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**United Nations Commission  
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Settlement Reform)  
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## **Possible reform of investor-State dispute settlement (ISDS)**

### **Submission from the Government of Thailand**

This note reproduces a submission received on 8 March 2019 from the Government of Thailand in preparation for the thirty-seventh session of Working Group III. The submission is reproduced as an annex to this note in the form in which it was received by the Secretariat.



## Annex

### I. Proposed Work Plan

#### 1. Introduction

1. Pursuant to the discussion at the thirty-sixth session of Working Group III when the chairperson invited member States/stakeholders to submit a plan for phase three of the work, Thailand wishes to submit the following proposal for the Working Group's consideration and comments.

#### 2. Important Considerations for the Work Plan

2. A successful outcome of the Working Group hinges on a process which is inclusive, accessible, and usable by all States. The Working Group should encourage broad participation from both developing and developed countries to allow all possible options for reform to be discussed in light of the differences in experience.

3. The reform of ISDS is complex. There is a wide range of problems; each varying in terms of severity, scope and urgency. From its experience, each State will have its own view on the nature of the problems and different views on how to solve them. A wide range of solutions has been proposed, which could address a single problem or many problems to a varying degree of success. However, there is no one-size-fits-all solution. States must be mindful that any new solutions could also bring new problems into the equation.

#### 3. The Three-Step Work Plan

4. Taking into account the aforementioned considerations, Thailand proposes the following three-step Work Plan:

*Step 1: Presentation of proposals and debate*

5. The Working Group allocates time for all States to discuss reform options. The most efficient way to proceed is to base the dialogue on the note by the Secretariat, document [A/CN.9/WG.III/WP.149](#). The Working Group should go through each concern and discuss the most appropriate reform options. Options presented at this stage should be in conceptual form.

*Step 2: Selecting the way forward*

6. Once the analysis of each concern is done, the Working Group should decide on the best reform option(s) overall taking into account the advantages and disadvantages. The way forward can be one distinct option or a combination of various proposals.

*Step 3: Discussion on reform*

7. The Working Group discusses the details of the most desirable option(s) that has been prioritized. A preliminary work plan is established.

### II. Possible Options for Reform

#### 1. Introduction

8. The objective of this submission is to present the views of Thailand on reform options to address the concerns on ISDS. This paper will first examine the overarching principles that must be the backbone of any successful reform, and then propose solutions at a conceptual level on how these reforms can take place. Thailand's proposal is based on its experience in ISDS. It is not intended to be comprehensive. This constructive contribution should be used as a platform on which other ideas from other States can be presented.

## 2. Overarching Principles on Proposed ISDS Reform

### *Universality and versatility*

9. A successful outcome of the Working Group must be practical and benefit as many States as possible. A solution which is not widely accepted by the majority of States will be difficult to sustain in the long term. To promote efficiency of work, the Working Group should build on existing efforts and coordinate with other international organizations, such as ICSID and UNCTAD. The Working Group should focus its efforts on problems that are widespread, and on solutions with potential for immediate success and impact. In Thailand's view, a prompt solution on cost and duration of proceedings is a particularly pressing issue for developing countries.

### *"Building blocks" for the future*

10. The reform of the ISDS system will be a lengthy and complicated process. To save valuable resources, any work on reform, to the extent possible, should form part of the "building blocks" for future work. Any outcome should be adaptable enough to combine with other work in the future and does not exclude other viable options.

### *Prevention rather than litigation*

11. Fewer investment disputes necessarily mean fewer ISDS problems. Thailand believes in nipping the problem in the bud. Government agencies responsible for ISDS issues in many developing countries still lack the know-how to recognize a looming dispute, and more crucially, how to manage them. In addition, a knowledge gap exists between the government legal experts and the officials directly responsible for measures potentially breaching treaty obligations. Narrowing this knowledge gap can significantly decrease the number of ISDS cases.

## 3. Thailand's Proposals on ISDS Reform

12. In light of these overarching principles, Thailand would like to conceptually propose that UNCITRAL work on the following: (1) a new UNCITRAL ISDS Rules to address the special needs of ISDS cases; (2) Guidelines on Dispute Prevention; (3) the establishment of an Advisory Centre for International Investment Law (ACIIL); and (4) Model Clauses on Substantive Provisions. Should UNCITRAL deem any of these reform options appropriate, discussions on the specific details will be needed at a later stage.

13. These reform options do not rule out other reform options which could be more comprehensive in nature. On the contrary, these "building blocks" can serve as solid first steps to any comprehensive reforms in the future. Further, it is not the purpose of this paper to discuss the disadvantages of any other reform proposals. This debate is best left to the Working Group sessions.

### 3.1 UNCITRAL ISDS Rules

14. A new UNCITRAL ISDS Rules can address many of the current concerns on ISDS. ISDS cases are unique, and they require a unique set of rules to govern them effectively. ISDS claims involve States and measures taken by States. These often concern questions of public policy and public interest, which are absent from commercial arbitration. A new set of rules can take into account a State's needs. For example, decision making for States is slow and budgeting is difficult and unpredictable. Further, there are many government agencies that need to understand the arbitration process and act quickly before attaining counsel. The UNCITRAL ISDS Rules have to be concise and easy to understand. In addition, investment disputes exist in a legal regime involving the investor, the host State and the home State (to the extent that it agreed on the treaty obligations). A unique set of rules can cater for the aforementioned most effectively and in a balanced manner.

15. The UNCITRAL ISDS Rules' core provisions can build on existing UNCITRAL Arbitration Rules and ICSID Rules. Being based on existing rules means that this new

UNCITRAL ISDS Rules can be completed quickly, while at the same time starting from scratch means there is total freedom to address concerns in this fine-tuning process. The core provisions should ensure the efficient running of the arbitration process. In addition, the UNCITRAL ISDS Rules can be further drafted to allow States to utilize the provisions to address any of their concerns in the ISDS process as they deem appropriate. The UNCITRAL ISDS Rules should function like a “toolbox” that States can use as they see fit, as will be further elaborated below.

### 3.1.1 Cost and Duration

16. **Procedures to manage costs:** States need to streamline procedures and reduce cost. A potential area for change involves budgetary planning. For instance, the tribunal could be required to consult the parties in order to establish a fixed/acceptable budget for the proceedings. In addition, parties could decide to cap the fees of arbitrators at the outset before the appointment. The Working Group can also explore options as to whether counsel’s fees could be regulated in some way.

17. **Predetermined time frame/expedited procedures:** More predictable proceedings should be encouraged. Parties could benefit from having a predetermined time frame to the proceedings. This is in contrast to the existing *ad hoc* nature of current arbitral timetables which could be subject to lengthy negotiations between the Parties. The UNCITRAL ISDS Rules could potentially set out an optional expedited procedure, to be used as appropriate. Any rules on expedited procedure must take into account that ISDS cases are usually complex and involve high damages. To avoid duplication of work, the discussion on expedited arbitration in Working Group II should also be taken into account.

18. **Regulation of third-party funding:** There needs to be more transparency on third-party funding. If desirable, the UNCITRAL ISDS Rules could require full disclosure of any third-party funders and details of the funding agreements. It could also further lay out other details on the regulation of third-party funding as deemed appropriate. Regulation is particularly important where there could be a conflict of interests between the arbitrators and the third-party funders.

19. **Principles on allocation of cost:** Parties to the dispute need clarity on the issue of liability and allocation of cost. The UNCITRAL ISDS Rules can provide for a higher degree of certainty in this regard by establishing the cost allocation at the outset of the dispute, either through specific provisions or as determined by the arbitral tribunal. States can consequently plan their budget.

### 3.1.2 Arbitration and Decision-makers in ISDS: Appointment, Ensuring Independence and Related Matters

20. The UNCITRAL ISDS Rules can help address concerns on arbitrators to ensure a legitimate ISDS regime. Clearer provisions can be drafted to fill any gaps in existing rules, including the regulation of double-hatting. The UNCITRAL ISDS Rules could potentially link the selection of the arbitrators to a roster. This roster need not be extensive but should focus on names of established arbitrators specialized on ISDS. It could take into account the gender balance, geographical distribution, and balancing between arbitrators from developing and developed countries. The new roster could help bring new lawyers into the already established circle of arbitrators. In addition, there could be other innovative ideas presented to address existing concerns on arbitrator selection, such as the involvement of States in the arbitrator selection process for the roster; obligatory rotating names in and out of the roster; or, for any particular arbitral tribunal, requiring a number of arbitrators from the roster and a number who are party appointed.

21. With regard to the conduct of arbitrators, the Working Group can explore a Code of Conduct on Arbitrators that can be included in the UNCITRAL ISDS Rules. The new Code of Conduct could have rules imposed on the arbitrators by States, regulating ethics, double-hatting, capping of fees. A new set of standards will benefit from

recognizing the specificities of investment disputes. At the minimum, the Code should provide disclosure obligations, permissible external activities, and duties to avoid the appearance of impropriety or bias.

### **3.1.3 Consistency, Coherence, Predictability and Correctness of Arbitral Awards**

22. The UNCITRAL ISDS Rules could resolve the issue of unjustifiably inconsistent interpretations of the same investment treaty provisions through joint interpretation. This mechanism would allow increased participation of the investor's home State. For States that value stability and predictability, the new rules could make joint interpretations binding on the arbitral tribunals.

23. In addition, there could be room for States which are parties to a particular treaty to jointly set out the scope of the law or principles to be used by the tribunal to ensure that the treaty is interpreted as intended by its drafters.

### **3.1.4 Alternative Dispute Resolution Mechanisms**

24. The Working Group has so far focused its work on the reform of investor-State arbitration. However, Thailand is of the view that current concerns on ISDS must be also addressed by alternative dispute resolution (ADR). Either as part of the UNCITRAL ISDS Rules or as a separate document, there can be provisions in detail on investor-State conciliation and mediation. These ADR rules can also encompass procedural framework for combining adjudicative and non-adjudicative processes, as referred to as hybrid or mixed-mode dispute resolution.

## **3.2 Guidelines on Dispute Prevention**

25. Cost and duration of arbitration can be reduced if States are prepared. The Working Group can build on existing work from other fora, and embark on drafting guidelines on how States can manage investment disputes. The Guidelines can act as a platform for States to share their experience, good practice, know-how, and can include the following:

(a) The negotiation stage: what could be done to prevent, or best regulate, disputes by the drafters of the treaty. Treaty provisions can address a wide range of issues;

(b) Encouraging dialogue: how to encourage dialogue between host States and foreign investors to prevent conflicts from escalating into full-fledged disputes;

(c) The domestic mechanism for ISDS management: what are the best practices to prevent disputes, deal with a looming dispute, or manage and settle a dispute once they arise;

(d) Pre-arbitration phase: whether, when and how States could use alternative means of dispute resolution.

## **3.3 Establishing an Advisory Centre on International Investment Law (ACIIL)**

26. Developing countries may not be able to respond effectively to investment disputes because of the lack of resources and institutional capacity. This problem can be addressed by establishing an Advisory Centre on International Investment Law (ACIIL). Similar to the functions of the Advisory Centre on WTO Law (ACWL) for WTO law, the ACIIL can provide states with legal advice on investment law before a dispute arises and act as counsel when there is a dispute. In addition, the ACIIL can also help States in capacity-building and the sharing of best practices.

27. Thailand recognizes that there have been past efforts in trying to establish such an advisory centre. There are still a lot of questions which need to be addressed: including its financing, access to its services, and the supporting legal structure. Nonetheless, given the number of stakeholders present at Working Group III, UNCITRAL is the ideal platform to drive forward this issue and explore innovative options.

### 3.4 Model Clauses on Substantive Provisions

28. Although the Working Group has decided to focus its work on procedural issues, Thailand is of the view that the Working Group should keep an open mind on possible reforms on substantive issues. Substantive and procedural aspects of the ISDS system are often closely intertwined, and reforms in both areas can go hand-in-hand.

29. Possible work consists of providing guidance to States on how to draft treaty provisions with more precision and clarity. UNCITRAL can build on existing work from other fora and develop model clauses on different substantive provisions which States can then incorporate into their model BITs or use as the first draft when negotiating IIAs. There may be more than one model clause on a given substantive issue to reflect divergences in underlying policy choice regarding the standard of investment protection. The model clauses on substantive provisions can reduce the fragmentation of international investment law and ensure consistency, coherence, and predictability of arbitral awards.

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