to find an amicable solution with the host State before engaging in arbitration. It was further suggested that home State and host State could be organized in joint committees to address potential conflicts between an investor and a State.

31. It was pointed out that an appropriate balance would need to be found between settlement through ADR methods and other fundamental questions, such as how such methods could lead to regulatory chill, reduced transparency from the settlement of claims behind closed doors, and settlements inconsistent with other areas of domestic and international law and policy. In this context, it was stressed that mechanisms promoting ADR methods should be designed so as to ensure consistency with good governance norms, including as reflected in the Sustainable Development Goal (SDG) 16.

Model clauses

32. Regarding references to ADR methods in investment treaties, the Working Group considered whether to undertake the development of model clauses, which would: (i) indicate procedural steps the disputing parties could usefully take; (ii) guide parties on how to conduct a mediation; (iii) include a realistic time frame; and (iv) possibly address mandatory mediation as a prerequisite to arbitration. On that last point, it was pointed out that making mediation mandatory might be detrimental in certain situations and would be at odds with the voluntary nature of the mediation process.

33. It was highlighted that some current treaties already included such model clauses and could serve as a model for the Working Group.

Link to other reform options

34. It was said that an advisory centre, if established, could play a role in compiling and sharing information on best practises with regard to ADR. Other reform options which may be combined with the strengthening of mediation included those relating to the setting up of a multilateral standing body. In that context it was highlighted that the broader picture of ISDS reform needed to be taken into account when finalizing work on ADR, as many of the concerns that might be raised regarding ADR, such as fear of exposure to public opinion, were relevant also to the broader ISDS framework. In addition, it was noted that reform options aimed at addressing coherence and

consistency could have an impact on ADR means, as coherent and consistent interpretation by arbitral tribunals would make it easier for the parties to assess the potential outcome of a dispute and base the search for a settlement on solid grounds.

Preparatory work on the topic of ADR

Introductory remarks

35. The Working Group noted the general interest in having the Secretariat pursue further work on the question of mediation and other forms of ADR, with a view to ensure that ADR could be more effectively used. It was observed that ADR methods were still largely underutilised in the ISDS context, and the structural, legislative and policy impediments particular for governments were noted. It was also noted that not all disputes were suitable for mediation, and that any work that might be undertaken should ensure that the application of ADR methods would not lead to unintended consequences such as regulators failing to act appropriately in the public interest.

Way Forward

- Amicable settlement period (also referred to as the "cooling off period")

36. After discussion, the Working Group requested the Secretariat to prepare model clauses reflecting best practices on the amicable settlement or cooling off period, including an adequate length of time and clear rules on how such period could be complied with. The Secretariat was requested to compile guidelines or recommendations on how such a period could be more effectively used.

37. It was said that the model clauses should encourage disputing parties to use mediation as a possible step to avoid resorting to arbitration. It was underlined that attention should be given to avoid unnecessary delays and costs and ensure that mediation or other forms of ADR would be used in a meaningful manner.

- Preparation of guidelines for effective use of ADR and preparation of rules

38. It was felt that there would be value in developing more specific guidelines and rules. In that regard, the Secretariat was requested to develop two types of instruments, building on existing best practices, and in consultation with all stakeholders who would indicate to the Secretariat an interest in participating.

39. First, as a matter of information-sharing, capacity-building and awareness-raising, the Secretariat was requested to prepare guidelines and best practices for participants in ISDS mediation, covering matters such as (i) the organizational aspects that States might need to consider at the national level to minimize structural or policy impediments and to ensure that mediation could be effectively used; (ii) the representation of public interest in the mediation; and (iii) the setting up of lists or rosters of qualified mediators in the field of ISDS. It was also said that consideration should be given to how the home State of the investor could promote mediation and other forms of ADR with their investors. In that context, it was clarified that it should be explored, when doing further work on an advisory centre, how such a centre, if one were to be created, could assist in the resolution of disputes outside of the adversarial context.

40. Second, the Secretariat was requested to work with interested organizations, such as ICSID, to develop or adapt rules for mediation in the ISDS context as well as model clauses that could be used in investment treaties or a potential multilateral instrument on ISDS reform. These specific rules and clauses would build on the numerous documents already available and would aim at creating procedures and provisions that would take into account some of the specificities of ISDS such as the public interests involved. It was also noted that work in the field of mediation should take into account the reform options identified by the Working Group, so as to ensure that solutions developed could be adapted to the various options.

B. Multiple proceedings and counterclaims, including shareholder claims and reflective loss

1. Multiple proceedings, shareholder claims and reflective loss (A/CN.9/WG.III/WP.193 and A/CN.9/WG.III/WP.170)

41. The Working Group then considered issues relating to multiple proceedings along with those relating to shareholder claims and reflective loss (hereinafter "multiple proceedings" for ease of reference). It was reiterated that multiple proceedings had been identified as a concern by the Working Group due to, among others, their possible negative impact on the cost and duration of the ISDS proceedings, potential inconsistent outcomes, possible double recovery, forum shopping as well as abuse of the process by claimant investors.

42. References were made to various circumstances leading to multiple proceedings, shareholder claims being one of them. It was mentioned that work should focus on instances which were perceived to be particularly problematic and had negative consequences. In that regard, it was suggested that there could be merit in clarifying the meaning of multiple proceedings which would set forth the scope of the work.

43. References were also made to a wide range of existing mechanisms and tools which had been developed to prevent the occurrence of multiple proceedings and to effectively manage them, thus limiting their impact (see paras. 26–33 of document A/CN.9/WG.III/WP.170 and paras. 21–29 of A/CN.9/WG.III/WP.193). It was observed that a number of recently concluded investment treaties provided concrete provisions to mitigate the problems arising from multiple proceedings.

44. As to the mechanisms to be further developed, there was support for preparing model clauses or guidance on joinder and consolidation. It was suggested that such work could focus on addressing some of the practical questions, for example, who would make the determination, the basis for such determination and how to incentivize ISDS tribunals to proceed with consolidation. It was, however, mentioned that joinder and consolidation had their limitations in cases where the proceedings were based on different treaties or procedural rules or were being administered by different institutions. It was also mentioned that joinder and consolidation should be based on the voluntary consent of the parties.

45. There was also support for work which would clarify the powers of ISDS tribunals to stay or suspend the proceedings and to set forth the circumstances which would justify the exercise of such powers.

46. Some emphasis was put on work to further develop coordination mechanisms, which would aim at clarifying existing tools that ISDS tribunals could easily utilize. It was said that enhanced sharing of information among the ISDS tribunals could be useful and as such, the need to promote transparency was highlighted. While it was pointed out that consolidation and coordination mechanisms might not be effective in addressing multiple proceedings that occurred over time (and not concurrently), it was stated that one possible way to address that problem was through a statute of limitations.

47. While some support was expressed for providing guidance on the doctrines of *lis pendens* and *res judicata*, doubts were also expressed as those doctrines could be interpreted differently depending on the jurisdiction and the applicable laws and as such guidance might inadvertently touch upon the substance or the merits of the dispute.

48. Some support was expressed for further developing provisions on denial of benefits and those aimed to prevent abuse of process. While there was general support for elaborating on the notion of abuse of process or of claim (including the notion of double recovery) in ISDS, it was cautioned that a certain level of flexibility should

be provided to ISDS tribunals in applying that notion to achieve effective control over multiple proceedings.

49. Some support was expressed for work on waivers (or the "no U-turn" approach) as well as the so-called "fork-in-the-road" clauses offering a choice between domestic courts and international arbitration. There was some support for developing model waiver clauses, which could be used by investors as well as companies, the latter in the case of claims by their shareholders.

50. More specifically to shareholder claims, it was suggested that work could focus on the regulation of those types of shareholder claims found to be most problematic, including prohibition of some in certain instances. That was based on concerns about the possible distortion to the basic principles of corporate law as well as discrimination against other shareholders and creditors. It was suggested that in addition to the mechanisms mentioned above, regulation of shareholder claims could be achieved through a clearer definition of "investment", "investor" or "control" in investment treaties or by better defining direct (and not derivative) claims that would be allowed for shareholders. It was further suggested that provisions on shareholder claims could be further refined following recently revised or concluded investment treaties, which included clearer language on the conditions to be met for a shareholder to raise such claims (for example, when the shareholder owned or controlled the company, with appropriate waivers and damages to be paid to the company).

51. On the other hand, concerns were expressed about the possible impact that the regulation of shareholder claims could have on foreign direct investment and the right of foreign investors to be compensated when there was a breach of the treaty obligation by States. In that context, the objective of investment treaties to encourage foreign investment and to provide foreign investors with access to justice was emphasized, particularly when ISDS was the only means available to investors to remedy treaty breaches related to their investments. References were made to ownership restrictions or requirements of joint venture with local entities which justified reflective loss claims. It was further mentioned that the regulation of shareholder claims could unduly limit the flexibility of structuring foreign investment as well as corporate strategies. In support, it was stated that the existing tools and mechanisms could sufficiently protect States from abusive claims. It was also stated that the concerns were based on hypothetical harms which were speculative and did not manifest in reality.

52. During the deliberations, it was mentioned that if a multilateral standing body were to be established to handle ISDS disputes, such a body would be in a better position to address the wide-ranging issues that could arise from multiple proceedings. It was further stated that a number of the mechanisms and tools mentioned above to address multiple proceedings could be incorporated in the treaty establishing, or rules governing, a multilateral standing body. On the other hand, it was mentioned that the creation of such a body would not have the intended impact of solving the issue of multiple proceedings, and could result in increased multiplicity of proceedings, since disputes would be brought in respect of different investment treaties which were differently drafted. Furthermore, it was said that if not all countries joined such permanent mechanism, the current system of investment tribunals would exist in parallel and continue to deal with disputes arising from more than 3000 investment treaties. In that case, the problem of multiple proceedings should be dealt with by other means.

Preparatory work on multiple proceedings

Introductory remarks

53. It was widely felt that there was a need to reform the current ISDS system by addressing the concerns expressed with regard to multiple proceedings, particularly as the old-generation investment treaties did not provide appropriate means to address them. It was broadly shared that multilateral efforts to develop and implement a

number of the mechanisms and tools to address the concerns raised by multiple proceedings would be particularly beneficial.

54. It was also felt that in furthering the reform options, there was a need to strike a balance between addressing the concerns and ensuring the continued promotion of foreign investment as well as protection of foreign investors. The need to ensure due process and procedural fairness in implementing the different tools was also emphasized.

Way forward

55. After discussion, the Working Group requested the Secretariat to (i) identify more specifically the types of multiple proceedings and shareholder claims that might arise and the concerns or lack of concerns associated with each, so as to further define the scope of the issue; (ii) compile a list of the tools and mechanisms that already existed in treaty practice to address these concerns, and identify for which of the type of multiple proceedings the tool was used; (iii) recommend model clauses (including for potential use in a multilateral instrument on ISDS reform) which would reflect an improvement of existing tools, particularly in light of the problems that continued to be faced; and (iv) recommend options for the implementation of these tools in the ways intended, such as through resolutions of the General Assembly, guidelines to tribunals, or other explanatory works. It was said that a detailed toolbox that would specifically and appropriately respond to the concerns that existed with respect to multiple proceedings and shareholder claims could be developed. It would then remain to determine how to implement it as part of the reform process.

56. In preparing the above-mentioned material, the Working Group requested that the Secretariat continue to cooperate with all delegations who would indicate to the Secretariat an interest in participating, including those who have recent treaty practice as well as the OECD, the Academic Forum and other interested international organizations and to make reference to recently concluded investment treaties containing relevant provisions as well as efforts undertaken by ICSID as part of the Rules Amendments.

2. Counterclaims (A/CN.9/WG.III/WP.193)

57. The Working Group considered the issues relating to respondent States' counterclaims in ISDS. It was noted that two distinct aspects needed to be considered, one being the procedural aspect, or the admissibility of counterclaims and the jurisdiction of tribunals to examine them; and the other being the substantive obligations of investors, the breach of which would form the basis of the counterclaims.

58. On the procedural aspect, it was reiterated that any work on ISDS reform should not foreclose the possibility of respondent States bringing a counterclaim against an investor, where there was a legal basis for doing so. While a view was expressed that it would be necessary for States parties to investment treaties to agree on the use of counterclaims, it was pointed out that procedural rules applicable to ISDS generally contemplated the possibility of the respondent State raising counterclaims and that recent investment treaties included explicit provisions allowing counterclaims. It was noted that a framework allowing for counterclaims would permit ISDS tribunals with expertise in the field to hear such claims and could avoid multiple proceedings. The impact of allowing counterclaims on the outcome of the dispute was also noted. It was generally felt that procedural issues such as the jurisdiction and admissibility of counterclaims deserved further consideration, also in the context of a multilateral standing body.

59. On the second aspect, it was stated that the current work on ISDS reform should not address the obligation of investors or the legal basis for counterclaims, as such work would touch upon the substantive aspects, whereas the focus of the work should be on procedural aspects of ISDS. In that context, it was explained that counterclaims could be raised with regard to the breach of investor's obligations in investment

treaties as well as contracts and that the investor's conduct was often taken into account by ISDS tribunal when rendering the final award. It was pointed out that that matter could be considered further in light of investor's obligations that were not purely economic, such as obligations in relation to human rights, the environment as well as to corporate social responsibility. It was also mentioned that the issue of counterclaims would need to be considered in light of possible resort to domestic courts by States to seek affirmative relief as well as the need to provide a linkage with the claim raised by the investor.

Preparatory work on the topic of counterclaims

Introductory remarks

60. During the discussion, it was pointed out that one of the primary reasons for the lack of counterclaims in ISDS was the absence of substantive obligations on the part of investors in investment treaties. It was clarified that drafting such obligations was not within the mandate of the Working Group focusing on procedural reforms. Nonetheless, it was felt that further work of a procedural nature on counterclaims should remain part of the work. It was noted that, while rare, counterclaims were being permitted in limited cases. Benefits of allowing counterclaims mentioned included procedural efficiency, deterring frivolous claims, and avoiding a multiplicity of claims in different forums.

Way forward

61. After discussion, the Working Group requested the Secretariat to continue to work on the topic of counterclaims with a focus on the procedural aspects. The Secretariat was asked to prepare model clauses that could be used as consent clauses, whether in treaty-based arbitration or in a multilateral standing body, that would condition a State's consent to ISDS on the consent of the investor to have the same tribunal hear counterclaims. It was said that such a clause could clarify the jurisdiction of the ISDS tribunals to hear counterclaims as well as the question of admissibility.

62. Regarding the admissibility of claims, the Working Group requested the Secretariat to prepare options to clarify the conditions under which a counterclaim could be brought, including factual linkage with the primary claim.

63. Regarding the existing sources of law for counterclaims, it was suggested that it would be useful to examine the applicable sources of existing substantive law that provided for investor obligations and hence the legal basis for counterclaims. It was further said that such exploratory work, which could be carried out jointly with the Academic Forum, and take the form of webinars and preparation of research papers by the Academic Forum, should also examine the procedural tools that would allow for the bringing of counterclaims.

C. Security for costs and frivolous claims

1. Security for costs (A/CN.9/WG.III/WP.192)

64. The Working Group reaffirmed the need to develop a more predictable and clearer framework for security for costs in ISDS. The difficulties often faced by successful respondent States in recovering costs of ISDS from claimant investors were reiterated. It was noted that security for costs could further protect States against a claimant's inability or unwillingness to pay, as well as contribute to discouraging frivolous claims. However, it was also underlined that a balanced approach would need to be taken as security for costs could limit access to justice for certain investors, particularly small and medium-sized enterprises. It was further mentioned that security for costs should not inadvertently delay the proceedings or increase costs and that due consideration should be given to preserving procedural fairness.

65. It was pointed out that arbitration rules generally recognized the arbitral tribunal's power to order security for costs as a provisional measure. However, it was

noted that such provisions might not provide a sufficient framework. It was also noted that a number of recently concluded investment treaties expressly provided for the right of the respondent State to request security for costs. Moreover, it was mentioned that a security for costs mechanism had been considered during the ICSID Rules and Regulations amendment process.

66. Empirical evidence mentioned during the discussion showed that security for costs was ordered in very exceptional circumstances reflecting a high threshold of existing mechanisms and that ISDS tribunals were generally reluctant to grant such orders. As such, it was suggested that some guidance should be provided to ISDS tribunals on the ordering of security for costs under existing mechanisms.

67. A number of suggestions were made on the circumstances which would justify the ordering of security for costs. It was suggested that providing clarity on those circumstances and/or the factors to be considered by the tribunal would be essential. It was, however, said that a certain degree of flexibility should be provided to tribunals when considering requests for security for costs, so that they would be able to take into account the overall circumstances of the case. For example, it was said that ordering of security for costs might not be appropriate, particularly if the impecuniosity of the investor was caused by a State measure.

68. It was generally felt that indications that a party would not be willing to comply with an adverse cost award or would not be able to do so, such as impecuniosity or insolvency or past instances of non-compliance with cost awards, were key circumstances for ordering security for costs. It was said that claims channelled through shell companies with no funds of their own may be an indication of an investor's unwillingness and inability to pay costs.

69. It was generally felt that the existence of third-party funding or the lack of commitment of the third-party funder to take responsibility for cost awards were elements to be taken into account when ordering security for costs. While views were expressed that security for costs should always be ordered when there was third-party funding, it was felt that the mere existence of third-party funding would not justify an order for security for costs and should be considered with other elements mentioned above.

70. The Working Group also considered some procedural aspects relating to security for costs. It was generally felt that security for costs should be ordered upon the request by a party and not *ex officio* by the tribunal. While some support was expressed for allowing the claimant to request security for costs, it was generally felt that the main rationale for security for costs was to protect a successful respondent State. In response, it was mentioned that counterclaims by the respondent State could justify the claimant requesting security for costs. It was further mentioned that the likelihood of success of either the claim or defence should not be an element to be considered in ordering security for costs.

71. It was suggested that a party requesting security for costs should be required to justify its request. On the other hand, a suggestion was made that the burden of proof could be shifted to the other party. It was widely felt that third parties (including non-disputing treaty parties) should not be ordered to provide security for costs, as that could undermine their ability to participate in ISDS proceedings.

72. With regard to the consequences of non-compliance of a party with regard to an order for security for costs, it was mentioned that suspension of the proceeding followed by termination should be considered.

73. It was suggested that a formula or guideline could be prepared to guide ISDS tribunals on the appropriate amounts to be ordered as security. It was generally felt that the amount of the security to be ordered as well as the modalities for complying with the order, such as a deposit in escrow or a bank guarantee, could be left to the discretion of ISDS tribunals. It was suggested that guidance should be provided to ISDS tribunals on other procedural issues, for example, in case of multi-party proceedings.

Preparatory work on the topic of security for costs

74. After discussion, the Working Group requested the Secretariat to leverage the work done by ICSID in order to compile existing approaches to the issue of security for costs. Delegations with a relevant treaty experience on security for costs were invited to provide information to the Secretariat. It was said that, building on that work and experience, a model clause should be prepared, which might be included in a potential multilateral instrument on ISDS reform, and which would (i) primarily focus on making security for costs available for respondents against claimants, (ii) clarify that security for costs would only be available on request of a party, and (iii) not apply against third parties. The model clause should cover the conditions and threshold and specify options for consequences in case of failure to comply.

75. Regarding the conditions, a number of options should be prepared, in terms of what those conditions might be, ranging (i) from general options which would give more discretion to ISDS tribunals (such as a reasonable apprehension of an unwillingness or lack of ability to pay), (ii) to options that list items for consideration more expressly but leave how to apply these to the ISDS tribunals together or in combination (such as impecuniosity, where the investor was a shell corporation, where there were multiple claimants, history of compliance with awards and the existence of third-party funding), and (iii) to options that would include very prescriptive lists mandating security for costs in defined circumstances (such as third-party funding). In crafting these conditions, it should be ensured that (i) a balance would be found between ensuring effective rights for States on the one hand and access to justice on the other, and (ii) the ISDS tribunal would not be required to prejudge the dispute.

76. Furthermore, the Working Group requested the Secretariat to prepare guidelines and best practices regarding how the security for costs provisions could be applied in a fair and consistent manner. It was indicated that such guidelines could not only instruct ISDS tribunals on the appropriate application of the conditions but could also address issues regarding how much security would generally be required, how it could be paid, and other such practical questions.

77. It was further noted that the impact of any framework on security for costs should be considered in conjunction with the other ISDS reform options currently being discussed by the Working Group.

2. Frivolous claims (A/CN.9/WG.III/WP.192)

78. There was general support for developing a more predictable framework to address frivolous claims, which would make it possible to dismiss such claims at an early stage of the proceedings and provide an expedited process. It was noted that such a framework could address, among others, concerns about the cost and duration of ISDS as well as regulatory chill.

79. While it was noted that a number of recently concluded investment treaties included provisions to address frivolous claims, it was also mentioned that the majority of claims were currently being brought on the basis of treaties that did not contain such provisions.

80. With regard to the types of claims to be addressed in such a framework, reference was made to claims that were manifestly lacking legal merit, unsubstantiated or unmeritorious claims, unfounded claims as a matter of law, and claims resulting from treaty shopping (including through corporate restructuring). It was mentioned that the framework should provide clear language to guide ISDS tribunals in identifying frivolous claims. It was further suggested that a stringent threshold would be more appropriate in light of due process concerns of limiting the investor's access to justice. It was also generally felt that the framework should apply to claims that related to the merits as well as to the jurisdiction of the tribunal.

81. With regard to the actions to be taken by an ISDS tribunal when it determined that a claim was frivolous, a number of examples were provided including ordering

of security for costs, early dismissal of claims, preliminary determination as well as cost allocation. It was generally felt that the actions to be taken by the ISDS tribunal would differ depending on the type of claim and that flexibility should be provided to the tribunal to take the appropriate action.

82. Attention was drawn to the risk of abuse or misuse of a framework to address frivolous claims by respondents, which could lead to increased costs and delays in the proceedings. To address such risk, it was suggested that the framework could address the allocation of costs and provide for strict time frames for the respondent to make any objection and for the tribunal to make the determination. It was suggested that there could be a two-stage determination process, with the first determination being whether to hear the objection.

83. It was noted that the issue of frivolous claims could be considered together with other reform options, mainly security for costs and third-party funding. It was also mentioned that the reform option of establishing a multilateral standing body could include a mechanism to deter frivolous claims.

Preparatory work on the topic of frivolous claim

Way Forward

84. The Secretariat was requested to work with relevant organizations to compile information about provisions in existing investment agreements and arbitration rules (such as article 41(5) of the ICSID Arbitration Rules) as well as relevant jurisprudence to capture the wide range of approaches to address frivolous claims at an early stage of the proceedings. Delegations with relevant treaty practice were invited to provide information to the Secretariat.

85. Based on that work, the Secretariat was requested to prepare options for a model clause, which would create a clear framework for the early dismissal of frivolous claims, while giving flexibility to the ISDS tribunal to handle frivolous, vexatious and other types of claims. The options should also include, as an alternative to that single broad-based clause, an approach which would offer multiple different clauses for the early dismissal of a variety of claims which might offer slightly different mechanisms depending on the reason for the dismissal being sought.

86. It was further requested that the framework provide a prompt determination of any request for dismissal, and that the model clause should provide for the termination of the proceedings when a claim had been abandoned and the request for dismissal had not been challenged by the claimant.

87. The clause should also ensure due process for the claimant as well. It was requested that the clause be prepared to include options for allocating costs related to frivolous claims, bearing in mind that access to justice should not be unduly impinged. It was also noted that balance should be sought between the efficiency that would be achieved through early dismissal and the possible obstruction that could result from the misuse of such mechanism. Therefore, the clause to be prepared should provide options that would address instances where requests for early dismissals themselves were frivolous, for example, through allocation of costs. However, it was noted that given the high threshold for early dismissal, an unsuccessful request should not be deemed frivolous.

88. In addition, it was requested that the model clause explore the role that a lack of clarity in initial pleadings might have in essentially requiring States to make objections they would not otherwise make if the initial pleadings were clearer and more information was provided.

89. Lastly, the work should illustrate how the model clause could be implemented, possibly in arbitration rules, by States in investment treaties or in a multilateral instrument on procedural reform and in a multilateral standing mechanism.

D. Interpretation of investment treaties by treaty parties (A/CN.9/WG.III/WP.191)

90. At the outset, it was noted that treaty Parties had numerous tools at their disposal to ensure that the interpretation of their investment treaties was in line with their intent. It was underlined that tools on treaty interpretation, when used, would contribute to alleviate concerns regarding the lack of consistency, coherence and predictability of decisions by ISDS tribunals, as well as concerns regarding their correctness. It was noted that treaty Parties were guardians of their treaties and uniquely placed to provide authoritative and authentic interpretations to the tribunals.

91. While noting that many tools were at the disposal of treaty Parties and that provisions on joint interpretation were increasingly found in investment treaties, it was also mentioned that interpretations by treaty Parties remained rare and, for any reform to be successful, it would be important to identify why that was the case. In that context, it was stated that treaty interpretation required sufficient capacity and resources of States which developing States particularly lacked. In addition, it was suggested that treaty Parties might be reluctant to provide their interpretation when a case was ongoing to avoid any interference. It was further suggested that the establishment of joint committees usually made it easier for treaty Parties to agree on joint interpretation, as such committees would monitor the process.

92. The Working Group undertook consideration of certain interpretative tools at the disposal of the treaty Parties.

93. Regarding joint interpretations, diverging views were expressed on whether they should bind ISDS tribunals, and whether they should have a retroactive effect. It was underlined that interpretation of investment treaties, which aimed to clarify the terms of a treaty, ought to be distinguished from amendments, which typically required a formal process, for example, through domestic ratification.

94. It was said that, in addition to joint interpretation, other tools could be used such as consistent positions by States on the interpretation of their investment treaties, whether in the pleadings as respondent or in submissions as non-disputing Party. Reference was made to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) which included a provision on non-disputing Party submissions and their publication. In addition, it was said that mechanisms in recent treaties on review of draft awards provided an efficient tool to ensure correctness in treaty interpretation. In that context, it was suggested that a balance needed to be found between protecting the independence of the ISDS tribunals and treaty Parties’ intent.

95. Regarding unilateral declarations, it was said that it would be necessary to further study the nature and impact of such declarations in light of the Vienna Convention on the Law of Treaties and the practice of public international law. The suggestion to develop autonomous interpretative principles and rules that could complement or replace the general principles of treaty interpretation did not receive support and reference was made to the Vienna Convention on the Law of Treaties. It was suggested that the possibility of multilateral interpretation could be explored, while it was also noted that multilateral interpretations were difficult to envisage given the separate negotiation histories of each treaty and the differing intentions of the parties to those treaties.

96. It was said that, although interpretive tools could clarify ambiguities, correctness and predictability of the interpretation of substantive investment obligations could only be promoted through precise and careful drafting of the treaty provisions themselves, including the use of interpretive language in the investment treaty. It was pointed out that interpretative tools posed serious challenges, namely the difficult distinction between treaty interpretation and treaty amendment on the one hand as well as the impact on investors’ rights on the other.

97. It was suggested that any work in the field should take into account existing clauses of recent investment treaties, as well as the results of the ongoing discussion in the frame of the ICSID Rules and Regulations amendment process. It was further suggested that possible work could be conducted to provide guidelines on the legal effect of these tools to ensure that their interpretive weight and functions were clear to ISDS tribunals, States and investors. The development of a glossary for the interpretation of treaty norms was also mentioned. Further suggestions included guidelines on the interpretations of key provisions; however, in that regard, it was noted that drafting such interpretive guidelines on the meaning of key provisions was beyond the scope of the Working Group's mandate.

98. It was said that reforms on treaty interpretation could be made part of a multilateral instrument on ISDS reform, serving as fundamental elements of any future suite of reform options. It was also said that if an instrument were to be prepared establishing a standing multilateral mechanism, States Parties to that instrument should be able to intervene in disputes regarding the interpretation of provisions that were of systemic importance, while the ability of the treaty Parties to retain control over their interpretation would need to be preserved. It was also said that an advisory centre might be a means to implement some of the reforms on treaty interpretation.

99. However, doubts were also expressed on the need for further work in that area, given the existing framework and its availability to treaty Parties.

Preparatory work on treaty interpretation by State Parties

Way forward

100. After discussion, in light of the interpretative tools already available to treaty Parties and the various views expressed on the works that could nevertheless be usefully carried out, the Working Group requested the Secretariat to compile the various interpretive tools contained in investment treaties, building on available resources, and to provide information on how they addressed the questions and concerns that have been raised in the deliberations, including how these tools have been interpreted by tribunals.

101. In addition to such a compilation, the Working Group requested that the Secretariat prepare a further iteration of document A/CN.9/WG.III/WP.191 in order to provide more information on the issues discussed, including on the reasons why the existing tools on treaty interpretation were not effectively used by States or were not accepted by tribunals and how the numerous tools that were identified could be effectively used.

E. Multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.194)

102. The Working Group recalled the submissions made with regard to the possible means to implement the reform options, mainly a multilateral instrument on ISDS reform. In addition to A/CN.9/WG.III/WP.194, references were made, in particular to the following: (i) document A/CN.9/WG.III/WP.182, which proposed a "suite" approach, according to which States could choose to incorporate one or more of the proposed reform options based on their political and policy concerns and interest; (ii) document A/CN.9/WG.III/WP.159/Add.1, which focussed on the development of an instrument establishing a standing multilateral first instance and appellate court; and (iii) document A/CN.9/WG.III/WP.173 and A/CN.9/WG.III/WP.175, which elaborated on a multilateral instrument following the model of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. References were also made to the approaches taken in the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency) and the United Nations Convention on the Law of the Sea (UNCLOS), the latter which allowed Contracting Parties to determine which mode of dispute settlement to accept in principle (pursuant to article 287(1)).

103. Views were expressed that, as noted in document A/CN.9/WG.III/WP. 194, para. 3, that topic was not itself a reform option but a potential delivery mechanism for all or some of the reform options which were being considered. It was further said that there was accordingly no basis to discuss the multilateral instrument as a parallel stream to the consideration of the reform options, but rather to do so at a later stage, once the reform options had been developed. Views were expressed that there was a need to consider first the content and form of each reform option, before considering the means of implementation. For some options, the use of a multilateral instrument on ISDS reform was the only way of applying them to the vast network of existing investment treaties, whereas for other options, different forms, such as a model clause or guidance to tribunals, could be prepared to implement them. It was also said that the shape which any multilateral instrument might take may also be impacted by other pragmatic considerations such as the need to balance structural and non-structural reform and the fact that there was currently no agreement on extra resources.

104. Differing views were expressed, stating that it was not only appropriate but also essential to discuss the means of implementing reform options at the current stage. It was said that the means of implementing the reform options could reflect how the reform options were formulated. Accordingly, in their remarks, these delegations commented on the substantive issues raised in document A/CN.9/WG.III/WP.194. The delegations who had expressed the view that now was not the time for such deliberations (see above, para. 103), participated in those discussions without prejudice to their position that these discussions were premature.

105. It was said that a multilateral instrument on ISDS reform would aim to provide a framework for implementing multiple reform options. The need for a coherent and flexible approach to the different reform options was underlined, allowing States parties to choose whether and to what extent they would adopt the relevant reform options.

106. The following characteristics were suggested as being important: the instrument should (i) respond to identified concerns, in particular consistency and coherence, and promote legal certainty in ISDS; (ii) establish a flexible framework, whereby States could choose the reform options – including the mechanism for ISDS and relevant procedural tools, also accommodating future developments in the field of ISDS; (iii) provide temporal flexibility to allow continued participation by States Parties; (iv) allow for the widest possible participation of States to achieve an overall reform of ISDS; and (v) provide for a holistic approach to ISDS reform clearly setting forth the objective of achieving sustainable development through international investment.

107. Regarding the possible contents of a multilateral instrument, it was suggested that the instrument could provide for a minimum standard, in other words, certain core elements that would need to be adopted by all participating States. It was also suggested that it was not necessary or feasible to adopt certain core elements. It was said that, in any event, it was premature at this stage of the discussion to determine which elements would constitute the core elements, if there were to be any. It was also pointed out that the multilateral instrument could be conceived so as to contribute to more consistency and coherence in respect of those norms that were shared. The question was raised of the possible incompatibility between this multilateral instrument and other existing multilateral instruments including in particular the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). It was suggested that such question would need to be examined together with the possible amendments of the provisions of these conventions.

108. It was also said that the multilateral instrument would contain optional elements that could be opted in or out by a participating State. However, it was also questioned whether a flexible instrument with optional elements as contemplated might contribute to more fragmentation of the ISDS system and forum shopping. It was

further cautioned that complications might arise should the instrument permit certain reform options to be combined.

109. As to the temporal scope of such an instrument, a greater preference was expressed for an application to both existing and future treaties. In that respect, it was said that the whole purpose of a multilateral instrument was to make some, or all, of the reform options being developed applicable to existing investment treaties. Diverging views were expressed on whether a State-to-State mechanism should be one of the dispute settlement mechanisms to be provided in a multilateral instrument.

110. As to declarations to be allowed under the multilateral instrument, a wide range of views were expressed. In that context, it was suggested that where a State party did not make any declaration, it should be deemed to have opted for the dispute settlement method agreed on a bilateral basis (instead of being deemed to have opted for a determined dispute settlement framework). It was however felt that it was too early in the reform process to consider such matter.

111. Different views were expressed as to whether the development of a proposed multilateral instrument should be considered in parallel to the development of the other reform options or as part of the work on each reform option. It was said that the former approach would be preferred, in the interest of time, and given the nature of a multilateral instrument as a tool implementing all reforms. In addition, given the need to thoroughly analyse the form such instrument would take, as well as the legal implications of such an instrument, including on the existing ISDS framework, and other considerations, support was expressed for continuing work on a multilateral instrument on ISDS reform, including through intersessional work performed by interested delegations. It was also said that the latter approach was preferred, as the implementation of reform options through the mechanism of a multilateral instrument would depend on whether there was a need or desire to give States the possibility of applying the particular reform option to their existing investment treaties, and that it would be counterproductive to develop a rigid framework separately from each reform option and without regard to the pragmatic considerations noted in paragraph 103 above. Those delegations also took the position that there was no need for further work on the mechanism of the proposed instrument (as opposed to its ultimate contents and scheme) given that the mechanism was simple, and had been used by UNCITRAL in its work on transparency in treaty-based investor-State arbitration.

IV. Workplan and other issues

A. Work and resource plan

112. It was recalled that the Commission in September 2020 did not reach consensus on the resource requirements of the Working Group and that the topic was expected to be further considered by the Commission at its next session, in 2021. It was further recalled that the Commission had encouraged the Working Group to continue to make progress on its mandate.

113. In that light and as a way to develop a work and resourcing plan (the “plan”), it was agreed as follows:

- The chair and the rapporteur would work with all interested delegations to develop an initial draft of the plan with the support of the Secretariat.
- The plan would include, to the extent possible, specific ways for the Working Group to tackle various topics including tools and other mechanisms to be utilized, the sequence of work as well as the resources necessary to ensure that all meetings of the Working Group, including consultations, are fully inclusive.
- Once the initial draft of the plan was prepared, it would be circulated and open for comments in writing to the delegations of the Working Group.

- To facilitate the written-comment stage, the chair and the rapporteur would hold a number of informal explanatory sessions about the initial draft plan, in English, French and possibly Spanish.
- The chair and the rapporteur would review the comments and prepare a revised draft of the plan.
- The plan would be prepared intersessionally and an agreed plan would be presented to the Working Group at its next session in April 2021 for its approval and subsequently to the Commission in 2021 as the Working Group's plan.

B. Intersessional activity

114. The Working Group was informed that in light of the global COVID-19 situation, the intersessional meeting in Hong Kong, China, scheduled for the second half of 2020 would be postponed tentatively to the second half of 2021, and instead a virtual pre-intersessional meeting on the use of mediation in ISDS would be held on 9 November 2020. It was stated that the virtual pre-intersessional meeting would aim to facilitate the sharing of information on mediation and contribute to the discussion of the Working Group on the way forward for the strengthening of mediation as an ISDS reform option. Delegates were invited to attend the meeting.

115. The Working Group was further informed that the Academic Forum would be holding three webinars in English and in French (where possible), on the following topics prior to the fortieth session of the Working Group:

- Code of conduct (November 2020);
- Selection of adjudicators (January/February 2021); and
- Damages (March 2021).

C. Status of the Mauritius Convention on Transparency

116. During the deliberations, the Working Group was informed that Australia had ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration in September 2020 and that the Government of the Plurinational State of Bolivia was in the process of ratifying the Convention. In that light, States were urged to consider becoming a party to the Convention, which entered into force on 18 October 2017.

D. Translation of ISDS awards

117. The Working Group heard a proposal emphasizing the importance of translation of ISDS decisions and awards, in particular into French, as well as the advantages of disseminating such information in the development of investment law. There was some support for the proposal in light of the need to ensure multilingualism in ISDS reform. It was also mentioned that the linguistic capacity should be one of the competences to be considered in the selection of arbitrators to promote linguistic diversity. Nonetheless, it was pointed out that the translation of ISDS awards posed practical challenges, for example, identifying the resources for the translation and the languages in which the awards should be translated. In that context, it was suggested that the proposal could be further considered in the context of other reform options, such as an advisory centre or a standing multilateral body.