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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017)

Part I*

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* Part II of this Report will be issued as A/CN.9/930/Add.1/Rev.1.

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I. Introduction

1. 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]

2. 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 (referred to below as the "CIDS report"),[2] and a short overview of its outcome (A/CN.9/890).

3. 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 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.

4. 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]

5. 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).

6. 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,

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[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.

[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.

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]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its thirty-fourth session in Vienna, from 27 November–1 December 2017. The session was attended by the following States members of the Working Group: Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), 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), Kuwait (2019), Malaysia (2019), Mauritius (2022), Mexico (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Singapore (2019), Spain (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022) and Venezuela (Bolivarian Republic of) (2022).

8. The session was attended by observers from the following States: Albania, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Costa Rica, Croatia, Cyprus, Dominican Republic, Egypt, Estonia, Finland, Georgia, Iceland, Malta, Montenegro, Morocco, Netherlands, New Zealand, Niger, Norway, Paraguay, Peru, Portugal, Saudi Arabia, Serbia, Slovakia, South Africa, Sudan, Sweden, Uruguay and Viet Nam.

9. The session was also attended by observers from the European Union.

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

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Energy Community Secretariat, Gulf Cooperation Council (GCC), Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Arab Association for International Arbitration (AAIA), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Association for the Promotion of Arbitration in Africa (APAA), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Dispute Settlement (CIDS), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), CISG Advisory Council (CISG-AC), Council of the Interparliamentary

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

Assembly of Member Nations of the Commonwealth of Independent States (CIS), Forum for International Conciliation and Arbitration (FICA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Moot Alumni Association (MAA), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration, Lagos (RCICAL), Russian Arbitration Association (RAA), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration), Swiss Arbitration Association (ASA) and Vienna International Arbitration Centre (VIAC).

Election of officers

11. The Working Group proceeded to elect the chairperson for the session. The importance of transparency, neutrality and inclusiveness of the process and of the deliberations of the Working Group were emphasized. Proposals to elect a chairperson and a rapporteur, who would alternate their roles in subsequent sessions, and to elect co-chairs did not gain support.

12. In the absence of consensus on the election of a chairperson and having received more than one nomination for that position, the Working Group proceeded with the election of the chairperson by secret ballot in accordance with the Rules of Procedure of the General Assembly as applicable to UNCITRAL.

13. Forty-five ballots were cast, of which one was invalid; forty-four ballots were valid; there were three abstentions; the number of States members of the Working Group present and voting were therefore forty-one and the required majority for the election was twenty-one.

14. Mr. Shane Spelliscy (Canada) having obtained twenty-four votes and consequently the required majority in the first ballot, was elected as the Chairperson of the session.

15. The Working Group elected as Rapporteur Ms. Natalie Yu-Lin Morris-Sharma (Singapore).

Documents and adoption of the agenda

16. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.III/WP.141); and (b) notes by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS)" (A/CN.9/WG.III/WP.142) and on submissions from International Intergovernmental Organizations (A/CN.9/WG.III/WP.143).

17. The Working Group adopted the following 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. Adoption of the report.

III. Deliberations and decisions

18. The Working Group considered agenda item 4 on the basis of the notes by the Secretariat (A/CN.9/WG.III/WP.142 and A/CN.9/WG.III/WP.143). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV.

IV. Possible reform of Investor-State Dispute Settlement

A. General remarks

19. It was recalled at the outset that the mandate given to the Working Group contained three stages: (i) to identify and consider concerns regarding ISDS; (ii) to consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission.[7]

20. It was also recalled that ISDS provided a method to enforce the substantive obligations of States. It was noted that critical questions on possible ISDS reform involved the underlying substantive rules. Nonetheless, it was clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement rather than on the substantive provisions.

21. There was general agreement on the importance and sensitivity of the work to be undertaken by the Working Group. It was said that work should be based on a thorough analysis of all relevant issues. It was added that a full and candid exchange of views would support the consensus-driven approach.

22. Considering that the mandate consisted of three stages, it was agreed that each stage would be considered in sequence. It was also agreed that the Working Group should take a gradual and cautious approach, without undue haste, but would proceed efficiently. Consequently, it was generally felt that the second and third stages of the mandate should be considered in due course, once the Working Group has had sufficient opportunity to consider the concerns.

23. Nonetheless, it was said that it might not be practicable to separate a discussion of concerns and whether or not they were valid concerns justifying reform. From this perspective, it was said that the first two stages of the mandate could be considered together, if the element of ISDS concerned so warranted. In addition, an indication of whether the issues might warrant reforms, and whether the reforms might be incremental or systemic, might be made. Any such indications would be recorded to allow the Working Group to prepare for any future discussions on the second and third stages of the mandate. It was emphasized that the Working Group would respect the order of the mandate and allow sufficient time for discussion of all issues.

24. It was also stated that the objective of the Working Group was to identify and address the core concerns in relation to ISDS, and that an exhaustive consideration of all issues would not be desirable.

25. In discharging the mandate of the Working Group, the cooperation between UNCITRAL and other relevant international bodies was welcomed.

26. In addition, it was stated that ISDS reform raised complex issues of public international law, highlighting that the process should be government-led, as recognized in the mandate of the Working Group. Nonetheless, it was noted that the contributions from observer organizations, and the transparent nature of the UNCITRAL process, would assist the Working Group in its deliberations on ISDS reform.

ISDS under investment treaties, laws and contracts

27. The Working Group proceeded to consider whether work should be limited to ISDS under investment treaties or should encompass all forms of ISDS regardless of the instrument upon which cases arose. It was reported that 75 per cent of investment claims before ICSID (which comprised over 70 per cent of all ISDS claims) were treaty-based, and the remaining 25 per cent were divided between claims based on investment contracts and those arising as a matter of domestic investment law. It was

[7] Ibid.

further reported that 46 per cent of ICSID claims with African States as respondent were based on or related to investment contracts.

28. In response to a suggestion that the focus of the Working Group should be confined to treaty-based ISDS cases, it was said that the level and apparent increase in the number of cases based on contractual provisions was such that the door should be left open to investment law- and contractual-based ISDS cases. In addition, it was mentioned that, as a matter of procedure, the concerns arising in the different underlying instruments were not dissimilar, even if there were policy differences between the instruments themselves. However, it was suggested that such an approach might extend the scope of the Working Group's tasks to include what might be difficult issues on investment contracts.

29. On the other hand, it was said that the broader approach would also allow parties to a variety of instruments to apply the eventual results of possible reform. It would also allow the Working Group to consider all concerns as envisaged by its mandate, would avoid unnecessary definitional difficulties, and would not require the Working Group to engage in an unnecessary exhaustive analysis. In addition, it was pointed out that excluding investment contracts completely might have the potential to undermine the results of possible reform, if investors chose to negotiate contractual mechanisms instead of relying on treaty provisions.

30. In light of the above, it was agreed that the Working Group would focus on treaty-based ISDS and would later consider the possibility of extending the results of its work to contract and investment law based ISDS. That said, it was understood that delegations continue to raise concerns and views on contract and investment law based ISDS.

Investment arbitration and other types of ISDS mechanisms

31. The Working Group then considered whether work should be limited to arbitration or should include other types of existing ISDS mechanisms. Recalling its earlier discussion, there was a generally-shared view that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration. In that context, the Working Group recalled the work done by the Commission in the field of conciliation and the current work being undertaken by Working Group II on enforcement of mediated settlement agreements.

32. One view was that such alternative methods were an integral part of ISDS, might be mandatory under some investment treaties, might assist in identifying concerns and possible procedural solutions to concerns about arbitration in ISDS and so should be considered by the Working Group.

33. In response, it was recalled that the mandate of the Working Group related to identifying concerns about ISDS and that concerns about ISDS had generally focused on arbitration. While some potential concerns were mentioned regarding mediation, it was widely felt that work should focus on arbitration and the concerns it raised. Accordingly, it was said that the work should first concentrate on identifying concerns regarding arbitration, and that other types of ISDS mechanisms could subsequently be considered as part of a holistic approach to addressing those concerns. From this perspective, States' experience in domestic court mechanisms and sequencing issues, the relationship between arbitration, alternative dispute resolution mechanisms and court procedures, and State-to-State mechanisms, might inform the Working Group's considerations of solutions at the third stage of its mandate.

B. Consideration of the arbitral process and outcomes

1. Procedural aspects

34. The Working Group undertook its consideration of concerns relating to the arbitral process and outcomes based on document A/CN.9/WG.III/WP.142, paras. 22–41. In that context, the Working Group took note that, as indicated in paragraph 19 of that document, the issues listed therein were not exhaustive, and that any additional issues might be raised, and considered, by the Working Group at a later stage of its deliberations.

(a) Duration and cost

Overall levels of duration and cost

35. During the discussion, the experience of States and of intergovernmental organizations in connection with ISDS was shared. The Working Group was informed that the Secretariat had consulted extensively with key international organizations involved in ISDS and in the wider reform of investment treaties, including UNCTAD, ICSID, OECD and PCA, as reflected in the documents available to the Working Group. The Secretariat had also taken into account data made available by relevant arbitration institutions.

36. The Working Group took note of analyses based on limited available information suggesting that 80 to 90 per cent of costs in ISDS were associated with fees for legal representation and for experts and that the amount of costs per proceeding averaged US$ 8 million.

37. It was widely felt that lengthy and costly ISDS proceedings under some approaches raised concerns and practical challenges to respondent States as well as to claimant investors. Highlighting the resource-intensive nature of the proceedings, it was mentioned that the very inclusion of ISDS provisions in investment treaties could have financial implications for respondent States.

38. There was a shared understanding that the duration and cost of the proceedings were interlinked, as lengthy proceedings were likely to result in higher costs.

39. It was mentioned that there was little doubt about the negative impact of duration and costs on respondent States, but that the Working Group could design a model to relate duration and the level of costs to the benefits of investment to the investors, as a practical tool to prevent such disputes.

40. Particular attention was drawn to the fact that the high costs of ISDS paid with public funds were difficult to justify for developing States, whose financial resources were scarce. In that context, it was stated that such costs and awards made against those States could compete with urgent developmental needs. It was added that responding to an ISDS claim posed a disproportionately heavy burden on the officials of smaller States.

41. It was further stated that the high costs of ISDS under some approaches could limit the access of small and medium-sized enterprises to the ISDS mechanism, thus depriving them of the protection provided to them under investment treaties.

42. The Working Group was cautioned that deliberations relating to duration and cost should be fact-based. At the same time, it was noted that perceptions were also relevant in terms of maintaining the legitimacy of ISDS. Furthermore, it was emphasized that notions of duration and cost were relative in nature, and whether the process was excessively lengthy and/or costly should be determined on a case-by-case basis and taking into account the need for effective administration of justice.

43. It was emphasized that the duration and costs of ISDS proceedings should not be examined in isolation, but by reference to suitable comparators, which might include other international dispute settlement bodies (such as the International Court

of Justice and the Dispute Settlement Body of the World Trade Organization), and domestic court procedures. The costs of ISDS might need to be further assessed from that perspective, even if it were acknowledged that the costs had risen over time.

44. It was pointed out that the implications of the duration and cost of the procedures were also derived from the fact that the ISDS regime lacked a rule of binding precedent and a consequent lack of predictability. As a result, it was said, legal counsel would be under a duty to press all available arguments, whether or not those arguments had been accepted or rejected by earlier tribunals.

45. The following items were noted as contributing to the levels of costs: complexities of the case, the underlying treaties and the proceeding; large volume of evidence; quality of factual records; conduct of the proceedings; ineffective case management; the need for States to have time to develop their defences and to ensure the best possible representation; the need for parties to expend considerable sums in appointing tribunals; and the need to translate numerous documents and evidence into the language of the arbitration. In addition, a lack of organization, tribunal dynamics leading to lengthy deliberations and sometimes dissenting opinions, and excessive numbers of hearings also contributed to the levels of cost. In that relation, concerns were expressed about the negative effects on case management due to fears of challenges and annulment of awards.

46. It was also stated, however, that excess costs could be attributed under some approaches in part to abusive practices, parallel proceedings, the absence of clear procedures, and the absence of a mechanism to dismiss frivolous claims at an early stage. In addition, it was pointed out that the increase in costs was related to systemic issues and the structure of the ISDS regime, or, alternatively, the lack of a system. These issues, it was added, had led to a lack of consistency and, importantly for States as respondents in particular, a lack of predictability of outcome. A further issue was that the same arbitrators were commonly appointed in a number of cases, resulting in further delays, extended durations and leading to further increases in costs.

47. It was suggested that the increasing complexities of the underlying treaties was an additional cause of increased costs.

48. With regard to the duration, it was mentioned that the appointment of the tribunal, disclosure or discovery and the deliberations when drafting the award were the three time-intensive stages. In addition, concerns were expressed with regard to the lengthy period of time that might elapse between the final hearing and the rendering of the award. An additional stage that contributed to the overall duration of ISDS proceedings was noted to be enforcement action, which was reported in some cases to have exceeded the original arbitration proceedings in length.

49. On the other hand, it was also mentioned that disputing parties as well as States parties to the treaty under which the dispute arose had a role to play in determining the overall duration of an ISDS proceeding.

50. It was added that States generally required more time to respond to claims, as they were required to coordinate among a number of authorities, and to engage legal counsel and experts to defend their case. In that context, the need for States to be given sufficient time to respond to claims was emphasized.

51. It was observed that States had the opportunity to take steps to control both duration and cost through effective case management and their decisions as respondents, including in selecting counsel and experts, in considering their choices of arbitrators and of arbitration institutions to administer the case, in agreeing on the procedural timetable, in deciding to bifurcate proceedings, and in seeking early dismissal where possible. All these steps, it was noted, had the potential to shorten the duration.

52. In addition, it was stated that the States could use tools in their investment treaties to reduce duration and cost proceedings, including using forms of dispute settlement other than arbitration (negotiation, consultations, diplomatic efforts or

mediation). It was further added that some treaties allowed for early dismissal of frivolous claims and provided for consolidation, might address allocation of costs, and might provide for effective means of constituting tribunal, for example, requiring the claimant to nominate its arbitrator in its initial notice of claim to expedite the process.

Allocation of costs

53. The allocation of costs by arbitral tribunals in ISDS was highlighted as a concern that merited further consideration. It was explained that arbitral tribunals in ISDS had historically followed the default rule under public international law and in inter-State cases that each party would bear its own costs. It was pointed out that the respondent State might find itself in the position of not being able to recover a substantial part or any of its costs in defending an unsuccessful, frivolous or bad faith claim by investors. In addition, it was stated that in the absence of allocation of costs, there was no incentive for the parties to limit their arguments and submissions.

54. In that context, an institution reported that costs had been allocated among parties in approximately half of recently issued arbitral awards, and therefore that a trend in favour of departing from the traditional public international law default rule mentioned above could be identified. In the awards concerned, arbitral tribunals had ordered that the costs of the arbitration should be borne by the unsuccessful party, or costs had been apportioned between the parties. Article 42 of the UNCITRAL Arbitration Rules (2010, as revised in 2013) was given as an example of a rule providing for allocation of costs among the parties.

55. As regards cost allocation, it was suggested that the Working Group might take note of an emerging approach based on a proportional allocation of costs. It was explained that an award of costs might reflect the relative success of the winning party in terms of the proportion of successful limbs of its claims.

Security for costs

56. A further area of concern mentioned related to difficulties faced by successful respondent States in recovering costs from claimant investors. It was said that investors might use shell companies, or might be impecunious, which left States with no possibility of recovery. That was highlighted as another area of imbalance as States had a permanent and financial standing, which investors did not. It was said that that situation was aggravated by the fact that the possibility of obtaining security for costs was not provided for under investment treaties or in certain arbitration rules.

Third-party funding

57. It was observed that investors sometimes resorted to third-party funding, and to other forms of external financing, which were not available to States. It was suggested that the development of that practice raised concerns that might require further consideration.

(b) Other procedural issues

58. Further, it was highlighted that arbitral institutions had sought to implement a number of measures to tackle certain procedural issues, in particular to streamline the process. Such efforts were also made with regard to the revision of the UNCITRAL Arbitration Rules in 2010/2013. By way of example, it was reported that the ICSID Arbitration Rules had provided for an early dismissal mechanism since 2006. Over 20 applications for such dismissal had been made, leading to the conclusion that where such an application was successful, time and costs were saved. (On the other hand, where the application failed, additional time and costs clearly arose.) A further example of efforts to streamline the process was the consolidation of claims, whether formal or informal.

(c) Holistic approach to procedural reform

59. Comments were made that concerns regarding duration and costs had to be examined as a whole; its constituent parts interacted in different ways, so that once the various concerns had been identified, it would be necessary to consider them from a systemic viewpoint. In particular, attention was called on the need to consider the issues of duration and costs in the broader context of (a) innovations in arbitration rules and investment treaties (such as early dismissal of frivolous, unmeritorious claims, preliminary objections, security for costs); (b) the need to ensure correctness of decisions; and (c) enhancing the predictability of decisions by reducing unnecessary submissions. It was added that a comprehensive analysis would require nuanced and not merely simple solutions.

60. The extent to which experience from international commercial arbitral tribunals should guide an analysis of ISDS concerns was discussed. In that regard, it was stated that arbitrators might take an overly narrow view of the issues concerned, and so pay insufficient attention to the public international law context, that they might be reluctant to manage concurrent proceedings through consolidation and to limit the submission of documents and discovery. On the other hand, it was said that developments in arbitration practice regarding case management including matters such as time limits, cost ceilings and transparency, as well as encouraging mediation and other alternative dispute resolution mechanisms, could be taken into account by the Working Group at a later stage in its deliberations.

2. Summary of the deliberations

61. After discussion, the Working Group summarized its deliberations on duration and costs in ISDS proceedings, as follows.

(a) The overall duration and costs of ISDS proceedings

62. The Working Group recalled the need to ensure that it had the appropriate facts before it, and in that light, that it should consider carefully the appropriate comparators when assessing whether costs were in fact excessive (see para. 36 above), or durations unnecessarily long. In addition, the Secretariat was requested to seek further information on appropriate comparative information from States and other organizations. It was also noted, however, that document A/CN.9/WG.III/WP.142 was prepared taking into consideration the available information and data, much of which was already in the public domain. In addition, it was mentioned that the Working Group had had the benefit of (a) data from States, drawn from their direct experiences as respondents, on the duration and costs of ISDS proceedings, and (b) data provided by international organizations and other bodies involved in investment treaty policymaking and reform in ISDS.

63. While the importance of a fact-based analysis was generally accepted, it was also said that the Working Group should not lose sight of perceptions on the issues under discussion, in light of the overall concerns about the legitimacy of the system. In that context, it was observed that perceptions were indeed relevant to States in making policy decisions.

64. It was added that the costs of ISDS had risen to a level where they could be seen as imposing a barrier to accessing the system to some investors, particularly small and medium-sized enterprises (see para. 34 above). Investors were resorting to third-party funding, a mechanism that caused significant concern and created a structural imbalance between States and investors.

65. In addition, the Working Group took note that the most time-consuming stages of ISDS cases included the appointment of the tribunal members, discovery or document production, and the issuance of awards.

(b) Allocation of costs

66. There was a widely shared view that allocation of costs in ISDS warranted detailed consideration. A key concern was that the costs to the State in defending claims were significant, and that even where the State was successful in its defence and notwithstanding recent trends, it was not always awarded its costs (see para. 46 above).

67. It was mentioned that a consideration of the topic should include the possibility of specific and clear rules on the allocation of costs, including on awards of costs proportionate with results, and reflecting the conduct of the parties, among other things (see para. 48 above).

(c) Security for costs

68. It was highlighted that States often encountered difficulties in recovering awards of costs. That issue exemplified an imbalance between the parties, because States, given their permanence, were in a different position from investors, who might be unable to pay. The link between this question and the lack of rules allowing orders for security for costs was emphasized (see para. 49 above).

(d) Third-party funding

69. It was observed that third-party funding had become a significant concern, in that it created a systemic imbalance and did not ensure a level playing field. It was added that issues of third-party funding related not just to costs, but also had an impact on other issues, such as conflicts of interest, collection and enforcement of costs awards.

(e) Indications of possible solutions on procedural issues

70. Without prejudice to future work by the Working Group, some preliminary indications of issues that the Working Group might wish to include in its discussions of possible solutions at a later stage were given.

71. It was highlighted that it would be important to draw a distinction between what could be termed “excessive” or “unjustified” time and costs, on the one hand, and “necessary” or “justified” time and costs on the other. In that regard, it was recalled that the quality of outcomes should be balanced with the desire to reduce duration and cost. With respect to “unjustified” time and costs, a number of procedural mechanisms were mentioned, including bifurcation of claims, expeditious dismissal of frivolous claims, consolidation of concurrent claims, and clear and definitive rules on cost allocation that took into account proportionality as well as party conduct. With respect to “justified” time and costs, it was said that the use of tools such as procedural timetables, of arbitral institutions and of modern technologies could be considered. In addition, fixed tariffs and time limits as well as training for arbitrators on case management were mentioned.

72. However, it was added that each case would be different in terms of the time and the costs that would be needed and so justified and thus one-size-fits-all rules would not be appropriate. Further, it was noted that for developing States even justified costs carried significant budgetary impacts. A possible support mechanism could be the establishment of a fund for defence costs or other forms of assistance such as advisory centres.

73. It was also stated that States might improve cost-effectiveness through engaging legal counsel on better contractual terms, which need not sacrifice the quality of representation.

74. The use of methods other than arbitration to resolve disputes, including mediation, were also considered as potential measures that could reduce time and costs in ISDS.

75. It was also noted that some of the above measures were already being implemented in recent treaties and procedural rules, and that a number of clear approaches could be implemented through treaty provisions or through case management in specific cases. However, it was said that such an approach would not address the existing treaties, of which there were over 3,000.

76. It was said that the systematic nature of the concerns identified indicated a need for systemic solutions, which would bring with them the reduction of the overall costs through enhanced predictability and a greater ability to control proceedings themselves.

77. The possibility of developing solutions that could be applied on a bilateral and a multilateral basis was mentioned. In that context, it was added that such bilateral and multilateral approaches need not be mutually exclusive, and that there could be a suite of solutions developed simultaneously on both tracks, particularly in light of the differences in experiences between States. It was observed that soft law instruments on questions such as the extent of discretionary powers of the tribunal under existing arbitral rules could support such efforts.

78. It was noted that its deliberations had explored key concerns that could be taken into account as its work progressed.

3. Transparency

79. The Working Group undertook its consideration of transparency in ISDS, based on document A/CN.9/WG.III/WP.142, paragraphs 26 and 27.

80. Throughout the deliberations, the importance of transparency in ISDS was underlined. It was also stated that transparency was a key element of the rule of law, and of access to justice as well as the legitimacy of the ISDS system. In that light, it was said that transparency was important for shedding light on ISDS, thus providing States the necessary information to respond to general criticisms of ISDS.

81. The Working Group recalled that UNCITRAL had undertaken work to address the lack of transparency in ISDS. Such work had resulted in the UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration (“Transparency Rules”), which the Commission had adopted in 2013, and the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (“Mauritius Convention”) adopted by the General Assembly in 2014. It was noted that both texts (referred to jointly as the “transparency standards”) were recommended by the General Assembly for consideration of use by States.[8]

82. It was noted that the Transparency Rules constituted a set of procedural rules that ensured transparency in the conduct of treaty-based investor-State arbitration. The Working Group was informed that the Transparency Rules had been incorporated in a large number of investment treaties concluded after 1 April 2014. In addition, a number of investment treaties had introduced elements of transparency for arbitral proceedings within its provisions. The Working Group was informed that the Mauritius Convention was signed by twenty-two States and entered into force on 18 October 2017, after having been ratified by three States.

83. While some observations were made regarding the slow rate of adoption of the transparency standards, the Working Group was informed that progress was being made through inclusion of the Transparency Rules in investment agreements concluded after 1 April 2014, voluntary adoption by the parties and the entry into force of the Mauritius Convention.

84. The Working Group took note of comments and explanations from States on their experience with transparency in ISDS including the operation of the Transparency Rules as well as their treaty practice. It was suggested that stocktaking

[8] General Assembly resolutions 68/109 and 69/116, respectively.

of efforts to enhance transparency would be advisable before proceeding to address concerns related to transparency.

85. A comment was made that transparency was a matter for each State to consider when negotiating investment treaties or as a respondent State in a specific case. It was further said that transparency was relevant to various aspects of ISDS and not necessarily limited to the conduct of the proceedings. In that light, it was suggested that additional information on how transparency operated within the broader notion of ISDS would assist the Working Group in its further consideration of the topic.

86. Recognizing that a distinction should be drawn between the transparency of the arbitral proceedings (which the Commission has already addressed through the transparency standards) and a broader notion of transparency, the Working Group heard suggestions on possible issues that could be considered at a later stage.

87. With regard to enhancing transparency of arbitral proceedings, two potential areas of work were identified. One area related to the implementation and promotion of the transparency standards, including preparation of soft law instruments that could encourage parties and tribunals to apply such standards where not explicitly prohibited by treaty or other applicable law or arbitration rules. Another area related to enhancing the public understanding of ISDS through the transparency mechanism already in place. It was highlighted that enhancing public understanding of ISDS was key in addressing the perceived lack of legitimacy of the system. In addition, the asymmetry of information available to the States and investors was highlighted.

88. With regard to the broader notion of transparency, there was shared interest in the Working Group in exploring concerns relating to third-party funding arrangements, transparency in appointment of arbitrators and transparency with respect to the compensation of arbitrators. It was noted that the broader concept of transparency was indeed cross-cutting and related to many aspects of possible ISDS reform. In consequence, transparency would be considered when addressing those issues.