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Possible reform of Investor-State dispute settlement (ISDS)

Submission from the Government of the Russian Federation

Note by the Secretariat

This note reproduces a submission received on 30 December 2019 from the Government of the Russian Federation in preparation for the resumed thirty-eighth session of the Working Group. The submission is reproduced as an annex to this note in the form in which it was received.

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Annex

Proposal
of the Russian Federation
on reform of the investor-State dispute settlement system
(UNCITRAL Working Group III)

The Russian Federation welcomes the work of UNCITRAL to improve the investor-State dispute settlement (ISDS) system and considers that the individual elements of that system should be adjusted. The Russian Federation shares many of the concerns identified by Working Group III and is interested in addressing those concerns effectively.

The international community's efforts to overcome the problems identified should be systemic and sustained over the long term. They cannot be guided by an artificial distinction between structural and incremental reform. Such an unwarranted categorization of the many initiatives that have been put forward by States members of Working Group III over the course of the two years of the Group's work on ISDS often leads to distortion of the purport of those initiatives and weakens their potential positive impact. We consider that any proposals – both those relating to investment arbitration and those going beyond it – may ultimately have structural implications for the entire ISDS system.

Working principles

Reform of the ISDS system should be based on the following principles:

1. The leading role of States, with due regard for the interests of all other actors in the ISDS system

2. Preservation of the advantages of the current ISDS system, such as its decentralized nature, flexibility and neutrality

3. Consideration of, and the according of equal weight to, the interests of all participants in the reform of the ISDS system in the process of decision-making

4. The depoliticized nature of the ISDS system

5. Consistency in addressing the concerns identified, taking into account any consensus that emerges in Working Group III with respect to specific initiatives and also taking into account the potential effectiveness of proposed solutions.

Organization of work

In the view of the Russian Federation, there is no one-size-fits-all solution to the problems that have been identified in the field of ISDS. In order to ensure the inclusiveness of the work undertaken, the discussion of concrete ways of reforming the ISDS system should focus primarily on those areas in which there is the least divergence of views among the Working Group III member States. Such an approach will ensure the optimal use of Working Group III resources, the continued effectiveness of the work carried out and compliance with the principle of consensus in decision-making.

The Russian Federation broadly shares the concerns identified in document A/CN.9/WG.III/WP.149:

1. Concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions

2. Concerns pertaining to arbitrators and decision makers

3. Concerns pertaining to cost and duration of cases

4. Other concerns.

Concerns pertaining to consistency, coherence, predictability and correctness of arbitral decisions

Divergent interpretations of key investment protection standards, problems in determining the jurisdiction of the arbitral tribunal and the admissibility of claims, inconsistency in the decisions taken by arbitrators and the lack of legal provisions governing multiple concurrent arbitration proceedings are at the core of this problem.

With respect to the concerns identified by Working Group III in this regard, the following reform options would be optimal:

1. Strengthening of the role of States in the process of interpreting the international treaties to which they are parties in order to ensure that the provisions of those treaties are applied correctly and consistently by arbitrators.

In that regard, the initiative to establish mechanisms for the interpretation by States of the provisions of international investment treaties whereby such interpretation would be binding on the arbitral tribunal – thus preventing arbitrators from introducing new meaning into the text of an international treaty or taking decisions based on considerations that go beyond the interpretation of the law – deserves substantive consideration in Working Group III.

2. The establishment of an ad hoc appellate mechanism that would operate on the basis of the same principles as the current system for the settlement of international investment disputes.

There is currently no such mechanism in the ISDS system, but the potential benefits and modalities of establishing such a mechanism with a view to ensuring the consistency and correctness of arbitral decisions merit close attention. The Russian Federation stands ready to take part in the consideration of this issue within UNCITRAL.

3. The development of model procedural provisions (such as the "denial of benefits" clause, provisions governing the pre-arbitral settlement of disputes and provisions to prevent conflicts of interest) that can be included in existing bilateral and multilateral treaties.

Concerns pertaining to arbitrators and decision makers

The right of the parties to appoint arbitrators in investment arbitration is one of the key principles of the ISDS system that builds confidence in ISDS and makes international arbitration more attractive both to States and to investors. That principle enables parties to proceedings to ensure that the composition of the arbitral tribunal is, in their view, balanced and best suited to the specificities of the dispute. The Russian Federation considers that any reform option should preserve the mechanism whereby the parties to investment arbitration proceedings appoint the arbitrators.

However, the ISDS system lacks coherence with respect to the requirements applicable to arbitrators (the substantive aspect of the problem) and to procedures that provide the necessary safeguards (the procedural aspect of the problem).

Each of the following aspects should be considered when searching for possible solutions:

1. The establishment of requirements with respect to the qualifications of arbitrators in the ISDS system with a view to, inter alia, diversifying the pool of arbitrators in terms of States of nationality, legal systems, gender and prior experience, including the experience of supreme court judges

2. Strengthening of the rules requiring the disclosure of information concerning the composition of the arbitral tribunal that affects the tribunal's independence and impartiality, including rules enabling the identification of links between arbitrators and third parties funding the proceedings

3. The establishment of rules that restrict or prohibit “double-hatting” and of provisions governing the resolution of other conflicts of interest

4. The adoption of provisions governing the workload of arbitrators, in particular the establishment of requirements relating to the provision of guarantees that the arbitrator has sufficient time to examine the dispute

5. The establishment of provisions governing the consequences of discovery that an arbitrator does not meet the applicable requirements, including where such non-conformity is discovered after the arbitrator has been appointed

6. The establishment of special requirements applicable to the secretaries (rapporteurs) of investment arbitration tribunals and aimed at preventing conflicts of interest and ensuring proportional representation of employees from different regions of the world and non-discriminatory access in terms of their selection and/or appointment

7. The elaboration of rules preventing secretaries of investment arbitration tribunals from taking decisions instead of arbitrators.

Concerns pertaining to cost and duration of cases

Investment arbitration is an expensive dispute resolution mechanism. The total amount of arbitration costs consists of three major components: arbitrators’ fees, the fees charged by the institution administering the arbitration and the fees of legal advisers. The latter category accounts for the largest amount.

The Russian Federation supports the proposal to consider the establishment of a non-governmental advisory centre on ISDS in order to provide expert assistance to interested parties, including developing countries.

In addition, the following mechanisms could reduce both the costs borne by the parties to a dispute and the burden on the ISDS system as a whole:

1. The development of rules making prior conciliation proceedings mandatory

2. The formulation of recommendations for strengthening the involvement of State entities with a view to the preliminary settlement of disputes within the framework of the relevant national jurisdiction.

The use of these mechanisms in good faith would facilitate a mutually beneficial compromise between the parties to a dispute, which in the long term would contribute to the maintenance of cooperative relations between investors and host States.

The following could also help to address the challenges of reform of the ISDS system:

1. Expansion of the use of the statute of limitations in relation to investment claims against the State

2. Strengthening of the procedure for the expeditious dismissal of claims that do not meet certain formal criteria.

Other concerns

In the view of the Russian Federation, the following should also be addressed as part of the work of Working Group III:

1. The delineation of clear limits to investor protection, especially with regard to the prevention of companies operating fictitiously (without conducting any real economic activity) in the territory of the host State from using ISDS mechanisms.

2. The introduction and extensive use of digital technologies, which will significantly expedite, reduce the cost of and simplify the procedure for resolving investment disputes.

As noted above, there is no one-size-fits-all solution to the problems of the ISDS system. The same applies to the form in which any solutions are implemented. Some of the issues concerned are best addressed through the implementation of soft-law instruments, including those adopted by UNCITRAL. However, other solutions need to be enshrined in relevant international treaties.

In light of the above, the Russian Federation proposes that the members of Working Group III adopt an approach to the improvement of the ISDS system whereby the concerns identified are examined taking into account the priority of those matters on which there is a consensus among the UNCITRAL member States. Radical options, such as the creation of an international investment court, are not only likely to fail to solve the fundamental problems of the current system but might also lead to new problems. Any changes to the current system must be calibrated and balanced and must reflect the interests of all actors in the ISDS system.

The considerations of the Russian Federation with regard to the reform of the ISDS system as set out above are preliminary in nature and do not prejudice the final position of the Russian Federation on specific issues.