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12 January 2021

**Re: UNCITRAL Working Group III (ISDS Reform) - Informal online meetings  
- 6-10 December 2021**

Dear Delegates to Working Group III,

It is my pleasure to share with you a summary, prepared by the Rapporteur and myself with the assistance of the Secretariat, of the main points discussed during the informal meetings held on 6 to 10 December 2021 on the following topics:

- Code of Conduct – Article 11 (Compliance with the code of conduct) and means of implementation (organized jointly with ICSID);
- Financing aspects of a multilateral investment tribunal;
- Shareholders claims for reflective loss (organized jointly with the OECD); and
- Multilateral instrument on ISDS reform.

The purpose of the meetings was to explore topics in detail in order to support delegations in their preparation for the next Working Group meetings at which these topics will be considered and make such discussions more efficient. In addition, informal meetings can be helpful in providing technical support to the Secretariat tasked with the preparation of the working papers to be formally presented to the Working Group. No decisions were taken at these meetings.

The meetings were held in English and French, with the interpretation being sponsored by the German Federal Ministry for Economic Cooperation and Development (BMZ).

- ***Code of conduct (6 December)***

Participants considered **draft article 11 of the draft code of conduct for adjudicators (Code)** which addressed the question of compliance of adjudicators with the Code and sanctions, on the basis of the note prepared by the Secretariat (A/CN.9/WG.III/WP.209) available [here](#).

The discussions focussed on paragraphs 2 (“*The disqualification and removal procedures in the applicable rules or treaties shall apply to this Code*”) and 3 (on additional sanctions) of draft article 11 of the Code.

It was explained that the draft proposed to continue to apply the disqualification and removal procedures under the applicable rules or treaties and that consideration could be given to additional sanctions. A drafting suggestion on paragraph 2 was to add “or any other sanctions”.

Suggestions included the following:

- Regarding the sanctions, the following were mentioned:
  - o Reducing fees, noting however that this could not necessarily be implemented in all institutional settings (for instance, in the ICSID context, it would be difficult to apply financial sanctions as fees are paid in accordance with a set fees schedule);
  - o Reputational sanctions, which could consist of publishing information about violations of the Code of Conduct. As an example, it was suggested that arbitral institutions could draw up surveys (addressing for example, whether the award was issued in a reasonable time, there were any other specific concerns) to be circulated among the parties that have pending cases or concluded cases that year; the institutions could then publish the survey results at the end of each year allowing States and investors to review any concerns that might be raised about particular adjudicators;
  - o Recourse to professional accreditation bodies, for example, bar associations, to submit complaints, noting however that this might not be a workable solution, given that arbitrators are not necessarily part of such bodies, which also usually have their own rules and are organized locally.
- Regarding the authority which could impose the sanctions, it was suggested that:
  - o In an institutional setting, arbitral institutions could play a role, but there are also limits to the role institutions could or should play;
  - o In ad hoc arbitration, appointing authorities could apply sanctions, in particular sanctions of a financial nature;
  - o A body to be established as part of the reforms could monitor the implementation of the code, with the understanding that such body would not be created for the sole purpose of the Code;
  - o The World Bank sanction system could be referred to as a possible model.

- Regarding other means to implement sanctions, a suggestion was made to obtain the consent of the adjudicators on the application of the code, making it part of their terms of reference so that non-compliance could be dealt with as a contractual breach of obligation in front of State courts.

Regarding possible sanctions for failure to disclose pursuant to article 10 of the Code, it was noted that Article 10(5) provides that “*the fact of disclosure or failure to disclose does not by itself establish a breach of this Code*”. It was clarified that the drafting might be misleading, and a clearer approach would be to provide that a breach of article 10 would not necessarily constitute a ground for disqualification or removal.

Regarding the means of implementation of the Code, the solutions listed in document A/CN.9/WG.III/WP.208 (available [here](#)) were presented. Clarifications were sought regarding the possibility to attach the Code as an appendix to the ICSID and UNCITRAL Rules or to the declarations by arbitrators under these Rules. It was indicated that the matter would need to be decided by the Commission in relation to the UNCITRAL Rules. In relation to the ICSID Rules, it was noted that much would depend on the final wording of the rules, but that ICSID would consult its membership and determine if any specific changes were needed. Subject to this, it was likely that the Code could be attached as an appendix to the declaration of an ICSID adjudicator. A point underlined by many was the need to make the Code available as soon as possible for States and disputing parties.

- ***Cost of establishing a standing multilateral tribunal (7 December)***

Participants considered an outline of the working paper prepared by the Secretariat on the cost and financing of a permanent multilateral body (hereinafter, the “Tribunal”), available [here](#). In preparation of this outline, the Secretariat had sent a questionnaire to a number of international and regional courts and tribunals. The Secretariat expressed its gratitude for the answers received, which were considered useful in drafting the outline. It was suggested that the next iteration of the outline could provide more insights on various models of the Tribunal, including a standalone appellate mechanism.

After the presentation of the outline by the Secretariat, participants heard presentations by representatives of the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), the International Centre for the Settlement of Investment Disputes (ICSID), the Southern Common Market (MERCOSUR) Dispute Settlement Mechanism and the Mecanismo de Solución de Controversias Comerciales entre Centroamérica (MSC) at the Secretariat for Central American Economic Integration (SIECA), on the respective budgetary and financing structure of these bodies. Delegations thanked the representatives for their presentations, which were found to be informative. It was

suggested that the next iteration of the outline could contain certain elements found in other bodies, particularly the fee-based income model of ICSID.

Participants considered several aspects of the budgetary and financing structure of a multilateral investment tribunal.

Regarding the members of the Tribunal, views were expressed that part-time employment of judges should be avoided as this may replicate problems identified with regard to the current system. Accordingly, it was suggested that the outline should be adjusted to have fewer members of the Tribunal but with full-time employment status, for example, 9 full-time permanent judges in chambers of 3.

Also, it was suggested that pension and other benefits of the members of the Tribunal should be further elaborated. It was pointed out that costs relating to linguistic services (both translation and interpretation) should be reflected in the outline as they were a significant aspect of a number of tribunals.

It was pointed out that cost efficiency could be achieved by utilizing existing institutions. One possibility mentioned was to conclude facility cooperation agreements with related institutions.

Some doubts were expressed about relying on the budget of the United Nations to finance the Tribunal. Preference was expressed for the Tribunal to be financed by contributions by the States constituting the body and for the contributions to be weighted based on a number of elements so as to reduce the burden on developing and least developed countries. It was also stated that the user fee model should be given due consideration, while noting that these fees should not be too high and should not be used directly to remunerate the members of the Tribunal. It was also noted that a trust fund as used by the Caribbean Court of Justice could be established, which would manage contributions.

Delegations are invited to contact the secretariat for any comments or suggestions regarding the assumptions and other elements contained in the outline of the working paper.

- ***Shareholder claims for reflective loss (8 December)***

Participants considered the topic of shareholder claims for reflective loss. The Secretariat briefed the participants on prior discussions in the Working Group including the link with concerns expressed about multiple proceedings. The Academic Forum on ISDS presented an overview of their work on this topic.

Participants also heard a presentation of the Informal Discussion Paper of the Organisation for Economic Co-operation and Development (OECD) on "[Shareholder](#)

[Claims for Reflective Loss in Investment State Dispute Settlement: A “Component-by-Component” Approach to Reform Proposals](#)”. This paper builds on earlier work and inter-governmental discussions at the OECD as well as the discussions in Working Group III. The discussions at the OECD did not identify any policy reason that would explain the general allowance of shareholders’ claims for reflective loss in ISDS, or the difference between a government’s domestic law and its treaty policies on the issue.

The paper identifies as potential further components of future work the recourse to remedies in ISDS for directly-injured domestic companies, an express restatement of current ISDS interpretations considering emerging approaches on limiting instances where claims can be raised, and the development of procedural tools to address concerns.

The paper also includes a proposal for a draft provision to regulate shareholder claims in ISDS (“draft provision”). It was clarified, however, that the draft provision was to be understood as a first attempt to align the approach to shareholder claims for reflective loss in ISDS with the general approach in domestic law. The structure and main elements of the draft provision were further outlined.

#### *Discussions regarding the reasons for regulating shareholder claims*

Participants reiterated the concerns identified previously in the Working Group including an increased number of cases and multiple proceedings in ISDS, the cost and duration of ISDS proceedings, the lack of consistent outcomes and interpretations, double recovery, treaty shopping and the risk of excessive damages. It was suggested that given the linkage of reflective loss to other concerns identified by the Working Group, it could be efficient to deal with this issue as part of a package with other concerns.

Several views were expressed on the importance of work on this topic by the Working Group in the context of ISDS reform. It was suggested to make use of the established principles of corporate law and noted that this could be achieved with an approach as embodied in the draft provision in the OECD paper. Reference was also made to treaty provisions on shareholders’ claims in existing free trade agreements and international investment agreements.

However, views were also expressed that the concerns with regard to shareholder claims were theoretical and that there were good reasons to allow shareholders to bring claims for reflective loss, including the necessity of investors to form consortia in order to bear the high costs of investments.

### *Scope and definition of direct loss*

Comments were made that the definitions of direct and reflective loss in the draft provision would need to be further elaborated.

### *Exception for cases of expropriation*

Discussions also touched on article 4 of the draft provision, which was an exception to the general rule of no reflective loss claims, as shareholders would be allowed to raise claims in case the company was “directly and wholly” expropriated. Questions were raised with regard to the need for such an exception in cases in which the company has been compensated for the expropriation. However, it was mentioned that such an exception may be useful if the company was not fully compensated or the company was not in a position to raise related claims. Also, a concern was expressed that this exception, and more generally the issue of shareholder claims and responses thereto, could touch upon substantive aspects of ISDS, which would fall outside the scope of the mandate of the Working Group.

### **- *Multilateral instrument on ISDS reform (9-10 December)***

Participants considered the topic of a multilateral instrument on ISDS reform on the basis of document [A/CN.9/WG.III/WP.194](#), addressing the implementation of potential reform options developed by WG III.

### *Objective*

The aim of the multilateral instrument (the “instrument”) was discussed. It was noted that it would serve to:

- Implement the various reform elements through a single instrument;
- Ensure coherence and consistency of a reformed ISDS regime;
- Ensure the widest possible participation of States in ISDS reform.

### *Form*

To reach these objectives, it was said that the instrument should be in the form of an international treaty, and that it:

- Would provide for a simple mechanism to allow States to reform and incorporate in their treaties harmonized provisions;
- Would avoid that States engage in bilateral discussions to renegotiate existing BITs (particularly relevant for ‘first-generation’ treaties).

### *Scope*

Regarding the scope of the instrument, it was said that it should:

- Only regulate procedural issues, covering the reform options developed by the Working Group;
- Indicate that the international investment regime seeks to promote sustainable development;
- Also cover enforcement and implementation issues.

### *Structure/Flexibility*

The need for a flexible structure of the instrument was highlighted. It was emphasised that it should not be implied that States will accept all reform options, but that they should be allowed to opt into specific reform options according to their needs and policy choices. On the other hand, caution was also expressed that too much flexibility would lead to further fragmentation and unpredictability or at best preserve the status quo.

The following views were expressed:

- The instrument should allow for flexibility so that States can join certain mechanisms and reform options at different times. This means that the instrument should not only apply to existing agreements, but could also apply reform options to future agreements, i.e., if States wish to apply the treaty subsequently to BITs yet to be concluded or to apply reform options at a later stage.
- A regime that is not flexible would attract limited participation, while greater flexibility regarding scope and time would encourage increased participation/reform.
- The instrument should establish common/minimum standards to ensure uniformity and consistency of shared norms that all Parties to the instrument would commit to implement. It was also said that it might be difficult to agree on minimum standards on reform options.
- There should be a mechanism to allow for adjustments of the instrument over time to take into account developments in ISDS.
- There should be interpretative materials such as a guide to the instrument.
- There should be a mechanism to correct misinterpretations of the instrument by tribunals.
- There could be a framework convention on investment and sustainable development, which should contain objectives and scope, institutional provisions, procedures for adopting optional protocols and core/minimum standards. Such a convention could be supplemented by protocols and annexes on identified reforms.

### *Mechanisms for opting in or out*

Participants discussed how a process of opting into or out of the reform elements in the instrument would work.

The following views were expressed:

- The instrument should allow for the combination of various options by way of independent clauses or protocols for States to adopt (opt-in).
- There is a need to determine whether reservations (opt out) should be provided for in relation to each protocol.
- States should be able to use declarations as to their understanding or the interpretation of a particular provision.

- The establishment of default rules might be useful in the absence of a matching declaration/reservations by States. Also, where States Parties would be allowed to make a declaration as to whether any reformed dispute resolution mechanism provides an additional choice (supplementing existing investor-State provisions in their investment treaties) or an exclusive choice (entirely replacing such provisions), a default rule should be provided in case a State Party fails to make such a declaration. Questions were also raised as to whether the instrument could reform existing rules as a matter of treaty interpretation (where these are in a treaty and hence raise treaty interpretation issues – for e.g. articles 28, 30 and 41 of the Vienna Convention on the Law of Treaties), and even if they could, what the impact of this would be on the application of such rules which had been adopted by their respective organizations/institutions and operated as a cohesive regime.

*Institutional Framework – set up of a forum*

Participants discussed whether there should be an institutional framework for the implementation of the reforms, or whether a treaty framework would be sufficient.

Several views were expressed:

- It was said that an institutional framework would be fundamental to ensure oversight over the instrument; additionally, there would be a risk of further fragmentation if no overarching institutional framework would be created: however, it was also said that the creation of a specific body might be costly and time consuming, would be overly complicated, and the proliferation of new institutions should be avoided;
- With respect to an institutional framework, various models were mentioned: the WTO General Council, a forum for States to discuss general concerns relating to the ISDS reformed framework, and any further developments; as well as commissions or regular meetings of treaty parties as foreseen in FTAs and BITs; such models could alleviate costs concerns that go along with the creation of a full-fledged institution;
- It was also suggested that UNCITRAL could function as such a body; on that suggestion, it was noted that UNCITRAL could function as a place where matters of common interest would be considered, and implementation of any decision would be left to the Parties to the multilateral instrument; it was highlighted that UNCITRAL as a Commission of the UN General Assembly, could ensure the widest possible participation of States and that examples could be found in the UN context, such as the OLA division for Ocean Affairs servicing the Open-ended Informal Consultative Process.
- In that context, it was mentioned that in the past, UNCITRAL took over different functions, from issuing a recommendation regarding the interpretation of the New York Convention to serving as a repository, thereby providing the necessary structure to implement the UNCITRAL Rules on



Transparency in Treaty-based Investor-State Arbitration and that fulfilling such functions only depended on a clear mandate by member States.

*Application of reform options to existing treaties*

Participants said that the issue of application of reforms through the instrument to existing treaties is complex and needs to be considered further.

- Models of instruments to apply the reforms to existing treaties could be the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“Mauritius Convention”) and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“BEPS”).
- BEPS was said to have a useful system of notifications and listing of treaties to which the BEPS applies. In response, it was said that any system to be developed under the instrument ought to remain simple and easy to manage.
- It was mentioned that simplicity would be key so that States are not required to go through each treaty to compare with the provisions providing for the reform option; it was suggested that the reforms should be presented as a package for States to adopt.
- Limitations linked to the existing framework were mentioned. For example, the ICSID Convention could only be amended by consensus and precludes in its article 53 any appeal, thereby making it uncertain whether article 41 (as well as articles 28 and 30) of the Vienna Convention on the Law of Treaties could apply. Similar questions arise with respect to other parts of the ICSID Convention (a treaty) concerning, for example, voting (Article 6), Panels of Conciliators and Arbitrators (Articles 12-16), constitution and selection of arbitral tribunals (Articles 36-41), replacement and disqualification of arbitrators (Articles 56 – 58)
- A number of complicated international public law and treaty law matters would need to be considered when drafting the instrument. It was suggested to narrow down the list of issues to be looked at and subsequently organise an informal meeting with treaty law experts in the field.