

Contribution of the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) with regard to the open call for input for Working Group on Business and Human Rights’ report on “Human Rights-compatible International Investment Agreements (IIAs)”

UNCITRAL Working Group III: Investor-State Dispute Settlement Reform

The United Nations Commission on International Trade Law (“UNCITRAL” or “Commission”) Working Group III is currently working on a comprehensive reform of the regime for investor-State dispute settlement (“ISDS”), based on concerns and shortfalls identified so far. In its current phase of work, the Working Group is in the process of developing concrete reform solutions, on the understanding that these should be made applicable to the more than 3,000 existing international investment agreements (“IIAs”).¹

The work is carried out considering that (i) investment policies should provide legal certainty, as well as effective and equal protection to investors and investments; and (ii) mechanisms for the prevention and settlement of disputes should be fair, open and transparent, with appropriate safeguards to prevent abuse, with decisions-makers reflecting the geographical, cultural and gender diversity.² The work is also carried out in light of the 2030 Agenda for the Sustainable Development Goals (SDGs), and is conceived as a step towards realizing the broader objectives of the SDGs, which include reducing poverty, empowerment of indigenous peoples, promoting decent work, access to affordable energy and water, and reversing environmental degradation and climate change.

The General Assembly has recognized the vital role UNCITRAL plays in shaping “fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development”.³ This has also been noted in a submission of March 2019 by the Working Group on Business and Human Rights – jointly with several human rights experts of the Special Procedures. However, the authors of this submission also expressed concerns with regard to the consideration of human rights in the UNCITRAL ISDS reform deliberations.⁴ The authors argued in particular that systemic reform was needed in order to address a risk by IIAs and ISDS to the regulatory space required by States to comply with their international human rights obligations and achieve the SDGs and that it would be a lost opportunity to narrowly focus on amending the existing procedural rules. As will be elaborated further in this contribution, UNCITRAL Working Group III continues to simultaneously develop a variety of reform options, including options for systemic reform and options for procedural reform, to address the concerns identified with regard to the current ISDS system.

¹ For the latest updates on UNCITRAL’s activities and the current status of the reform discussion, please visit the UNCITRAL Working Group III web page (https://uncitral.un.org/en/working_groups/3/investor-state) and follow our posts on twitter (@annajoubinbret) and LinkedIn (<https://www.linkedin.com/company/uncitral/>).

² See Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat”, UNCITRAL, Working Group III, 38th Sess. (Vienna, 14-18 October 2019), UN Doc. A/CN.9/WG.III/WP.166 (30 July 2019) para. 11.

³ See United Nations General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1 (2012), para. 8, available at: <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf> (last accessed 21 April 2021).

⁴ The submission is available on the UNCITRAL webpage at https://uncitral.un.org/sites/uncitral.un.org/files/public_-_ol_arm_07.03.19_1.2019_0.pdf (last accessed 21 April 2021).

I. MANDATE

In July 2017, UNCITRAL entrusted its Working Group III with a broad mandate to work on the possible reform of ISDS against the background of its global reach and its experience with the negotiation of legal instruments in the field of international dispute settlement.⁵

It was the prevailing view that UNCITRAL provides an appropriate multilateral forum to discuss relevant issues in an inclusive and transparent manner, where the interests of not only States but also of other stakeholders could be considered. It was recalled that UNCITRAL has successfully undertaken a first step towards reform of ISDS with the preparation of standards on transparency.⁶

In 2014, the Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (Rules on Transparency) came into effect in April 2014.⁷ These rules address the need “to take account of the public interest involved in such [ISDS] arbitrations”.⁸

UNCITRAL further prepared a convention designed to facilitate the application of the Transparency Rules to the 3,000 or more investment treaties concluded before their entry into force, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the “Mauritius Convention on Transparency”). In essence, the Mauritius Convention on Transparency introduces the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument.

After the adoption of these texts, the question was raised whether the Mauritius Convention on Transparency could provide a useful model for possible further reforms in the field of ISDS. It was noted that the then current circumstances posed a number of challenges to ISDS and proposals for reforms had been formulated by a number of organizations.⁹ In 2016, a research paper presented to UNCITRAL proposed to follow an approach similar to the one pursued in respect of the Mauritius Convention on Transparency, that would allow reform of a complex and atomized regime by way of a single multilateral instrument.¹⁰

II. PROCESS

1. *A government-led process*

⁵ See also wording of the mandate in “Report of the United Nations Commission on International Trade Law”, 50th Sess. (3-21 July 2017) General Assembly, 72nd Sess. Supplement No. 17, UN Doc. A/72/17, para. 264.

⁶ “Report of the United Nations Commission on International Trade Law, Fiftieth session (3-21 July 2017)” General Assembly, 72nd Sess., UN Doc. A/72/17, para. 258.

⁷ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014), text and additional resources available on the UNCITRAL web page at <<https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency>> (last accessed 4 December 2020).

⁸ “Report of the United Nations Commission on International Trade Law”, 46th Sess. (8-26 July 2013) General Assembly, 68th Sess., UN Doc. A/68/17, Annex I, at C.

⁹ “Report of the United Nations Commission on International Trade Law”, 48th Sess. (29 June-16 July 2015) General Assembly, 70th Sess., UN Doc. A/70/17, para. 268; See also “Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement, Note by the Secretariat” UNCITRAL, 49th Sess. (New York, 27 June-15 July 2016) UN Doc. A/CVN/9/890 (24 May 2016).

¹⁰ Gabrielle KAUFMANN-KOHLER and Michele POTESTÀ (CIDS – Geneva Centre for International Dispute Settlement), “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 roadmap” (3 June 2016), available from <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf>, p. 93, 94.

The Commission had noted that ISDS involves a number of policy issues and highlighted that Governments should have a leading role in the reform process.¹¹ The reform deliberations in Working Group III have benefitted from high level input from government representatives in the working group sessions as well as in the form of over 50 written submissions contributing to the Working Group’s deliberations.¹²

2. *An inclusive process*

The Working Group sessions have benefitted from significant and increasing participation by States, including developing and least developed countries. The Working Group session in January 2020 in Vienna, for example, was attended by more than 400 delegates representing 106 States, and 66 international organizations and non-governmental organizations.¹³

3. *Broad inputs from all stakeholders*

The deliberations of the Working Group are based on a broad range of available expertise from different stakeholders. More than 66 international inter-governmental organizations and non-governmental organizations with a variety of industry and policy expertise have participated in the Working Group sessions as observers and have organized numerous side events during as well as in-between the Working Group sessions.¹⁴

4. *Consensus-based process*

Legislative work by UNCITRAL and its working groups is generally based on consensus.¹⁵ While the adoption of an instrument or a text by consensus does not give it any binding nature and States remain free to decide whether they want to adopt or apply it, it was stated that efforts should be made to consider all possible options so as to achieve the broadest consensus.¹⁶

5. *Transparency*

The reform process is being conducted in a fully transparent manner. Each step of the deliberations is documented in the Working Group and Commission reports. The reports as well as the notes by the Secretariat and submissions by States are publicly available on the UNCITRAL web page in all six UN languages.¹⁷ Moreover, audio recordings of the sessions are available on the UNCITRAL web page.¹⁸

6. *Coordination with parallel ISDS reform developments*

¹¹ “Report of the United Nations Commission on International Trade Law”, 50th Sess. (3-21 July 2017) General Assembly, 72nd Sess. Supplement No. 17, UN Doc. A/72/17 (henceforth Commission Report 72), para. 250.

¹² Submissions by States and observer organizations are published on the UNCITRAL Working Group III web page at <https://uncitral.un.org/en/working_groups/3/investor-state> (last accessed 2 December 2020).

¹³ See “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session” (Vienna, 20–24 January 2020) UNCITRAL, 54th Sess., UN Doc. A/CN.9/1004/Add.1 (28 January 2020) (henceforth WGIII Report 1004/Add.1) p. 3; See also “UNCITRAL Working Group on investor-State dispute settlement (ISDS) continues work on reforms”, Press Release, UNIS Vienna, United Nations Information Service, (24 January 2020), available at <<https://unis.unvienna.org/unis/en/pressrels/2020/unisl289.html>> (last accessed 2 December 2020).

¹⁴ See WGIII Report 1004/Add.1, p. 3; See also “UNCITRAL Working Group on investor-State dispute settlement (ISDS) continues work on reforms”, Press Release, UNIS Vienna, United Nations Information Service, (24 January 2020), available at <<https://unis.unvienna.org/unis/en/pressrels/2020/unisl289.html>> (last accessed 2 December 2020).

¹⁵ Commission Report 72 , para. 259.

¹⁶ Ibid.

¹⁷ See UNCITRAL Working Group III web page at (<https://uncitral.un.org/en/working_groups/3/investor-state>) (last accessed 4 December 2020).

¹⁸ Audio recordings of the Working Group III sessions can be accessed at <<https://uncitral.un.org/en/audio>>.

Besides the UNCITRAL ISDS reform process, reform developments are also taking place in other fora, including (i) ICSID, which is currently updating its rules through the Rules and Regulations Amendment process;¹⁹ (ii) the OECD in particular regarding its work on shareholder claims and reflective loss in its preparatory work;²⁰ and the United Nations Conference on Trade and Development (UNCTAD).

Lastly, while it is the objective to develop reform options in a coherent and consistent manner, an additional layer of consistency needs also be addressed. It was noted that a reform of ISDS needs to ensure that ISDS does not undermine the obligations of States to take action under the SDGs and against climate change under the Paris Agreement.²¹

III. REFORM SOLUTIONS

The Working Group completed the first two phases of the reform agenda based on a broad consensus on identified concerns with regard to the current ISDS regime and the desirability of reform and has started with the preliminary consideration of a number of reform solutions.²²

1. Development of reform solutions

In its session in October 2019, the Working Group has started with the preliminary consideration of the identified reform options.²³ These discussions were based on submissions by States and input from relevant observers.

At this stage, and without prejudice of the decisions of the Working Group, it is possible to categorize the reform options into two broad categories. A first category, that we could call, procedural reform options would include those reform options that typically feature in the investment chapters of the more modern free trade agreements and address the ISDS procedure with a view to correct lack of clarity and shortcomings in the procedure.

Under this category or stream, the Working Group has identified the following reform options:

- Strengthening ADR mechanisms, including recourse to investor-State mediation;
- Developing structures and policies to strengthen and operationalize dispute prevention;
- Developing new methods for the selection and appointment of ISDS arbitrators;
- Developing a code of conduct for adjudicators in ISDS;
- Other ISDS procedural rules reforms, including procedure to address frivolous claims; multiple proceedings; reflective loss; counterclaims; security for costs; third party funding; treaty interpretation, damages calculations.

A second category regroups reform options of a structural or institutional nature. These reform options consist of setting-up new mechanisms and new institutions such as:

¹⁹ For further information on the ICSID Rules and Regulations Amendment project see the ICSID web page at <<https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers>> (last accessed 3 December 2020).

²⁰ See Secretariat Note 170.

²¹ WGIII Report 1004, para. 99.

²² The Working Group had identified a number of concerns related to the following three broad categories: the lack of consistency, coherence, predictability and correctness of arbitral decisions, arbitrators and decision makers, and cost and duration of ISDS. The Working Group had further agreed to discuss, elaborate and develop multiple potential reform solutions simultaneously.

²³ WGIII Report 1004, para. 25.

- A multilateral advisory centre patterned on the WTO-ACWL to assist States in ISDS procedures;
- An appellate mechanism or a second instance appellate court to hear appeals against arbitral awards or first instance court judgements;
- A permanent investment court comprising a first and a second instance standing body.

The Working Group also plans to consider the means of implementation of the entire reform of ISDS, through a multilateral instrument.²⁴

2. *Implementation of the reform: a multilateral framework based on the Mauritius Convention on Transparency model?*

Implementation is a key question and has been addressed in submissions by States.²⁵ As discussed early in the process, a potential model is the Mauritius Convention on Transparency. Submissions by States further suggest the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) as a model.²⁶

IV. CONCLUSION

The Working Group has completed a first round of preliminary considerations of reform options, tasked the Secretariat with further extensive preparatory work and engaged actively in discussions on the structure and resources for future work. For several of the reform options on the agenda, draft provisions have been developed to provide a basis for further deliberations. A work plan has been prepared aiming for a completion of the overall reform of the ISDS regime by 2024 and a final adoption through the United Nations process in 2025.

For further information on the ISDS reform process please contact Ms. Anna Joubin-Bret, Secretary, UNCITRAL (uncitral@un.org).

²⁴ See WGIII Report 1004, para. 17; WGIII Report 970, para. 39 and 40; This list of reform options was considered non-exhaustive and other concerns were not precluded from being identified and dealt with at a later stage of the deliberations.

²⁵ The Submissions that refer to the implementation of multiple reform options include the following: Submission by the European Union 159/Add.1; “Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Colombia, Note by the Secretariat”, UNCITRAL Working Group III, 38th Sess. (Vienna, 14–18 October 2019) UN Doc. A/CN.9/WG.III/WP.173 (14 June 2019) (henceforth Submission by Colombia 173); and Submission by Ecuador 175; see also “Possible reform of investor-State dispute settlement (ISDS), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, Note by the Secretariat”, UNCITRAL Working Group III, 38th Sess. (Vienna, 14–18 October 2019) UN Doc. A/CN.9/WG.III/WP.182 (2 October 2019) (henceforth Submission by Chile, Israel, Japan, Mexico and Peru 182), suggesting implementation of reform options through a “suite” approach; See also Secretariat Note 194; WGIII Report 1004, paras. 101 and 104.

²⁶ Submission by Colombia 173.