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Possible reform of investor-State dispute settlement (ISDS)

Note by the Secretariat

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I. Introduction

1. At its fiftieth session, in 2017, the Commission had before it notes by the Secretariat on possible future work on concurrent proceedings in international arbitration (A/CN.9/915), on ethics in international arbitration (A/CN.9/916), and on possible reform of investor-State dispute settlement (ISDS) (A/CN.9/917), together with a compilation of comments by States and international organizations (A/CN.9/918 and addenda). The Commission also had before it a research paper by the Centre for International Dispute Settlement (CIDS) on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration could serve as a model for further reforms (the “CIDS report”).¹
2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of ISDS.²
3. In line with the UNCITRAL process, Working Group III, in discharging its mandate, was requested to 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 to allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).³
4. In order to assist the Working Group in pursuing this mandate, this Note outlines certain characteristics of the ISDS regime and recent trends, and continues with a summary of issues and concerns expressed regarding ISDS. This Note was prepared with reference to a broad range of published information on the topic,⁴ and does not seek to express a view on the desirability of reforms, which is a matter for the Working Group to consider. This Note also refers to documents mentioned in paragraph 2 above, which provided an outline of issues that the Working Group might wish to consider.

II. Characteristics of the ISDS regime, trends and statistics

A. Characteristics of the ISDS regime

5. By way of background, the current ISDS regime was developed to allow a foreign national (whether an individual or a company) to bring a claim directly against

¹ Geneva Centre for International Dispute Settlement (CIDS), “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” (2016), available on the UNCITRAL website at <http://www.uncitral.org/uncitral/en/commission/sessions/50th.html>.

² *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264.

³ *Ibid.*

⁴ This Note takes account of information published by the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), the Centre for International Dispute Settlement (CIDS), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School, and the E15 Initiative on Strengthening the Global Trade and Investment System for Sustainable Development, jointly undertaken by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum (WEF).

a sovereign State where its investment was made, in a significant break from traditional mechanisms which essentially relied on diplomatic means of protection to resolve disputes relating to investment. Importantly, the ISDS regime was intended to “de-politicize” investment disputes and effectively remove the risk of such disputes escalating into inter-State conflicts (see document [A/CN.9/917](#), paras. 9 and 10).⁵

6. Investment treaties,⁶ conceived as a means to enhance confidence in the stability of the investment environment, provide substantive guarantees to foreign investors and their investments in the form of enforceable obligations placed upon States, as States undertake to respect certain standards of investment protection (such as fair and equitable treatment, protection from expropriation, and non-discrimination). Although the specific terms vary, investment treaties follow a similar structure and contain a number of core principles. These broad similarities among investment treaties make it possible to speak of a “regime” of international investment protection.⁷

7. The Working Group may wish to note that a large number of investors’ claims seek to enforce these protections under investment treaties.⁸ While ISDS provisions in investment treaties vary, they normally provide for dispute settlement mechanisms based on arbitration and the following features: (i) the claimant-investor may bring a claim directly against the host State; (ii) the dispute is resolved by an arbitral tribunal constituted ad hoc for that particular dispute; and (iii) both disputing parties, including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal.⁹

B. Trends and statistics

1. Trends and statistics regarding ISDS provisions in investment treaties

8. A 2012 OECD survey of investment treaties showed that 96 per cent contained ISDS provisions allowing foreign investors to raise claims through international arbitration and, to a lesser degree, in domestic courts.¹⁰ Indeed, only 7 per cent of the investment treaties surveyed did not provide for arbitration. However, they are commonly silent or contained little guidance on the conduct of ISDS proceedings, relying mainly on established sets of arbitration rules.¹¹

9. Historically, such investment treaties have also tended to contain broad formulations on substantive investment protection standards, opening the door to a

⁵ See also CIDS report, paras. 8-14.

⁶ The term “investment treaty” in this Note covers broadly any bilateral or multilateral treaty that contains provisions on the protection of investments or investors, including any treaty commonly referred to as a free trade agreement, economic integration agreement, or trade and investment framework or cooperation agreement.

⁷ See CIDS report, para. 5.

⁸ According to ICSID, as of 30 June 2017, 16.8 per cent of the cases originated from investment contracts, 9.6 per cent from national investment laws and the rest from investment treaties (see ICSID Caseload — Statistics (Issue 2017-2), p. 10, available at <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>). According to the PCA, out of the 148 cases for which the PCA provided registry services in 2016 (40 were initiated in 2016), 86 were cases arising under investment treaties and/or national investment laws, 51 were cases arising under contracts involving a State, intergovernmental organization, or other public entity (see PCA Annual Report 2016, p. 8, available at <https://pca-cpa.org/wp-content/uploads/sites/175/2017/03/ONLINE-PCA-Annual-Report-2016-28.02.2017.pdf>).

⁹ CIDS report, paras. 6 and 7.

¹⁰ Gaukrodger, David and Kathryn Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, OECD Working Papers on International Investment, 2012/03, p. 64, at <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

¹¹ [A/CN.9/918/Add.7](#), OECD contribution. See also Pohl, Joachim, Kekeletso Mashigo and Alexis Nohen, “Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey”, OECD Working Papers on International Investment, 2012/02 available at https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf.

wide range of different interpretations and to uncertainty regarding the extent of protections in practice.¹²

10. More recently, States have made efforts to adjust their investment treaties by drafting more precise substantive investment protection standards, leaving less room for interpretation of those standards in ISDS cases.¹³

11. UNCTAD also reported that recently-concluded investment treaties have reduced the scope of access to ISDS. Some do so by specifying treaty provisions that are subject to ISDS, others by excluding certain policy areas from ISDS, or yet others by restricting the time for submission of a claim. Out of the 18 investment treaties concluded in 2016 and reviewed by UNCTAD, 13 limit access to ISDS.¹⁴

2. Statistics regarding ISDS cases

12. The Working Group may wish to take note of the following statistics regarding known treaty-based ISDS cases. As of 1 January 2017, there were 767 publicly known treaty-based ISDS cases. 109 States were respondents in one or more known ISDS cases. In 2016, investors initiated 62 ISDS cases against 41 States, which was higher than the 10-year average of 49 cases per year (2006-2015) but lower than 74 cases initiated in 2015. About two thirds of treaty-based ISDS cases in 2016 were brought under bilateral investment treaties, most of them dating back to the 1980s and 1990s. The remaining third were based on other treaties with investment protection. At 29 per cent, the relative share of known ISDS cases in 2016 against developed countries was lower than in 2015 (45 per cent).¹⁵

13. By the end of 2016, some 495 treaty-based ISDS cases had been concluded. 36 per cent of the cases have been decided in favour of States, 27 per cent in favour of investors, 2 per cent in favour of neither party, 25 per cent settled, and 10 per cent discontinued. Of the cases that ended in favour of a State, about half were dismissed for lack of jurisdiction. Among the cases where a decision was made on the merits, 60 per cent were decided in favour of investors, and 40 per cent in favour of States.¹⁶ In cases decided in favour of investors, successful investor-claimants were awarded on average about 40 per cent of the amounts claimed.¹⁷ The mean amount claimed was \$1.4 billion and the median \$100 million. The mean amount awarded was \$545 million and the median \$20 million.¹⁸

14. In 2016, ISDS cases were initiated mainly in the service sectors involving supply of electricity and gas, construction, as well as information and communication. State measures challenged included alleged direct expropriation of investments, legislative reforms in the renewable energy sector, tax-related measures, concessions, and revocation or denial of licences or permits.¹⁹ The amounts claimed ranged from \$10 million to \$16.5 billion.²⁰

3. Developments regarding arbitration rules

15. The Working Group may wish to note certain recent developments regarding arbitration rules used in the context of ISDS.

¹² Ibid.

¹³ CIDS report, para. 18.

¹⁴ UNCTAD, World Investor Report 2017 (WIR 2017), p. 120. WIR 2017 reported that 37 new investment treaties were concluded in 2016, bringing the total to 3,324 treaties at the end of 2016 (see also UNCTAD online tool on investment treaties available at <http://investmentpolicyhub.unctad.org/IIA>). WIR 2017 also noted that 16 investment treaties of the 18 reviewed investment treaties omitted the umbrella clause.

¹⁵ UNCTAD, WIR 2017, pp. 114 to 116.

¹⁶ Ibid., p. 117.

¹⁷ Ibid., p. 118.

¹⁸ Ibid.

¹⁹ Ibid., p. 116.

²⁰ Ibid., p. 117.

16. In 2006, the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) were amended to include provisions on transparency, expedited procedures for making preliminary objections to non-meritorious claims and provisional measures.²¹ In October 2016, the Secretariat of ICSID initiated a consultation with its member States to identify areas where further reform of the ICSID Rules might be needed, and the consultation was extended to the public in January 2017. The preliminary outcome of the consultations indicated 16 potential areas for amendments, including arbitrator-related issues (appointment, code of conduct, challenge procedure), third-party funding, consolidation of cases, means of communication, preliminary objections proceedings, rules on witnesses, experts and other evidence, provisional measures, time frames and allocation of costs.²²

17. The UNCITRAL Arbitration Rules were revised in 2010 and 2013. A number of provisions were updated in 2010 with a view to improving procedural efficiency and new provisions on joinder and on interim measures were included. The Permanent Court of Arbitration (PCA), the institutional rules of which are based on the UNCITRAL Arbitration Rules, has implemented similar reforms.²³

18. The adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Rules on Transparency”) resulted in an additional revision to the UNCITRAL Arbitration Rules in 2013, with a new article 1(4) providing for the application of the Rules on Transparency. The Rules on Transparency, which came into effect on 1 April 2014, comprise a set of procedural rules that provides for transparency, and for accessibility by the public to treaty-based investor-State arbitration. The Rules on Transparency have been incorporated in most investment treaties concluded since their coming into force. In addition, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“Mauritius Convention on Transparency”), which opened for signature in March 2015 and will enter into force in October 2017, provides a mechanism for States to consent to the application of the Rules on Transparency to investment treaties concluded before the coming into force of these Rules in April 2014.²⁴

III. Concerns expressed regarding ISDS

19. This section summarizes some concerns expressed regarding the current ISDS regime for consideration by the Working Group. The treatment is not intended to be exhaustive, but seeks to highlight issues that are often set out or mentioned in

²¹ See ICSID, Amendment of ICSID’s Rules and Regulations available at

<https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>.

²² Information about the reform process is available at <https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf>.

²³ The PCA Arbitration Rules are available at <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>. Rules of other arbitral institutions administering ISDS cases have also undergone reforms to better address challenges posed by ISDS cases and improve procedural efficiency. See, for instance, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (available at <http://www.sccinstitute.com/dispute-resolution/rules/>), information about the application of the Rules on Transparency in conjunction with the SCC Rules is available at <http://www.sccinstitute.com/about-the-scc/news/2015/uncitral-rules-on-transparency-at-the-scc/>); the Cairo Regional Centre for International Commercial Arbitration (CRCICA) (available at <http://crcica.org/Arbitration.aspx>); the International Chamber of Commerce (ICC) (Report of the ICC Commission on Arbitration on States, States Entities and ICC Arbitration available at <https://iccwbo.org/publication/icc-arbitration-commission-report-on-arbitration-involving-states-and-state-entities-under-the-icc-rules-of-arbitration/>); and the Singapore International Arbitration Centre (SIAC) (Investment Arbitration Rules of the SIAC (2017) available at <http://www.siac.org.sg/our-rules/rules/siac-ia-rules-2017>).

²⁴ The status of the Mauritius Convention and the Rules on Transparency is available respectively at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html and http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.

commentary on ISDS. In exploring these concerns, the Working Group may wish to expand its consideration of other relevant issues.

A. General remarks

20. Concerns commonly expressed about the existing ISDS regime include (i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties (“party-appointment”), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns, further considered below, have been said to undermine the legitimacy of the ISDS regime and its democratic accountability (see document [A/CN.9/917](#), paras. 11-12). These concerns fall within two broad categories: those concerning the arbitral process and outcomes (see section B) and those relating to arbitrators/decision-makers (see section C).

21. In identifying concerns regarding ISDS, the Working Group may wish to consider whether such work (i) should be limited to ISDS under investment treaties, or should encompass all forms of ISDS regardless of the basis upon which cases arise (investment treaty, contract, or otherwise); and (ii) should be limited to arbitration as the most commonly used ISDS mechanism, or should include other types of existing ISDS mechanisms (such as mediation or domestic courts). The Working Group may wish to note that the commentary in this Note is drawn largely from information and comments relating to ISDS under investment treaties and conducted through arbitration. The Working Group may also wish to consider the extent to which the issues identified also apply to the broader ISDS regime noted in points (i) and (ii) in this paragraph.

B. The arbitral process and outcomes

1. Procedural aspects

22. Concerns expressed regarding procedural aspects of ISDS include: (i) lengthy duration and extensive cost of ISDS; (ii) lack of transparency in the proceedings; (iii) lack of an early dismissal mechanism to address unfounded claims; and (iv) lack of a mechanism to address counter-claims by respondent States.

(a) Duration and cost

23. Arbitration was conceived, among other things, as a relatively speedy and low-cost method of dispute resolution. However, concerns have been expressed that ISDS cases have involved increasingly high costs and lengthy proceedings.²⁵

24. The costs and length of proceedings may result, at least to some degree, from the complexity of the cases themselves, the fragmented nature of investor protection provisions, the open-ended nature of many legal issues in dispute, and the consequent need to study numerous previous arbitral awards and other legal sources.

25. Certain respondent States may struggle to meet the significant resources required for defending an ISDS case. States, in general, may be criticized for the use

²⁵ Since 2010, ICSID has published details of the average duration of arbitrations in its annual reports, a period typically “between three to four years”. OECD reported that the largest cost component of costs is the fees and expenses incurred by each party for its legal counsel and experts, which are estimated to average about 82 per cent of the total costs. Arbitrator fees average about 16 per cent of total costs. And institutional costs payable to organizations that administer the arbitration and provide secretariat services (such as ICSID, PCA, and SCC) amount to about 2 per cent of total costs.

of public funds in defending ISDS cases, particularly because arbitral tribunals have generally not ordered a losing claimant investor to pay the winning State's costs.

(b) Transparency

26. The concern over lack of transparency or justice being administered “behind closed doors” remains an important criticism levied against the current ISDS regime.²⁶

27. On that point, it should be noted that transparency in, and public access to, ISDS have been the focus of some recent reforms, for example, the 2006 transparency-related amendments to ICSID Rules and the 2013 adoption of the Rules on Transparency (see para. 18 above). It is expected that such reform efforts will allow for a better understanding of the interpretations given by arbitral tribunals to investment protection standards. This, in turn, may lead to increased consistency and a meaningful opportunity for public participation in the proceedings possibly enhancing the public understanding of the process.

(c) Other procedural issues

28. The Working Group may wish to consider other procedural issues, including those mentioned in paragraph 22 (iii) and (iv) above.

29. The Working Group may wish to note that arbitral institutions have sought to implement a number of measures to tackle certain procedural issues, in particular to streamline the process. For example, such measures have aimed at addressing frivolous claims where jurisdiction is doubtful and making it possible to reach preliminary decisions with regard to jurisdictional issues and early dismissals of non-meritorious claims. Arbitral institutions have introduced strict timelines and other measures to streamline the procedure. This approach is also reflected in the revised UNCITRAL Arbitration Rules 2010/2013.

30. When assessing the procedural issues of ISDS, the Working Group may wish to bear in mind that arbitration offers the flexibility to adjust the proceedings to meet the needs of the parties, to the extent that the contractual or other documents governing their relationship so permit.

2. Outcomes: coherence and consistency

(a) Investment protection standards

31. A coherent system ensures that its components are logically related with no contradictions. A consistent system would ensure that identical or similar situations are treated in the same manner. An ISDS regime that is coherent and consistent could support the rule of law and enhance confidence in the stability of the investment environment. Inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and, in the long run, its credibility (see document [A/CN.9/915](#)).²⁷

32. This lack of coherence and consistency in the ISDS regime may arise from the fragmented nature of existing underlying investment treaties. First, the investor protection standards in these treaties vary widely; some are vaguely or broadly formulated, leaving arbitrators with wide latitude for interpretation, though recent treaties were formulated more precisely (see para. 9 above).

33. Second, ISDS provisions in investment treaties also vary. Some treaties provide for ISDS in any dispute arising from the investment concerned. Others restrict ISDS to claims arising from breach of certain treaty provisions, or to claims relating to

²⁶ UNCTAD, *Transparency in IIAS: A Sequel*, UNCTAD Series on Issues in International Investment Agreements (2012), p. 36, and UNCTAD, *World Investment Report 2015*, p. 148.

²⁷ CIDS report, para. 22.

expropriations. Recent trends may indicate that limiting ISDS to some extent is becoming more common (see para. 9 above).

34. Third, access to arbitration is often subject to a variety of conditions and procedural requirements, as reflected in treaty provisions as well as the detailed arbitration rules of the different arbitration institutions.

(b) Awards in ISDS cases

35. Even when ISDS cases relate to a single measure by a State or a similar fact pattern or are based on identical or similar treaty provisions, divergent outcomes have been observed.²⁸ This situation may be attributable to the fact that ISDS cases are heard by arbitral tribunals constituted ad hoc and that arbitrators have to interpret vague or broad investor protection provisions.

36. The issue of conflicting outcomes becomes more acute in situations of concurrent or multiple proceedings, which most commonly arise where a measure by a State has an impact on a number of investors and separate ad hoc tribunals are established to hear each claim (see document [A/CN.9/915](#), paras. 5 and 6). As indicated in document [A/CN.9/915](#), a more predictable framework for coordinating concurrent proceedings could be sought, which would be in the interest of both investors and States.

37. As there is no doctrine of stare decisis in arbitration, on many occasions, arbitral tribunals have emphasized that they are not bound by previous decisions of other arbitral tribunals. At the same time, tribunals have also taken due account of previous awards; references to other awards can be found in some arbitral decisions. Nonetheless, this has not always secured consistency among the awards themselves.

38. In this context, the Working Group may wish to consider whether the limited corrective mechanisms (also referred to as control or review mechanisms) currently available are sufficient to ensure coherence and consistency of awards (see paras. 39-40 below).

3. Finality of the award and review mechanisms

39. Arbitral awards are final and are subject to review only in set-aside or enforcement procedures in domestic courts and in the case of ICSID awards, in annulment proceedings.²⁹ While such review mechanisms may assist in achieving some degree of coherence and consistency of awards, their main objective is to control

²⁸ CIDS report, para. 22.

²⁹ The domestic law of the seat of arbitration governs the setting aside of an arbitral award. National laws on setting aside have tended to be deferential towards arbitral awards, in keeping with the goal of facilitating the parties' choice of arbitration. The conditions for set-aside under article 34 of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, largely mirror the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The first four grounds for setting aside an award must be raised by the party seeking to set-aside the award, while the latter two can be decided of the court ex officio. The first four reflect concerns about due process and the scope of consent given by the parties who agreed to the arbitration, while the second two reflect concerns about public policy and arbitrability in the enforcing State. The drafters of the ICSID Convention sought to create an a-national, or de-localized, process that would be removed from the control of any national courts. Article 52 of the ICSID Convention provides as follows: "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." The choice of an annulment, rather than an appellate, mechanism reflects the preference for the finality of awards. The ad hoc committee — i.e. the panel that oversees an annulment proceeding can either annul the award (or a part thereof), or leave it intact. It cannot substitute its judgment for that of the original tribunal.

the integrity of awards rendered by the arbitral tribunals. Moreover, the jurisdiction of ICSID annulment committees and of domestic courts at the place of arbitration or where enforcement is sought (in case of non-ICSID awards) to review the awards is often restricted.³⁰

40. While the finality of an award is also considered as an element contributing to the efficiency of arbitration, the absence of an appeals mechanism means that incorrect decisions cannot be overturned and so legal correctness cannot be ensured.³¹ In addition, jurisprudence with regard to ISDS cases under different investment treaties with the same or substantially similar investor protection standards is unlikely to be harmonized.³²

41. The Working Group may consider that the objective of possible reform to promote coherence and consistency would be to enhance the predictability of ISDS cases rather than to seek uniformity. Uniformity in ISDS decisions may not be achievable, at least while the substantive investment protection standards continue to be anchored in different treaties. Further, the circumstances of the cases will continue to vary.

C. Arbitrators/decision-makers

1. Appointment and ethical requirements

42. In most ISDS cases, arbitral tribunals are composed of three arbitrators. Applicable treaty provisions or arbitration rules address the composition of the arbitral tribunal, providing the right of the disputing parties to appoint one arbitrator each, though the methods to designate the chair of the arbitral tribunal may vary.

43. Party-appointment is an important element of the arbitral process, often seen as conferring legitimacy to the arbitration procedure. It is meant to ensure appointment of individuals with experience, reputation and competence as well as to guarantee neutrality, all of which enhance parties' confidence in the process.

44. Party-appointment of arbitrators has, however, been one of the focuses of criticism expressed about ISDS, which relate to the following aspects:

- Lack of sufficient guarantee of independence and impartiality on the part of the individual arbitrators;³³
- Limited number of individuals repeatedly appointed as arbitrators in ISDS cases;
- Absence of transparency in the appointment process;
- Some individuals act as counsel and as arbitrators in different ISDS proceedings, with the possibility of ensuing conflicts of interest and/or so-called issue conflicts;³⁴
- Perception that arbitrators are less cognizant of public interest concerns than judges holding a public office;³⁵ and
- Development of third-party funding giving rise to ethical issues (such as possible conflicts of interest between the arbitrators and the funders and confidentiality duties of the funder), as well as procedural concerns (such as the possible control or influence of the funder on the arbitration process, and the allocation of costs).

³⁰ CIDS report, para. 22.

³¹ Ibid. See also document [A/CN.9/881](#), paras. 18-22.

³² Ibid., paras. 20-24.

³³ See CIDS report, para. 20.

³⁴ Ibid., para. 21; see also document [A/CN.9/916](#), paras. 16 and 23.

³⁵ Ibid.

D. Perceptions of States, investors and the public

45. Opinions diverge on the merits and demerits of the foreign investment protection regime and in particular, investor-State arbitration.³⁶ The debate has become largely public, with criticisms in leading media focusing on the use of arbitration to resolve disputes between a State and a foreign investor as opposed to the use of domestic adjudicatory systems, party-appointment, the application of international law to protect investments as opposed to domestic law, and the asymmetry of ISDS which is available only to foreign investors.

46. Awards in investment arbitration often have important implications for the general public and therefore attract regular media attention, particularly where large or controversial amounts are awarded to foreign investors (though the statistics noted in para. 13 above indicate that the mean award is significantly below the sums claimed). While ISDS may have depoliticized conflicts arising between investors and States from escalating into inter-State conflicts, it has nowadays become a political concern in a growing number of States.

47. Much of the criticism of ISDS has its roots in concerns about the democratic accountability and legitimacy of the dispute resolution process. Critics do not accept or recognize the power of individual arbitrators to decide on an ISDS case. Further, party-appointment may be contrasted unfavourably with the appointment of judges in domestic courts through processes designed to ensure integrity in upholding the rule of law and to provide public scrutiny of judicial decision-making. Finally, while States themselves have established and consented to the current ISDS regime and confirmed its legitimacy under international law, this legitimacy as such may not be accepted by their constituencies.³⁷

IV. Desirability of ISDS reform

48. In light of the matters set out above, the Working Group may wish to consider whether reforms to the ISDS regime are desirable.³⁸

49. If it wishes to consider to pursue reforms to the ISDS regime, the Working Group may wish to examine, among other questions:

- What would be the core policy objectives of any reforms to the ISDS regime;
- Whether reforms to address specific issues (for instance, increased length and cost, lack of consistency in arbitral awards, lack of a review mechanism, party-appointment and consequential issue relating to arbitrators' independence and impartiality) might sufficiently meet those policy objectives; and
- Whether such proposed reforms would be broad enough to be applicable to the wide range of investment treaties and proceedings under various arbitration rules.³⁹

50. The Working Group may wish to note that options for possible reform range from relatively minor adjustments to the existing ISDS regime to institutionalizing that regime further through the creation of a permanent adjudicatory body (such as a permanent investment court or dispute settlement body).

51. Possible adjustments to the existing ISDS regime may include:

- Alternative methods for appointing arbitrators (see document [A/CN.9/917](#), paras. 26 and 27), such as streamlining the appointment process and designing

³⁶ For a summary of arguments of the proponents and opponents, see CIDS report, paras. 8-23.

³⁷ *Ibid.*, para. 23.

³⁸ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 264.

³⁹ See document [A/CN.9/917](#), paras. 17-66.

a system with a pool of members that would form a new adjudicative body. The Working Group may wish to note that a forthcoming supplemental report by CIDS will address the matter of appointment of decision-makers (arbitrators/adjudicators) (see also document [A/CN.9/917](#), paras. 33-39);

- Strengthening (or establishing) ethical requirements in the existing ISDS regime, for example by introducing a code of conduct. Such a code of conduct, could build on existing examples, or a code could be developed and tailored specifically for the ISDS regime (see document [A/CN.9/916](#), paras. 19-36) (see document [A/CN.9/916](#));⁴⁰
- Formulating measures to address concurrent proceedings (see document [A/CN.9/915](#));
- The introduction of a doctrine of precedent (see document [A/CN.9/917](#));⁴¹ and
- The creation of a permanent or stand-alone appellate body (see document [A/CN.9/917](#)).

52. A more substantive reform would be the creation of a permanent dispute settlement body, such as an international investment tribunal, whose members would be tasked with resolving ISDS cases that fall under its jurisdiction.⁴²

Sequencing and ISDS reform

53. In light of the above, the Working Group may wish to commence its work by focusing on ISDS reform. However, it may also wish to consider observations to the effect that ISDS reform should be complemented with reforms to address coherence and consistency in the substantive rules of investment protection. In this regard, the Working Group may wish to note that consideration of the substantive investment protection standards may entail a more comprehensive process and may raise questions on whether and how to harmonize such standards.⁴³ As such, these issues might be addressed subsequently.

⁴⁰ Local bar associations, arbitral institutions and international organizations (among others) have developed a variety of texts on ethics, which can be found in arbitration rules, in guidance texts and, more recently, in investment treaties as a complement to ISDS provisions. Such codes or standards can include procedures to identify real or perceived conflicts of interest and steps to mitigate them. Some standards have a binding effect, whereas others are meant to provide general guidance. Court decisions on challenges to arbitrators as well as on setting aside or enforcement of arbitral awards provide the parties with an opportunity to address arbitrators' conduct (for the existing legal framework on ethics, see document [A/CN.9/916](#), paras. 4-17).

⁴¹ The Working Group may also wish to refer to document [A/CN.9/915](#), which outlines various other mechanisms that limit inconsistent decisions in concurrent proceedings, such as providing guidance to arbitral tribunals on stay of proceedings, on ways to address abuse of process, and on possible information-sharing. The document also refers to different types of treaty provisions available to address concurrent proceedings.

⁴² See document [A/CN.9/917](#), paras. 29-57.

⁴³ See document [A/CN.9/917](#), para. 14.