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Possible reform of investor-State dispute settlement (ISDS)

Information on options for implementing a workplan

Note by the Secretariat

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I. Introduction

1. At its fiftieth session, in 2017, the Commission had 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 fully transparent. The Working Group would proceed to: (i) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission had 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 on-going 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

2. The Working Group commenced work on the topic at its thirty-fourth session (Vienna, 27 November – 1 December 2017). At its thirty-sixth session (Vienna, 29 October – 2 November 2018), the Working Group had agreed that it would next have to develop a workplan to address the concerns for which it had decided that reform by UNCITRAL was desirable (A/CN.9/964, para.138). In that context, it requested the Secretariat to prepare for its consideration a note on the options available to facilitate the workplan to be developed for the third phase of its mandate (A/CN.9/964, para. 140).

3. This Note, in responding to that request, describes various possibilities for the deliberation process and the development of instruments, and identifies their main resource implications.

II. Options for implementing a workplan

A. Means available within the existing resources

4. Since its establishment,² UNCITRAL has carried out most of the legislative part of its mandate through an intergovernmental process organized in various fora within the United Nations. The first is its regular annual sessions, where the Commission, *inter alia*, finalizes legal texts; the second is the working groups (currently six in number), where legal texts are prepared; and the third is other intergovernmental meetings, such as congresses and colloquiums.

5. By way of background, it may be noted that the development of UNCITRAL texts as a matter of course is usually undertaken through the working group process. The Commission recognized “the link between that formal negotiation process and the universal applicability and hence acceptance of UNCITRAL texts, the importance of the transparency that that process confer[s]”,³ and the inclusive⁴ and multilingual⁵

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 264.

² See General Assembly resolution 2205(XXI) of 17 December 1966.

³ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 300.

⁴ The process is designed to ensure that all regions and all levels of development are appropriately included in deliberations and decision-taking (see further information available on the UNCITRAL website, at https://uncitral.un.org/en/about/faq/mandate_composition and <https://uncitral.un.org/en/about/faq/methods>).

⁵ Working papers and reports of working group sessions are made available on the website of UNCITRAL in the six official languages of the United Nations; the sessions of the Commission and of the working groups are facilitated by simultaneous interpretation in those official languages.

working methods of UNCITRAL. These methods, the Commission has recognized, help avoid the dominance of specialized groups and interests. The Commission also noted that the “flexibility of the methods successfully used by the Commission” in deliberations and decision-taking contributes to UNCITRAL’s effectiveness and efficiency.⁶ In the same vein, when issuing the mandate to Working Group III, the Commission noted that “UNCITRAL provided an appropriate multilateral forum to discuss relevant issues in an inclusive and transparent manner, where the interests not only of States but also of other stakeholders could be considered”. It was recalled that UNCITRAL had successfully undertaken a reform of investor-State dispute settlement with the preparation of standards on transparency.⁷

Annual allocation of conference time to UNCITRAL

6. Meetings of the Commission and its working groups are held using conference time allotted to UNCITRAL, which is currently a maximum of fifteen weeks per year.⁸ Three weeks of conference time are generally allocated for the annual session of the Commission. The Commission has on several occasions used up to one week of its session to consider and finalize a draft text,⁹ and has sometimes established Committees of the Whole for similar purposes.¹⁰ Provided that the session of the Commission does not extend beyond its conference time allotment, there are no budgetary implications of this approach for the Commission.

7. In 2003, the Commission agreed that its six working groups should normally meet for a one-week session twice a year, and that should one working group meet for less than the notionally allotted two weeks, the unused time could be used by another working group. Thus, for example, the unused conference time that would otherwise have been allocated to Working Group II during the fall 2018 was taken up with an intergovernmental expert group meeting on privately financed infrastructure projects.¹¹ Similarly, two days of unused time during the session of the Commission in 2018 were devoted to the same topic.¹²

8. It is not foreseen that there will be unused working group time that could be made available for Working Group III before the fifty-second session of the Commission in July 2019. However, at its fifty-first session, in 2018, the Commission agreed that it would aim to complete its work agenda in the first two weeks of the session, with the third week being available for other purposes.¹³ There is a possibility, therefore, for the Commission to decide allocating one week to a working group or project of its choice.

⁶ UNCITRAL decisions are consensus-based; see *UNCITRAL rules of procedure and methods of work* (A/CN.9/638/Add.4), and *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 387.

⁷ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para 258.

⁸ Three weeks are allocated to the Commission, and twelve weeks to the six working groups.

⁹ For example, when finalizing the draft Model Law on Public Procurement in 2011 (see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 13–191) and the UNCITRAL Notes on Organizing Arbitral proceedings in 2015 (see *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 14–132).

¹⁰ Such a Committee is established by the Commission during its annual session in relation to the formulation of normative texts; for an example, see the process for considering and provisionally approving parts of the Model Law on Secured Transactions in 2015, *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 12 and 169–213; for a more detailed consideration of Committees of the Whole, see *UNCITRAL rules of procedure and methods of work* (A/CN.9/638/Add.1), paras. 17–21.

¹¹ The expert group meeting was held in Vienna on 26–30 November 2018 (see https://uncitral.un.org/en/working_groups/1/pfip).

¹² *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), paras. 135–137.

¹³ *Ibid.*, para. 283.

Flexible allocation of time and topics

9. Working groups have held joint sessions where they are considering topics that interact, both to coordinate the work and to ensure consistency.¹⁴ Mandates to address overlapping topics have then been split between two working groups, an approach that could apply to Working Group III and Working Group II (Arbitration and Conciliation/Dispute settlement). For example, Working Group II could take up issues relating to arbitration practice for which Working Group III has identified reform is desirable, and is not limited to ISDS.

10. It may also be noted that while working groups usually meet for a one-week session twice a year, as noted above, the Commission could be requested to consider allocating two topics to one working group, which could then share the conference time available to that working group.

Meetings in the margin of Commission and working group sessions

11. The Commission agreed that greater use of informal consultations and drafting groups in the margins of Commission and working group sessions might enhance the use of meeting time for both the Commission and working groups. By way of example, the Commission noted the positive experience where States resolved controversies and finalized text through such consultations prior to the adoption of the Model Law on Public Procurement,¹⁵ and similarly for the Convention on International Settlement Agreements Resulting from Mediation.¹⁶ More generally, the Commission has invited “delegations to resort to informal consultations prior to actual meetings, thus reserving conference time only for those issues which required extensive deliberation, both formal and informal, in the context of Commission and working group meetings.”¹⁷

Colloquia and other forms of meeting

12. UNCITRAL regularly holds subject-specific colloquia, including on aspects of dispute resolution, and to promote its texts or mark special dates.¹⁸ Many past colloquia were held jointly with other organizations.¹⁹ While they generally consider topics that might be of future interest to UNCITRAL, they have also considered texts under development.²⁰ Colloquia may be intergovernmental in nature, and held using several days of Commission or working group session time.²¹

¹⁴ As an illustration, Working Groups V (Insolvency Law) and VI (Security Interests) held joint sessions in 2003 and 2004 to coordinate insolvency aspects of the Legislative Guide on Secured Transactions (A/CN.9/535 and A/CN.9/550); in 2005, an informal joint meeting of experts from Working Group IV (Electronic Commerce) and Working Group III (Transport Law) took place in London to consider the provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] as they related to electronic commerce (A/CN.9/WG.III/WP.47).

¹⁵ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 343.

¹⁶ *Ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 238; see also *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 31 and 62.

¹⁷ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para 382.

¹⁸ See more information available on the UNCITRAL website at <https://uncitral.un.org/en/colloquia>.

¹⁹ For example, the work of UNCITRAL on insolvency law, undertaken in Working Group V, has been supported by a series of colloquia held jointly by UNCITRAL, the World Bank and INSOL (see <https://uncitral.un.org/en/colloquia/insolvency>). The latter two organizations have hosted many of these colloquia, and the UNCITRAL Secretariat resource implications have been, broadly speaking, limited to Secretariat preparation and travel time.

²⁰ See, for example, the colloquia on Public-Private Partnerships and Privately-Financed Infrastructure at <https://uncitral.un.org/en/colloquia>.

²¹ For instance, at its thirty-fifth session, the Working Group heard suggestions to the effect that UNCITRAL and the International Centre for the Settlement of Investment Disputes (ICSID) might cooperate in developing elements of a code of conduct and other ethical requirements for arbitrators (see A/CN.9/935, para. 64). If the project is pursued, joint meetings of UNCITRAL

Inter-sessional meetings and other ways of supporting progress in-between working group sessions

13. Informal meetings of States can be held at the invitation of a Government. The inter-sessional meetings to support Working Group III reflect this general approach (see A/CN.9/935, paras. 101–102). When welcoming the first Inter-Sessional Regional Meeting in Incheon, Republic of Korea, the Working Group noted that such meeting would be designed to discuss in a regional context some or all the issues before the Working Group (see A/CN.9/935, para. 101), and the Commission took note that while the event would provide an open forum for high-level Government representatives and relevant stakeholders in the Asia-Pacific region to discuss those issues, no decisions would be made.²² The Working Group may wish to note that a second inter-sessional meeting is scheduled to be held in Santo Domingo (Dominican Republic) on 13–14 February 2019.

14. The Secretariat has also the flexibility to organize informal work to suit the needs of each relevant subject area. While noting the benefit of informal meetings, the Commission also agreed that the Secretariat should endeavour, resources permitting, to provide translation and interpretation in as many official languages as appropriate when holding such meetings.²³ The Working Group may wish to take this expectation into account in planning any meetings outside its formal sessions.

Human and financial resources in the Secretariat

15. Regarding financial aspects, the Working Group may wish to note that participation in UNCITRAL meetings is not financially supported so that, in principle, participants are expected to self-fund. The General Assembly established the UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL in 1993, recognizing that a lack of financial resources is a barrier to participation in UNCITRAL sessions.²⁴ Contributions to the trust fund are encouraged. It may be noted that, recently, the European Union and the Swiss Agency for Development and Cooperation have provided financial assistance to support broad participation in Working Group III, and other donors have expressed interest. Support was also received from the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH at the thirty-sixth session of the Working Group.

B. Means involving additional resources

Increasing the conference time allotted to UNCITRAL

16. A working group may request the Commission for additional time for its deliberations in its report to the Commission, with “proper justification” for the increased time allocation. Where the Commission considers that additional conference time would be required, it would need to reach a decision, which would then be conveyed to the General Assembly.²⁵ Therefore, member States of the

and ICSID for that purpose can be envisaged and would fall under that category.

²² *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 146.

²³ *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, Annex III, paras 13–14.

²⁴ See Frequently Asked Question, “*Are delegates provided financial assistance for travel and accommodation?*”, at https://uncitral.un.org/en/about/faq/mandate_composition/history.

²⁵ This would involve requesting additional conference time from the Department for General Assembly and Conference Management (DGACM), which manages a budget of its own. Considering that the available conference time of DGACM is likely to be limited, this would most probably require allocation of additional budget to DGACM. In order to request allocation of additional budget, the Secretariat (the United Nations Secretariat or DGACM more specifically) could include it in the proposed budget for 2020 or submit the request along with the draft omnibus resolution to the Sixth Committee (Legal). As the resolution (granting additional conference time to the Commission) would have budget implications, the Secretariat (most likely, the International Trade Law Division of the United Nations Office of Legal Affairs, which serves as the UNCITRAL secretariat, and DGACM jointly) would need to issue a formal

Commission would need to coordinate closely with their State representatives in the respective General Assembly committees to ensure that they are aware of the need for additional conference time. The Working Group may wish to note that the costs of servicing a one-week meeting within the entitlement to conference services support for regular calendar meetings of UNCITRAL or its working groups amount to USD 192,756.²⁶

Creation of additional working groups

17. In view of the overall conference time currently available for UNCITRAL and its working groups, and considering that one week is the minimum time needed to allow for meaningful deliberations and the preparation and adoption of a working group session report, since 2001, when the Commission decided to expand the work programme to cover six topics (as opposed to only three as had been previously the case),²⁷ the usual practice has been for each working group to hold two one-week sessions per year for each topic. The Commission was able to expand the work programme on its own because that decision did not require additional conference time. Should the Commission decide to increase the number of working groups once again, it would need to seek additional conference and secretariat resources.

Stand-alone period of conference time for special projects

18. Should the workplan include consideration of one or more multilateral instruments and texts, the Working Group may wish to note that draft conventions prepared by the Commission and its working groups must be reviewed and adopted by ad hoc diplomatic conferences convened by a member State, although in recent years the prevailing practice has been for those draft conventions to be presented to the General Assembly of the United Nations, which reviews and adopts them acting as a conference of plenipotentiaries. In the event that a preferred option would be to hold an ad hoc diplomatic conference for adoption of a multilateral instrument prepared by UNCITRAL, the Commission should make a recommendation to the General Assembly for that purpose which could include the object of the conference as well as the relevant rules and conditions for State participation.²⁸ The UNCITRAL

programme budget implication (PBI) report to the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Fifth Committee (Administrative and Budgetary) on the additional resources required. ACABQ and the Fifth Committee would review the PBI report along with the Sixth Committee, so that the General Assembly would eventually adopt a resolution permitting allocation of additional resources.

²⁶ This amount has been determined on the basis of the cost of conference services, estimated at USD 128,638, and the cost of translating pre-session documents (30 pages) and the report (25 pages), i.e., USD 64,118. It may be noted that, in 2011, the Commission expressed the view that servicing six working groups stretched the resources of the UNCITRAL secretariat to the maximum (see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 342); for information, the Secretariat consists of fourteen lawyers to service the six working groups and the Commission, and to support the adoption and use of UNCITRAL texts. Additional meetings or working groups would consequently have implications on the human resources within the Secretariat.

²⁷ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 376–383.

²⁸ For a discussion in the Commission on modalities of adopting a convention, and its decision that UNCITRAL would proceed to finalize a text and to recommend its adoption in the General Assembly, see *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, paras. 212 and 213. For the first example of the adoption of a Convention through that mechanism, see *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 304. As reported to the Commission in 2017, the consultations preceding the granting of the current mandate to Working Group III mentioned examples of international courts set up under the auspices of the United Nations, including the International Criminal Court (ICC). The processes of establishing the ICC, following the adoption of its draft statute by the International Law Commission, involved convening an international conference of plenipotentiaries and Ad Hoc and Preparatory Committees open to all States members of the United Nations or members of specialized agencies to finalize the draft Statute. This was based

Secretariat could also be called on to provide the secretariat services to the diplomatic conference.

III. Questions for consideration

19. The Working Group may wish to consider the various additional means and resources to support its work, and assess how to provide for appropriate transparency, multilingualism and inclusiveness mandated by the Commission in their application. These means and tools include the following:

- Determining whether unused conference time could be devoted to progressing the workplan (see above, paras. 8 and 10);
- Holding joint session on determined topics with another working group (see above, para. 9);
- Holding expert group meetings, organizing colloquiums or other forms of meeting in addition to the inter-sessional regional meetings (see above, paras. 12–14);
- Considering support that States may provide.

20. The Working Group may wish to consider whether to request the Commission to consider allocation of additional resources, as indicated above in para. 16. If so, the Working Group would need to request the Commission for additional time for its deliberations in its report to the Commission, with “proper justification” for the increased time allocation, which could include the need to implement the workplan and to consider in parallel different projects submitted by States. The Commission has decided that, if any request by a working group for extra time would result in the increase of the twelve-week allotment of conference time to the working groups, the request and justification will be reviewed by the Commission.²⁹ The Working Group may wish to note that should the procedure described under para. 16 be followed, resources would then be available for use in 2020.

on the recommendation by the International Law Commission to the General Assembly, which convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998 by adopting a resolution. The United Nations Secretariat prepared the text of the draft rules of procedure of the Conference and established trust funds for the participation of least developed countries and developing countries in the work of the Preparatory Committee and in the Conference.

²⁹ *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.