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United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform)

Thirty-fourth session

Vienna, 27 November-1 December 2017

Annotated provisional agenda

I. Provisional agenda

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

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following: Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), Malaysia (2019), Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2022), Sri Lanka (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where



the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The thirty-fourth session of the Working Group will be held at the Vienna International Centre, from 27 November to 1 December 2017. Meeting hours will be from 9.30 a.m. to 12.30 p.m. and from 2 to 5 p.m., except on Monday, 27 November 2017, when the session will be opened at 10 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Possible reform of investor-State dispute settlement (ISDS)

(a) Previous deliberations

5. At its forty-eighth session, in 2015, the Commission noted that the current circumstances in relation to investor-State arbitration posed challenges and proposals for reform had been formulated by a number of organizations. In that context, the Commission was informed that the Secretariat was conducting a study on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“Mauritius Convention on Transparency” or “Mauritius Convention”) could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations, including the Centre for International Dispute Settlement (CIDS), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School. In that light, the Secretariat was requested to report to the Commission at a future session with an update on the matter.¹

6. Pursuant to that request, at its forty-ninth session in 2016, the Commission had before it a note providing an update on a study conducted within the framework of a research project of CIDS, and a short overview of its outcome (A/CN.9/890). At that session, the Commission heard an oral presentation of the CIDS study which sought to provide a preliminary analysis of the issues that would need to be considered if a reform of the investor-State dispute settlement (also referred to as “ISDS”) regime were to be pursued at a multilateral level. The resultant report (referred to below as the “CIDS report”),² considered two possible reform options in depth: (i) creation of a permanent international dispute settlement body providing direct access to private parties and States parties alike for investment related matters; and (ii) establishment of an appeals mechanism for investor-State arbitral awards. It was highlighted that the final section of the CIDS report addressed possible means for States to incorporate those options into their existing and future investment treaties, and concluded that, although not the only possible solution that could be envisaged for that purpose, a convention modelled on the Mauritius Convention on Transparency with certain adaptations could effectively extend new dispute settlement options to existing investment treaties.

7. After discussion, the Commission requested the Secretariat to review how the project described in document A/CN.9/890 might be best carried forward, if

¹ *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 268.

² Kaufmann-Kohler, Gabrielle, and Michele Potestà. “Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?” Analysis and road map (2016), available via the UNCITRAL website at: http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

approved as a topic of future work at the fiftieth session of the Commission. In so doing, the Secretariat was requested to conduct broad consultations,³ and to take into consideration the views of all States and other stakeholders, including on how this project might interact with other initiatives in this area and on the format and processes that could be used.

8. The Commission also decided to retain two additional topics in the field of investment arbitration on its agenda for further consideration: possible future work on concurrent proceedings and on ethics for arbitrators.⁴ It further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all three topics so that the Commission would be in a position to make an informed decision on whether to mandate a working group to undertake work in any or all of them.⁵

9. 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 Investor-State Dispute Settlement Framework (A/CN.9/918 and addenda).

10. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).⁶

11. At its thirty-fourth session, the Working Group is expected to start work on consideration of possible reform of investor-State dispute settlement (ISDS) on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and with reference to the documents set out above, which were before the Commission at its forty-ninth and fiftieth sessions.

(b) Documentation

12. The Working Group will have before it a Note by the Secretariat: Possible reform of investor-State dispute settlement (ISDS), A/CN.9/WG.III/WP.142.

13. The Working Group will also have before it the following documents that were before the Commission at its fiftieth session:

- Note by the Secretariat: Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration, A/CN.9/915;

³ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 187-194.

⁴ *Ibid.*, paras. 175-186.

⁵ *Ibid.*, para. 195.

⁶ *Ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 264.

- Note by the Secretariat: Possible future work in the field of dispute settlement: Ethics in international arbitration, [A/CN.9/916](#); and
 - Note by the Secretariat: Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS), [A/CN.9/917](#).
14. A limited number of the following background documents will be made available at the session:
- Reports of the United Nations Commission on International Trade Law on the work of its forty-eighth session (*Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*); forty-ninth session (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*); and fiftieth session (*Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*);
 - Note by the Secretariat: Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement, [A/CN.9/890](#);
 - Compilation of comments by States and international organizations, Investor-State Dispute Settlement Framework, [A/CN.9/918](#) and addenda.
15. UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Item 5. Adoption of the report

16. The Working Group may wish to adopt, at the close of its session, a report for submission to the fifty-first session of the Commission, scheduled to be held in New York, from 25 June to 13 July 2018. The main conclusions reached by the Working Group at its first meeting (on Friday morning) will be summarily read out for the record at the second meeting and subsequently incorporated into the report.

IV. Scheduling of meetings

17. The thirty-fourth session of the Working Group will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,⁷ the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

18. The Working Group may wish to note that its thirty-fifth session is scheduled to be held in New York, from 23-27 April 2018.

⁷ *Ibid.*, *Fifty-sixth Session, Supplement No. 17* and corrigendum ([A/56/17](#) and Corr.3), para. 381.