UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

COMMISSION DES NATIONS UNIES POUR LE DROIT COMMERCIAL INTERNATIONAL

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27 June 2022

Re: UNCITRAL Working Group III (ISDS Reform) - Informal online meeting – 7-10 June 2022

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 7-10 June 2022, mainly on the following topics:

- Code of Conduct (organized jointly with ICSID);
- Procedural Rules Reform; and
- Multilateral instrument on ISDS reform

The purpose of these meetings was to present the draft working papers prepared by the Secretariat for the upcoming 43rd session of Working Group III (WG) in the second half of this year in order to support delegations in their preparation for the session and to support the Secretariat in the preparation of the working papers. No decisions were taken at these meetings.

The meetings were held in English and French, with the interpretation being sponsored by the Government of France.

7 June 2022 (Tuesday)

General information on way forward (Commission and WG)

On 7 June, information about the upcoming Commission session was provided. The chair provided a summary of the progress report he intended to give at that session. He noted that as the additional resources granted by the General Assembly to the work of ISDS reform at the end of 2021 has yet to be utilized, the oral report would touch upon how the resources will be utilized in the coming months. The Secretariat mentioned that it was in the process of recruiting staff members to support the work of the WG.

The chair also provided a general outline of the topics that the WG is expected to consider in the fall of this year (tentatively scheduled to take place from 5 to 16 September in Vienna)

as well as during the first half of 2023. The chair explained that the aim of the WG would be to move forward with a wide range of reform elements during the four weeks of conference time (two of the them utilizing the additional conference resources). The focus would be to complete the work with regard to the draft Code of Conduct (including the accompanying commentary) and texts on mediation and dispute prevention, and present the Code of Conduct and texts to the Commission in 2023.

The Secretariat noted that the Commission was expected to consider its working methods during the upcoming session in July, and that such decisions would have a significant impact on how the WG would conduct its work. These related to the means of taking decisions, adopting reports as well as the format of the meetings.

The documents that the Secretariat was preparing for the fall session of 2022 were outlined. The Secretariat updated that the commentary to the draft Code would not be available for the fall session due to the need for further coordination with ICSID. In that light, requests were made to have at least an outline of the commentary available or the English version of the commentary at the September session to assist the WG in considering the Code. It was suggested that WG members should provide input to the commentary, especially to provide illustrative examples where appropriate. It was suggested that a drafting group could be convened after the fall session so as to have a well-prepared draft ready for the sessions in early 2023.

Costs in International Investment Dispute Settlement by Academic Forum

During the second hour, the Academic Forum hosted a webinar on the "Costs in International Investment Dispute Settlement". Speakers discussed several aspects related to costs in ISDS, financing of a permanent mechanism and costs related to an appellate mechanism. Two papers of the Academic Forum respectively on Comparative Costs and Financing of Permanent Dispute Settlement Mechanisms and Excessive Costs and Recoverability of Cost Awards in Investment Arbitration were presented (available here).

8 -9 June 2022 (Wednesday)

The Secretariat presented an outline of the working papers that will be submitted to the 43rd session of Working Group with regards to procedural rules reform and cross-cutting issues, which also included draft provisions for regulating third-party funding and issues relating to assessment of damages and compensation (the respective presentations are available here). The Secretariat noted that the procedural rules that have been prepared to date relate to early dismissal of frivolous claims, security for costs, allocation of costs and counterclaims, the drafts of which were presented during the intersessional meeting hosted by the Republic of Korea on 2 and 3 September 2021. The Secretariat also highlighted that the Commission will consider

during its upcoming 55th session a document on early dismissal and preliminary determination based on the deliberations of Working Group II (available here).

The Secretariat noted that the fall session would be the first time that the Working Group would consider the draft provisions and that there had been no previous decisions made by the Working Group and that it was for the Working Group to decide what other rules might be developed. For example, the Working Group will need to consider the intended model and scope of regulation relating to third-party funding. With regards to damages, the paper would capture the concerns raised with regard to the inconsistency and unpredictability of awards on damages, valuation methods, including calculation of interest and divergence of expert damage calculations. The Secretariat further updated that it was continuing its preparatory work on other procedural rules and cross-cutting issues, such as the right to regulate, exhaustion of local remedies and denial of benefits.

The Secretariat said that the draft provisions were being prepared in the form of model treaty provisions and not in conjunction with the UNCITRAL Arbitration Rules as the aim of the reform that the WG was seeking was broader. Such provisions could be incorporated into investment treaties or a multilateral treaty on ISDS reform but would need to be adjusted if they were to be part of the UNCITRAL Arbitration Rules. The Working Group would need to consider how best to implement such procedural rules reforms.

Draft Code of Conduct (Code)

Participants were informed that an updated version of the Code, resulting from the previous two sessions of the Working Group and subsequent joint work by the UNCITRAL and ICSID Secretariats, was being prepared for the upcoming Working Group session. This version contained some editorial changes, which would be explained in the notes to the Working Group. These changes and the content of the notes, which would be reflected in the next Working Paper, were presented during the informal discussion:

Article 1

- The order of the definitions in subparagraphs (b), (c) and (d) would be changed for increased coherence and consistency, and a slightly refined definition of ex parte communication would be inserted as a new subparagraph (g) in lieu and place of article 7(1);
- Possible issues for the Working Group to consider would be whether to include temporal elements related to the obligations of adjudicators in the following articles of the Code (notably, in article 3(1)) in light of the definitions of arbitrator and judge in article 1, and whether to retain the bracketed language in subparagraph (f) on assistants which could instead be explained and developed further in the commentary.

Article 2

- Changes to paragraph 1 and 2 would include removing the distinct references to provisions on ethics, a code of conduct other than the Code, and the instrument upon which consent to adjudicate is based, which would be jointly captured by the wording "provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding" and "such provisions", to ensure consistency and make a clear distinction between such provisions and the Code;
- Possible issues for the Working Group to consider would include clarifying the complementary nature of the Code and providing concrete examples of what the term "inconsistencies" would cover.

Article 3

- Changes would include referring to "any of their legal representatives" in paragraph 1, replacing the term "duty" by "function" in subparagraph 2(f), and possibly moving here as a new subparagraph (c) the obligation related to the delegation of decision-making functions originally incorporated in article 5. Another possible change in paragraph 1 could be to remove the reference to the conclusion of the IID proceedings and only retain language referring to "the end of his or her term of office", although this might trigger difficulties in defining what such language would cover concretely;
- Possible issues for the Working Group to consider would include providing further guidance on the meaning of the term "loyalty" in subparagraph 2(a), whether to delete the phrase "or judgment" in subparagraph (c) as that could already be captured by the word "conduct", and whether to delete the word "significant" in subparagraph (d) as the focus of the prohibition in that subparagraph would be on the use of such interest rather than the level of interest.

Article 4

- Changes would include replacing in paragraph 2 the phrase "would create the appearance of a lack of independence or impartiality" with "would be in breach of article 3" for more accuracy. Other editorial changes would include using the singular form when referring to arbitrators and judges throughout the Code.
- Possible issues for the Working Group to consider would include clarifying the meaning of the phrase "conclusion of the IID proceeding" in paragraphs 1 and 2, providing general language in the Code on the possibility for the disputing parties to derogate from the Code, and whether to retain the three-year period in article 4 (and if/how the commentary should explain that this temporal limitation relates to the obligation of independence and impartiality under article 3).
- The question of how/to what extent an adjudicator who has resigned from an IID proceeding (meaning, prior to the conclusion of the proceeding and no longer an

adjudicator subject to the Code) would be subject to the limitation in article 4 was raised. It was suggested that this might need to be addressed separately in the article.

Article 5

- Possible issues for the Working Group to consider would include replacing the term "duty/ies" with a more appropriate and neutral term such as for instance "role" or "function", whether to retain subparagraph 1(d) that would arguably be covered under subparagraph 1(a), and whether former subparagraph 1(e) on the delegation of decision-making functions would be better placed under article 3.

Article 6

- Possible issues and suggested changes for the Working Group to consider would include whether the heading of article 6 "Integrity and competence" was appropriate, whether the obligation to treat participants with civility could already be subsumed under paragraph 1(a) and the corresponding subparagraph (b) therefore deleted, and whether to delete paragraphs 2 and 3 or replace them with a general assertion as found in article 11(2) as the assessment of skills and competence would for arbitrators be a self-determination and for judges be assessed at the selection phase in accordance with the applicable rules.

Article 7

- Changes would include clarifying the default rule and the exceptions regarding ex parte communication as defined in article 1, deleting the temporal element of the prohibition, and inserting a new paragraph for judges.

- Possible issues for consideration would be whether the contents in paragraph 2 could be explained in the commentary, and whether it would be possible for an arbitrator who had rendered the award or had been disqualified to communicate with the parties as they would no longer be bound by the Code and article 7.

- A pending issue for clarification would be whether communications between a party-appointed arbitrator and a disputing party regarding a candidate for presiding arbitrator would be covered under either subparagraph 1(a) or 1(b).

Article 8

- Possible issues and changes for consideration would be to clarify the scope of the phrase "publicly available" in paragraphs 1 and 3, whether the temporal elements in paragraph 5 should be deleted, and how the obligation in that paragraph could be enforced as an individual would not be subject to the Code following the IID proceeding.

- Further issues for clarification would be whether paragraph 4 would be inconsistent with paragraph 1, or if the exceptions in paragraph 1 would also apply to paragraphs 2 and 4.

Article 9

- Changes would include updating the structure as article 9 would apply only to arbitrator and arbitrator candidates, inserting a new paragraph 3 concerning the discussions on fees and expenses of an assistant, and clarifying in paragraph 5 that arbitrators should also make expenses records available upon request.
- Possible issues for consideration would include confirming the aspirational nature of paragraph 2, and whether the Code or the commentary should cover the question of reasonableness of fees and expenses found under existing arbitral rules.

Article 10

- Possible issues for consideration would be providing guidance on possibly improving the structure of the article, clarifying whether the inclusion of the phrase "in the eyes of the disputing parties" in paragraph 1 would broaden the existing standard of "justifiable doubts" and whether a risk of confusion would result therefrom, whether an alternative formulation of the chapeau in paragraph 2 would be advisable in order to indicate the non-imperative nature of the items to be disclosed under that paragraph, and clarifying in paragraph 7 whether non-compliance with article 10 would be a factual case-by-case assessment.

Article 11

- Changes would include the insertion of new paragraphs 2 and 4 to reflect the previous deliberations of the Working Group, and a redrafting of paragraph 3 clarifying that non-compliance with the article of the Code would not form the basis of challenges or remedies unless provided for in the applicable rules or treaty.
- Possible issues for consideration at the Working Group would be whether to retain paragraphs 1 and 2 as they refer to voluntary compliance by adjudicators, whether paragraph 4 is appropriate considering that the Code does not contain specific provisions applicable to assistants and clarifying what would be the consequences of non-compliance with paragraph 4.

10 June 2022

Multilateral instrument on ISDS Reform

The last day focused on the multilateral instrument on ISDS reform. Views of selected treaty law and public international law experts on document A/CN.9/WG III/194, which outlined the basic elements of such a multilateral instrument, were shared. The Secretariat also

shared their intention to widen the pool of treaty law and public international law experts, preferably from different parts of the word.

The starting point of the reflections was the Vienna Convention on the Law of Treaties (VCLT), which was the "treaty on treaties" and formulated based on customary international law. The VCLT was based on two basic principles: a State must consent to be bound; and once it expressed consent, is bound. As VCLT provided flexibility, VCLT can accommodate any treaty architecture and form States wished to agree on subject to only very few limitations. For instance, States could agree to replace their respective bilateral (or multilateral) agreements by a new multilateral one, or to supplement existing treaties. Similarly, it would be possible for each State to be given the choice of whether and to what extent it wished to adopt different reform elements. This would encompass different layers of commitment and obligations for States, and make regular revisions of the treaty or parts thereof possible. All of these different approaches were supported by examples.

However, it was emphasised by the experts that flexibility and coherence needed to be balanced to make sure that the ISDS regime would not be further fragmented and rendered unclear and thereby inaccessible to users. As ISDS impacts not only relations between States, but also a State’s relations with investors and the general public and its interest, coherence would be an important element of reform. The need for clarity and legal certainty was emphasised. Depending on the treaty model adopted, robust administration of the multilateral instrument could require a treaty monitoring body or regular meetings of the treaty parties to account for necessary changes and provide a monitoring forum for challenges in the implementation.

Certain legal techniques were discussed by the experts, such as a framework convention providing for certain core elements agreeable to all States, with accompanying protocols, which would contain those reform elements that only certain States wish to take up (or which States may wish to join at different points in time). Some doubts were expressed by the experts about offering States a menu of different solutions from which they could incorporate freely any element without agreeing on any minimum standards, noting that this could fragment the ISDS framework. Opt-in, opt-out solutions were discussed, as well as providing flexibility via reservations. With regard to the latter approach, it was suggested by the experts that reservations be allowed in limited circumstances with clear language on those that would be permitted.

In summary, the experts stated that once the States were able to identify the exact outcome that they want, it would be possible to work out a tailor-made solution in the form of a multilateral instrument.