6 October 2020

Original: English

**United Nations Commission on International Trade Law**
**Working Group III (Investor-State Dispute Settlement Reform)**
**Thirty-ninth session**
Vienna (online), 5–9 October 2020

# Draft summary

## I. Introduction

1. 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 ISDS Framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, the Working Group 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) 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).[1]

3. From its thirty-fourth to thirty-seventh session, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264.

Please recycle

4. At its fifty-second session, in 2019, the Commission expressed its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process and for the decision of the Working Group to elaborate and develop multiple potential reform solutions simultaneously.

5. At its thirty-eighth session (Vienna, 14–18 October 2019), the Working Group agreed on a project schedule and commenced with the consideration of the reform options regarding the establishment of an advisory centre, a code of conduct for adjudicators and the regulation of third-party funding. At the resumed thirty-eighth session (Vienna, 20–24 January 2020), the Working Group considered the appellate and multilateral court mechanisms as well as the selection and appointment of ISDS tribunal members. The thirty-ninth session (New York, 30 March-3 April) had been postponed following the outbreak of the COVID-19 Pandemic.

6. At its fifty-third session, in 2020, the Commission considered the reports of the Working Group on the work of its thirty-eighth and resumed thirty-eighth sessions (A/CN.9/1004 and A/CN.9/1004/Add.1) and expressed its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process, and for the support provided by the Secretariat. The Commission took note of the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent. It also took note of informal webinars and other informal events and consultations organized or facilitated by the Secretariat following the global outbreak of COVID-19 pandemic and the postponement of the thirty-ninth session of the Working Group, including on the topics on the agenda of the postponed session (dispute prevention and mitigation as well as other means of alternative dispute resolution; treaty interpretation by States parties; reflective loss and shareholder claims based on joint work with the Organization for Economic Cooperation and Development; and the development of a multilateral instrument on ISDS reform). The recording of the webinars organized jointly with the ISDS Academic Forum as well as the presentations made were available on the website of UNCITRAL. The Commission further noted the series of webinars organised jointly with ICSID on the draft code of conduct for adjudicators in investor-State dispute settlement.[2]

# II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its thirty-ninth session in Vienna from 5 to 9 October 2020 in accordance with the decision on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease (COVID-19), adopted on 19 August 2020 by the State members of UNCITRAL (contained in document A/CN.9/1038). Arrangements were made to allow delegations to participate in person and remotely.

8. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Burundi, Cameroon, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mali, Mauritius, Mexico, Nigeria, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

9. The session was attended by observers from the following States: Angola, Bahrain, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Bulgaria, Burkina Faso, Cambodia, Costa Rica, Cyprus, El Salvador, Egypt, Jamaica, Lao, Latvia, Lithuania, Madagascar, Maldives, Morocco, Netherlands, Norway,

[2] Ibid., *Seventy-fifth session, Supplement No. 17* (A/75/17, Part II), paras. 31–36.

Paraguay, Portugal, Senegal, Slovakia, Sweden, Tunisia, Turkmenistan, Uruguay, Uzbekistan, and Yemen.

10. The session was also attended by observers from the European Union and the Holy See.

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

(a) *United Nations System*: Economic Commission for Latin America and the Caribbean (ECLAC), and International Centre for Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organizations*: Commonwealth Secretariat, Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States *(CIS)*, Energy Charter Secretariat, Eurasian Economic Commission, Organization of the Petroleum Exporting Countries (OPEC), Permanent Court of Arbitration (PCA), Secretaria de Integración Económica Centroamericana (SIECA) and South Centre;

(c) *Invited non-governmental organizations*: African Academy of International Law Practice (AAILP), African Association of International Law (AAIL), American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR), American Society of International Law (ASIL), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian Academy of International Law (AAIL), Association pour la Promotion de l'Arbitrage en Afrique (APAA), British Institute of International and Comparative Law, Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Centre for International Legal Studies (CILS), Centre de Recherche en Droit Public (CRDP), Centre for International Law (CIL), Columbia Centre on Sustainable Investment (CCSI), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIArb), China International Economic and Trade Arbitration Commission (CIETAC), Centre for Research on Multinational Corporations (SOMO), Corporate Counsels' International Arbitration Group (CCIAG), European Federation for Investment Law and Arbitration (EFILA), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Institute for Transnational Arbitration (ITA), Instituto Ecuatoriano de Arbitraje (IEA), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Dispute Resolution Institute (IDRI), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), International Mediation Institute, International Telecommunication Union (International T), International Trade Union Confederation (ITUC), Organisation of Islamic Cooperation Arbitration Centre (OIC-AC), Pluricourts, Queen Mary University of London School of International Arbitration (QMUL), Russian Arbitration Association (RAA), Singapore International Arbitration Centre (SIAG), Singapore International Mediation Centre, The Law Association for Asia and the Pacific (LAWASIA), The Moot Alumni Association (MAA), The New York City Bar Association (NYCBAR), Third World Network, Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

12. According to the decision made by the State members of the Commission (see para. 7 above), the following persons continued their offices:

*Chairperson*: Mr. Shane Spelliscy (Canada)

*Rapporteur*: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

13. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.198); (b) note by the Secretariat on the reform options (A/CN.9/WG.III/WP.166 and its addendum) as well as notes by the Secretariat respectively on shareholder claims and reflective loss (A/CN.9/WG.III/WP.170); on dispute prevention, mitigation and mediation (A/CN.9/WG.III/WP.190); on treaty interpretation by States parties (A/CN.9/WG.III/WP.191); on security for costs and frivolous claims (A/CN.9/WG.III/WP.192); on multiple proceedings and counterclaims (A/CN.9/WG.III/WP.193); and on multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.194); (c) submissions from Governments: Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156); European Union and its member States (A/CN.9/WG.III/WP.159 and Add.1); Morocco (A/CN.9/WG.III/WP.161 and (A/CN.9/WG.III/WP.195); Thailand (A/CN.9/WG.III/WP.162); Chile, Israel and Japan (A/CN.9/WG.III/WP.163); Costa Rica (A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178); Brazil (A/CN.9/WG.III/WP.171); Colombia (A/CN.9/WG.III/WP.173); Turkey (A/CN.9/WG.III/WP.174 and A/CN.9/WG.III/WP.197); Ecuador (A/CN.9/WG.III/WP.175); South Africa (A/CN.9/WG.III/WP.176); China (A/CN.9/WG.III/WP.177); the Republic of Korea (A/CN.9/WG.III/WP.179); Bahrain (A/CN.9/WG.III/WP.180); Mali (A/CN.9/WG.III/WP.181); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182); Kuwait (A/CN.9/WG.III/WP.186); Kazakhstan (A/CN.9/WG.III/WP.187); Russian Federation (A/CN.9/WG.III/WP.188 and Add.1); The Netherlands, Peru and Thailand (A/CN.9/WG.III/WP.196).

14. The Working Group adopted the following agenda:

1. Opening of the session.

2. Adoption of the agenda.

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

5 October 2020

Original: English

**United Nations Commission on International Trade Law**
**Working Group III (ISDS Reform)**
**Thirty-ninth session**
Vienna (online), 5–9 October 2020

# Draft summary

**Addendum**

## III. Possible reform of investor-State Dispute Settlement

1. Based on a decision at its thirty-eighth session (A/CN.9/1004, paras. 25 and 104), the Working Group undertook consideration of the following reform options: (i) dispute prevention and mitigation as well as other means of alternative dispute resolution; (ii) reflective loss and shareholder claims; (iii) multiple proceedings including counterclaims; (iv) security for costs and means to address frivolous claims; (v) treaty interpretation by States parties; and (vi) multilateral instrument on ISDS reform.

2. In considering those reform options, the Working Group agreed to adopt the same approach as it had done at its thirty-eighth and resumed thirty-eighth sessions and undertook a preliminary consideration of the relevant issues with the goal of clarifying, defining and elaborating such options, without prejudice to any delegations' final position. It was clarified that the Working Group would not be making any decision on whether to adopt a particular reform option at the current stage of the deliberations.

### A. Dispute prevention and mitigation as well as other means of alternative dispute resolution (A/CN.9/WG.III/WP.190)

#### 1. Dispute prevention and mitigation

3. The Working Group took note of the submissions made by States in preparation for the third phase of its mandate ("Submissions") on dispute prevention and mitigation measures developed at the national level, in investment treaties, as well as dispute prevention initiatives and programmes available at the international level as outlined in document A/CN.9/WG.III/WP.190. At the outset, it was highlighted that the focus of reforms in that area would be on the-pre-dispute phase, rather than after a dispute has been brought to arbitration. It was underlined that dispute prevention and mitigation measures contributed to create a stable and predictable climate for investment and played a significant role in both attracting and retaining investments.

Please recycle

*At the national level*

4. During the discussion, information was provided on measures taken at the national level to prevent disputes from arising, including awareness-raising activities, policies to prevent disputes from escalating, and frameworks for the management of ISDS cases. The Working Group took note that various models had been developed to gather information about investors' complaints and to channel them to the relevant governmental entities. Reference was made to the identification of a lead agency, which would function as the channel of communication between the investor and the State and which would coordinate internally with other agencies in the government. Reference was also made to investment ombudspersons and institutions responsible for both the prevention and management of disputes.

5. It was also pointed out that information-sharing among the government agencies was important for dispute prevention so that stakeholders at various levels of a State were well-informed, and that coherence in the implementation and administration of investment-related matters could be achieved. It was mentioned that tools to ensure consistency between domestic legislation and investment treaties that contain international obligations undertaken by States were important. It was suggested that procedures could be established, such as inviting interested stakeholders to comment on draft legislation before enactment. The purpose of such procedures, it was further explained, was to ensure that government officials and legislators would become aware of potential consequences of their decisions and better understand the underlying investment framework. It was said that access to relevant information was provided through shared platforms, handbooks, or training events. The need for guidance on those matters was underlined and reference was made to the APEC Handbook on Obligations in International Investment Treaties, which contained guidance for government officials.

*In investment treaties and at the international level*

6. It was suggested that States, when negotiating investment treaties, should consider providing for dispute prevention and mitigation as well as pre-arbitration consultation procedures. Diverging views were expressed on the need for mandatory pre-arbitration procedures. It was also said that there would be merit in having duly established mechanisms, preferably in domestic legislation, that would allow disputing parties to make the most use of the cooling off periods (see below, para. 10).

7. Further, it was suggested that lack of awareness about and capacity for dispute prevention and mitigation should be addressed at the international level, for instance through technical assistance and capacity-building activities. It was underlined that government agencies responsible for handling ISDS matters in many developing countries still lacked the know-how to identify looming disputes and ways to manage them. As a means for cooperation, it was suggested that States would greatly benefit from the development of a systematic method of sharing knowledge and practices on dispute prevention. Reference was made to the development of guidelines, of a platform for States to share good practices and know-how, and of dispute prevention provisions. It was pointed out that such technical assistance and capacity-building activities, which would have a positive impact on dispute prevention, could be set up in an efficient way without burdening States. References were made to the Mechanism for the Cooperation and Discussion on Defense and Prevention of Investment Arbitration of the Pacific Alliance, and the Model Instrument on Investment Dispute Management developed by the Energy Charter Conference. A suggestion was made to undertake the development of a multilateral declaration by States on dispute prevention.

*Link to other reform options*

8. The Working Group noted that the question of dispute prevention and mitigation was closely connected to the reform option of establishing an advisory centre, which could possibly be tasked with dispute prevention and capacity-building activities. It

was also noted that the question of dispute prevention and mitigation was closely connected to the topic of treaty interpretation by States parties as disputes might be prevented where investment treaties were coherently interpreted and administered. It was also said that the reform option of a multilateral standing body or mechanism would include features aimed at preventing disputes.

**Preparatory work on the topic of dispute prevention and mitigation**

*Introductory remarks*

9. The Working Group noted the general interest in having the Secretariat pursue further work on the question of dispute prevention and mitigation. It was noted that States ought to remain free to regulate in the public interest and any solution developed to address dispute prevention and mitigation should not be encouraging them in any way to avoid doing so with the sole goal of avoiding disputes. Capacity building activities and ensuring the flow of information to those who needed it to make decisions were seen as key aspect of dispute prevention. In that light, four questions were underlined: (i) who would need to be better informed (reference was made officials who acted on the States behalf and to investors); (ii) what they would need to be informed of (for States, international obligations and for investors, relevant rules, policy interests, bureaucratic structures and State perspectives); (iii) how they could be informed: and (iv) by whom they would be informed.

10. It was underlined that best practices, guidelines or even a model text on dispute prevention or mitigation could be developed that would assist States in their efforts to prevent disputes. In that regard, it was noted that work on best practices had already been done by States and inter-governmental organizations, including by the World Bank, and by non-governmental organizations. Therefore, it was said that in developing what the best practices were, the Secretariat would be mainly responsible for identifying and compiling the relevant information into guidelines or a model text.

11. Regarding the suggestion to consider how it might be possible to have an international institution such as the proposed advisory centre take a greater role in assisting States in the implementation of these best practices, it was noted that some delegations considered information-sharing and capacity-building as a key function of the advisory centre, whereas others questioned whether an advisory centre should be more focused on the dispute context.

*Way forward*

12. After discussion, the Working Group requested the Secretariat to work with interested delegations and organizations to collect and compile relevant and readily available information on the best practices for States on dispute prevention and mitigation in light of the discussions of the Working Group. The Secretariat was requested to examine how such best practices could be applied by States in a more consistent manner and was asked to return to the Working Group with a suggestion of possible means to implement these best practices, such as the development of guidance or model texts. The Secretariat was also requested to consider how any advisory centre which might be developed as a part of these reforms could assist States in this area, as well as to examine the resources that might be required for any advisory centre to do so.

## 2. Alternative dispute resolution methods

13. The Working Group considered mediation, conciliation and other forms of alternative dispute resolution (ADR) methods. It was pointed out that such methods, which were less time- and cost-intensive than arbitration, also offered a high degree of flexibility and autonomy to the disputing parties, allowing the preservation and improvement of long-term relationships and the protection of foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts.

*Cooling-off period*

14. The Working Group noted that investment treaties foresaw a time frame (ranging from three to eighteen months) during which the disputing parties were required to attempt amicable settlement before arbitration (commonly known as the "cooling-off" period). It was said that the cooling-off period should provide an opportunity for a claimant investor and a State to avoid arbitration by solving the dispute through negotiations, consultations or mediation. It was emphasised that, for the cooling-off period to be a successful tool, it needed to be sufficiently long, more than six months. In that context, it was underlined that guidance was needed on how to make effective use of the cooling-off period.

*Fostering use of mediation*

15. The Working Group considered how ADR methods could be promoted and more widely used. To that end, the Working Group considered the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement to a dispute, the legal certainty required for officials to be involved in such settlement and how to ensure that the necessary approval process was set up, including that those negotiating the settlements had the necessary authority to agree to a settlement. It was said that policies as well as the legal framework for encouraging mediation would be necessary. In that context, it was highlighted that the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") provided for a useful instrument also in the context of ISDS.

16. In addition, it was clarified that ADR methods were a means to be considered not just before but also during a dispute and it was suggested that guidelines should be developed to encourage arbitral tribunals and disputing parties to explore such methods proactively. Further, the Working Group considered how to make stakeholders aware of mediation and how to incentivize both investors and States to actively engage in alternative dispute settlement methods. It was said that capacity-building and training of potential mediators and other stakeholders was a key aspect and examples of specialized courses were mentioned. It was suggested that the home State should encourage the investor to find an amicable solution with the host State before engaging in arbitration. It was further suggested that home State and host State could be organized in joint committees to address potential conflicts between an investor and a State.

17. It was pointed out that an appropriate balance would need to be found between settlement through ADR methods and other fundamental questions, such as how such methods could lead to regulatory chill, reduced transparency from the settlement of claims behind closed doors, and settlements inconsistent with investment policies. In this context, it was stressed that mechanisms promoting ADR methods should be designed so as to ensure consistency with the Sustainable Development Goals (SDGs), in particular SDG-16.

*Model clauses*

18. Regarding references to ADR methods in investment treaties, the Working Group considered whether to undertake the development of model clauses, which would: (i) indicate procedural steps the disputing parties could usefully take; (ii) guide parties on how to conduct a mediation; (iii) include a realistic time frame; and (iv) possibly address mandatory mediation as a prerequisite to arbitration. On that last point, it was pointed out that making mediation mandatory might be detrimental in certain situations and might be at odds with the voluntary nature of the mediation process.

19. It was highlighted that some current treaties already included such model clauses and could serve as a model for the Working Group.

*Link to other reform options*

20. It was said that an advisory centre, if established, could play a role in compiling and sharing information on best practises with regard to ADR. Other reform options which may be combined with the strengthening of mediation included those relating to the setting up of a multilateral standing body. In that context it was highlighted that the broader picture of ISDS reform needed to be taken into account when finalizing work on ADR, as many of the concerns that might be raised regarding ADR, such as fear of exposure to public opinion, were relevant also to the broader ISDS framework. In addition, it was noted that reform options aimed at addressing coherence and consistency could have an impact on ADR means, as coherent and consistent interpretation by arbitral tribunals would make it easier for the parties to assess the potential outcome of a dispute and base the search for a settlement on solid grounds.

6 October 2020

Original: English

**United Nations Commission on International Trade Law**
**Working Group III (ISDS Reform)**
**Thirty-ninth session**
Vienna (online), 5–9 October 2020

# Draft summary

**Addendum**

## III. Possible reform of investor-State dispute settlement (*continued*)

### 2. Alternative dispute resolution methods (*continued*)

**Preparatory work on the topic of ADR**

*Introductory remarks*

1. The Working Group noted the general interest in having the Secretariat pursue further work on the question of mediation and other forms of ADR, with a view to ensure that ADR could be more effectively used. It was observed that ADR methods were still largely underutilised in the ISDS context, and the structural, legislative and policy impediments particular for governments were noted. It was also noted that not all disputes were suitable for mediation, and that any work that might be undertaken should ensure that the application of ADR methods would not lead to unintended consequences such as regulators failing to act appropriately in the public interest.

*Way Forward*

*- Amicable settlement period (also referred to as the "cooling off period")*

2. After discussion, the Working Group requested the Secretariat to prepare model clauses reflecting best practices on the amicable settlement or cooling off period, including an adequate length of time and clear rules on how such period could be complied with. The Secretariat was requested to compile guidelines or recommendations on how such a period could be more effectively used.

3. It was said that the model clauses should encourage disputing parties to use mediation as a possible step to avoid resorting to arbitration. It was underlined that attention should be given to avoid unnecessary delays and costs and ensure that mediation or other forms of ADR would be used in a meaningful manner.

*- Preparation of guidelines for effective use of ADR and preparation of rules*

4. It was felt that there would be value in developing more specific guidelines and rules. In that regard, the Secretariat was requested to develop two types of

Please recycle

instruments, building on existing best practices, and in consultation with interested stakeholders, such as the World Bank.

5. First, as a matter of information-sharing, capacity-building and awareness-raising, the Secretariat was requested to prepare guidelines and best practices for participants in ISDS mediation, covering matters such as (i) the organizational aspects that States might need to consider at the national level to minimize structural or policy impediments and to ensure that mediation could be effectively used; (ii) the representation of public interest in the mediation; and (iii) the setting up of lists or rosters of qualified mediators in the field of ISDS. It was also said that consideration should be given to how the home State of the investor could promote mediation and other forms of ADR with their investors. In that context, it was clarified that it should be explored, when doing further work on an advisory centre, how such a centre, if one were to be created, could assist in the resolution of disputes outside of the adversarial context.

6. Second, the Secretariat was requested to work with interested organization, such as ICSID, to develop or adapt rules for mediation in the ISDS context as well as model clauses to be used in investment treaties. These specific rules and clauses would build on the numerous documents already available and would aim at creating procedures and provisions that would take into account some of the specificities of ISDS such as the public interests involved. It was also noted that work in the field of mediation should take into account the reform options identified by the Working Group, so as to ensure that solutions developed could be adapted to the various options.

## B. Multiple proceedings and counterclaims (A/CN.9/WG.III/WP.193), including shareholder claims and reflective loss (A/CN.9/WG.III/WP.170)

### 1. Multiple proceedings, shareholder claims and reflective loss (A/CN.9/WG.III/WP.193 and A/CN.9/WG.III/WP.170)

7. The Working Group then considered issues relating to multiple proceedings along with those relating to shareholder claims and reflective loss (hereinafter "multiple proceedings" for ease of reference). It was reiterated that multiple proceedings had been identified as a concern by the Working Group due to, among others, their possible negative impact on the cost and duration of the ISDS proceedings, potential inconsistent outcomes, possible double recovery, forum shopping as well as abuse of the process by claimant investors.

8. References were made to various circumstances leading to multiple proceedings, shareholder claims being one of them. It was mentioned that work should focus on instances which were perceived to be particularly problematic and had negative consequences. In that regard, it was suggested that there could be merit in clarifying the meaning of multiple proceedings which would set forth the scope of the work.

9. References were also made to a wide range of existing mechanisms and tools which had been developed to prevent the occurrence of multiple proceedings and to effectively manage them, thus limiting their impact (see paras. 26–33 of document A/CN.9/WG.III/WP.170 and paras. 21–29 of A/CN.9/WG.III/WP.193). It was observed that a number of recently concluded investment treaties provided concrete provisions to mitigate the problems arising from multiple proceedings.

10. As to the mechanisms to be further developed, there was general support for preparing model clauses or guidance on joinder and consolidation. It was suggested that such work could focus on addressing some of the practical questions, for example, who would make the determination, the basis for such determination and how to incentivize ISDS tribunals to proceed with consolidation. It was, however, mentioned that joinder and consolidation had their limitations in cases where the proceedings were based on different treaties or procedural rules or were being

administered by different institutions. It was also mentioned that joinder and consolidation should be based on the voluntary consent of the parties.

11. There was also support for work which would clarify the powers of ISDS tribunals to stay or suspend the proceedings and to set forth the circumstances which would justify the exercise of such powers.

12. Some emphasis was put on work to further develop coordination mechanisms, which would aim at clarifying existing tools that ISDS tribunals could easily utilize. It was said that enhanced sharing of information among the ISDS tribunals could be useful and as such, the need to promote transparency was highlighted. While it was pointed out that consolidation and coordination mechanisms might not be effective in addressing multiple proceedings that occurred over time (and not concurrently), it was stated that one possible way to address that problem was through statute of limitations.

13. While some support was expressed for providing guidance on the doctrines of *lis pendens* and res judicata, doubts were also expressed as those doctrines could be interpreted differently depending on the jurisdiction and the applicable laws and as such guidance might inadvertently touch upon the substance or the merits of the dispute.

14. Some support was expressed for further developing provisions on denial of benefits and those aimed to prevent abuse of process. While there was general support for elaborating the notion of abuse of process or of claim (including the notion of double recovery) in ISDS, it was cautioned that a certain level of flexibility should be provided to ISDS tribunals in applying that notion to achieve effective control over multiple proceedings.

15. Some support was expressed for work on waivers (or the “no U-turn” approach) as well as the so-called “fork-in-the-road” clauses offering a choice between domestic courts and international arbitration. There was some support for developing model waiver clauses, which could be used by investors as well as companies, the latter in the case of claims by their shareholders.

16. More specifically to shareholder claims, it was suggested that work could focus on the regulation of those types of shareholder claims found to be most problematic, including prohibition of some in certain instances. That was based on concerns about the possible distortion to the basic principles of corporate law as well as discrimination against other shareholders and creditors. It was suggested that in addition to the mechanisms mentioned above, regulation of shareholder claims could be achieved through a clearer definition of “investment”, “investor” or “control” in investment treaties or by better defining direct (and not derivative) claims that would be allowed for shareholders. It was further suggested that provisions on shareholder claims could be further refined following recently revised or concluded investment treaties, which included clearer language on the conditions to be met for a shareholder to raise such claims (for example, when the shareholder owned or controlled the company, with appropriate waivers and damages to be paid to the company).

17. On the other hand, concerns were expressed about the possible impact that the regulation of shareholder claims could have on foreign direct investment and the right of foreign investors to be compensated when there was a breach of the treaty obligation by States. In that context, the objective of investment treaties to encourage foreign investment and to provide foreign investors with access to justice was emphasized, particularly when ISDS was the only means. References were made to ownership restrictions or requirements of joint venture with local entities which justified reflective loss claims. It was further mentioned that the regulation of shareholder claims could unduly limit the flexibility of structuring foreign investment as well as corporate strategies. In support, it was stated that the existing tools and mechanisms could sufficiently protect States from abusive claims. It was also stated that the concerns were based on hypothetical harms which were speculative and did not manifest in reality.

18. During the deliberations, it was mentioned that if a multilateral standing body were to be established to handle ISDS disputes, such a body would be in a better position to address the wide-ranging issues that could arise from multiple proceedings. It was further stated that a number of the mechanisms and tools mentioned above to address multiple proceedings could be incorporated in the treaty establishing, or rules governing, a multilateral standing body. On the other hand, it was mentioned that the creation of such a body would not have the intended impact and could result in increased multiplicity of proceedings, since disputes would be brought in respect of different investment treaties which were differently drafted.

**Preparatory work on multiple proceedings**

*Introductory remarks*

19. It was widely felt that there was a need to reform the current ISDS system by addressing the concerns expressed with regard to multiple proceedings, particularly as the old-generation investment treaties did not provide appropriate means to address them. It was broadly shared that multilateral efforts to develop and implement a number of the mechanisms and tools to address the concerns raised by multiple proceedings would be particularly beneficial.

20. It was also felt that in furthering the reform options, there was a need to strike a balance between addressing the concerns and ensuring the continued promotion of foreign investment as well as protection of foreign investors. The need to ensure due process and procedural fairness in implementing the different tools was also emphasized.

*Way forward*

21. After discussion, the Working Group requested the Secretariat to (i) identify more specifically the types of multiple proceedings and shareholder claims that might arise and the concerns or lack of concerns associated with each, so as to further define the scope of the issue; (ii) compile a list of the tools and mechanisms that already existed in treaty practice to address these concerns, and identify for which of the type of multiple proceedings the tool was used; (iii) recommend model clauses which would reflect an improvement of existing tools, particularly in light of the problems that continued to be faced; and (iv) recommend options for the implementation of these tools in the ways intended, such as through resolutions of the General Assembly, guidelines to tribunals, or other explanatory works. It was said that a detailed toolbox that would specifically and appropriately respond to the concerns that existed with respect to multiple proceedings and shareholder claims could be developed. It would then remain to determine how to implement it as part of the reform process.

22. In preparing the above-mentioned material, the Working Group requested that the Secretariat continue to cooperate with interested delegations, including those who have recent treaty practice as well as the OECD, the Academic Forum and other interested international organizations and to make reference to recently concluded investment treaties containing relevant provisions as well as efforts undertaken by ICSID as part of the Rules Amendments.

### 2. Counterclaims (A/CN.9/WG.III/WP.193)

23. The Working Group considered the issues relating to respondent States' counterclaims in ISDS. It was noted that two distinct aspects needed to be considered, one being the procedural aspect, or the admissibility of counterclaims; and the other being the substantive obligations of investors, the breach of which would form the basis of the counterclaims.

24. On the procedural aspect, it was reiterated that any work on ISDS reform should not foreclose the possibility of respondent States bringing a counterclaim against an investor, where there was a legal basis for doing so. While a view was expressed that it would be necessary for States parties to investment treaties to agree on the use of

counterclaims, it was pointed out that procedural rules applicable to ISDS generally contemplated the possibility of the respondent State raising counterclaims and that recent investment treaties included explicit provisions allowing counterclaims. It was noted that a framework allowing for counterclaims would permit ISDS tribunals with expertise in the field to hear such claims and could avoid multiple proceedings. The impact of allowing counterclaims on the outcome of the dispute was also noted. It was generally felt that procedural issues such as the admissibility of counterclaims deserved further consideration, also in the context of a multilateral standing body.

25. On the second aspect, it was stated that the current work on ISDS reform should not address the obligation of investors or the legal basis for counterclaims, as such work would touch upon the substantive aspects, whereas the focus of the work should be on procedural aspects of ISDS. In that context, it was explained that counterclaims could be raised with regard to the breach of investor's obligations in investment treaties as well contracts and that the investor's conduct was often taken into account by ISDS tribunal when rendering the final award. It was pointed out that that matter could be considered further in light of investor's obligations that were not purely economic, such as obligations in relation to human rights, the environment as well as to corporate social responsibility. It was also mentioned that the issue of counterclaims would need to be considered in light of possible resort to domestic courts by States to seek affirmative relief as well as the need to provide a linkage with the claim raised by the investor.

5 October 2020
English
Original: French

**United Nations Commission on International Trade Law**
**Working Group III (Investor-State Dispute Settlement Reform)**
**Thirty-ninth session**
Vienna (online), 5–9 October 2020

# Communication from the Kingdom of Morocco on the role of translation in the process of reforming the investor-State dispute settlement regime

In connection with the current work of UNCITRAL Working Group III on investor-State dispute settlement (ISDS) reform, the delegation of Morocco wishes to raise the matter of the translation of decisions and awards rendered in investor-State arbitration proceedings.

The translation of arbitral awards rendered in investor-State arbitration proceedings plays a crucial role in ensuring awareness of recent developments in international investment law and trends in case law relating to investment arbitration, especially given that a number of ISDS cases that offer valuable guidance on a range of legal issues are not translated into French even though they are the cases most often considered as sources of legislation in the field of international investment protection.

Indeed, case law relating to investment is mostly in English and the documentation made available to the public by the secretariats of the arbitration centres that administer arbitration proceedings is often written in that language, a situation that constitutes a barrier to the monitoring of international case law, particularly for French-speaking countries, and undermines the principle of equal access to information among the various parties using the services of those arbitration centres.

This state of affairs is compounded by the fact that the links on the arbitration centres' websites often lead to documents written in English even though those centres use French and/or Spanish as working languages and for communication purposes, which reinforces the impression that investment-related arbitration awards exist only in English and are not translated.

While the translation of arbitral awards and documents used in arbitral proceedings into the six official languages of the United Nations would entail high costs for the centre administering the arbitration, it would be appropriate for English-language documents relating to the arbitration to be translated into French, especially if the latter language is used by the arbitration body or centre as a working language and language of communication.

Translation facilitates the broad dissemination of investment arbitration awards, thus enabling users (negotiators of bilateral investment treaties, judges, arbitrators, lawyers, experts and any interested party), in particular those from non-English-

Please recycle

speaking countries, to acquaint themselves with the content of those awards and to access extremely useful case-law resources in French.

Furthermore, translation will (i) enrich international investment law, which is a newly created discipline in the area of public international law, and (ii) enable the development of education in international investment law, which is one of the most dynamic branches of international law.

The Moroccan delegation therefore considers it important to take account of translation in the process of ISDS reform with a view to:

(i) Assuring legal equality between States by building the knowledge, capacity and expertise of French-speaking countries in the field of investment arbitration;

(ii) Ensuring the broad sharing of information on past ISDS cases that have led to awards constituting a reference source in the field of international investment arbitration so as to increase awareness of the ways in which arbitration tribunals have interpreted the substantive obligations set out in international investment treaties;

(iii) Promoting transparency and uniform understanding of international case law and arbitral awards among all participants in the ISDS process; and

(iv) Achieving linguistic balance with regard to the publication of documents relating to ISDS cases.