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Working Group 3**

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(Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018)

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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018)

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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) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) 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. At its thirty-fourth session (27 November–1 December 2017), the Working Group commenced work on consideration of possible reform of ISDS on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and submissions from Intergovernmental Organizations (A/CN.9/WG.III/WP.143). The deliberations and decisions of the Working Group at that session were set out in document A/CN.9/930, which contained Part I of the report. Part II of that report was adopted at the current session.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its thirty-fifth session in New York, from 23–27 April 2018. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Malaysia, Mauritius, Mexico, Namibia, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Algeria, Angola, Bahrain, Belgium, Benin, Burkina Faso, Costa Rica, Croatia, Cyprus, Dominican Republic, Egypt, Finland, Gabon, Georgia, Iceland, Iraq, Kazakhstan, Morocco, Myanmar, Nepal, Netherlands, New Zealand, Norway, Peru, Portugal, Saudi Arabia, Senegal, Serbia, Slovakia, South Africa, Sudan, Sweden, Syrian Arab Republic, Togo, Uruguay and Viet Nam.

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

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

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

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID) and United Nations Industrial Development Organization (UNIDO);

(b) *Intergovernmental organizations*: Commonwealth Secretariat, Organization for Economic Cooperation and Development (OECD), Organisation Internationale de la Francophonie (OIF), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: African Center of International Law Practice (ACILP), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Asociación Americana de Derecho Internacional Privado (ASADIP), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Caribbean Association of Industry and Commerce (CAIC), Center for International Dispute Settlement (CIDS), Center for International Legal Studies (CILS), Centre de Recherche en Droit Public (CRDP), Centre for International Environmental Law (CIEL), Centro de Estudios de Derecho, Economía y Política (CEDEP), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), Clientearth, Columbia Center on Sustainable Investment (CCSI), European Federation for Investment Law and Arbitration (EFILA), European Federation for Transport & Environment (T&E), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Friends of the Earth International (FOEI), Institute Afrique Monde (IAM), International Bar Association (IBA), Institute for Transnational Arbitration (ITA), Institute of Commercial Law (ICL), Institutio Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International Association for Commercial and Contract Management (IACCM), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce (ICC), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), New York International Arbitration Center (NYIAC), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration, Lagos (RCICAL), Russian Arbitration Association (RAA), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration), Swiss Arbitration Association (ASA), United States Council for International Business (USCIB) and World Economic Forum (WEF).

8. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

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

9. The Working Group had before it the following documents: (a) annotated provisional agenda ([A/CN.9/WG.III/WP.144](#)); (b) note by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS)" ([A/CN.9/WG.III/WP.142](#)); (c) submissions from International Intergovernmental Organizations ([A/CN.9/WG.III/WP.143](#)); (d) submissions from the European Union ([A/CN.9/WG.III/WP.145](#)); (e) submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators ([A/CN.9/WG.III/WP.146](#)); and (f) submission by the Government of Thailand ([A/CN.9/WG.III/WP.147](#)).

10. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered agenda item 4 on the basis of documents referred to in paragraph 10 above. The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV. The discussion of other business before the Working Group is reflected in Chapter V.

IV. Possible reform of investor-State dispute settlement

A. General remarks

12. The Working Group recalled its mandate (see para. 2 above) and continued its deliberations on identification of concerns in the field of ISDS, as contemplated in the first part of the mandate.

13. General statements made at the outset of the session emphasized the importance of the Working Group's mandate for developing States in light of the impact of investment and ISDS on sustainable development. Drawing on the national experience in several States, those statements reiterated issues and concerns about ISDS, including the lack of accountability, of transparency, of consistency and coherence, of effective review mechanism, and of mechanisms to address frivolous claims. Issues that were discussed at the thirty-fourth session of the Working Group, including cost and duration of ISDS as well as third-party funding, were also reiterated as potential concerns.

14. As a general point, the need for any ISDS reform to strike a balance between rights and obligations of the States on the one hand and of the investors on the other was stressed.

15. The statements also underlined the importance of considering the topic of possible ISDS reform at a multilateral level. It was mentioned that the consideration of the topic by UNCITRAL constituted a unique opportunity to make meaningful reforms in the field, and that active and wide participation by both developing and developed States was essential to ensure the effectiveness and legitimacy of the UNCITRAL process in implementing the mandate.

16. In that context, the Working Group was informed that the European Union as well as the Swiss Agency for Development and Cooperation had provided contributions to the UNCITRAL trust fund, in order to allow participation of developing States in the deliberations of the Working Group. Delegations were invited to consider making further contributions in order to allow for inclusive attendance at the sessions of the Working Group.

17. The Working Group recalled the work of UNCITRAL on transparency in treaty-based investor-State arbitration, which had resulted in the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency"). It was noted that such instruments demonstrated that reform of the fragmented ISDS regime was feasible. It was further pointed out that States in different parts of the world were in the process of reforming or refining their existing ISDS regime, through, inter alia, revising or

terminating existing bilateral treaties, developing new models for future agreements, and engaging in multilateral processes.

18. During the deliberations, it was underlined that the mandate of the Working Group was understood to focus on the procedural aspects of ISDS rather than on the underlying investment protection standards, thereby ensuring that any proposed reform would be feasible and achievable. In that context, different reform options were mentioned, including development of soft law instruments, appeal mechanisms and the creation of a multilateral investment court. The Working Group agreed that it was premature to consider those options at this stage of its deliberations and recalled that it should first undertake a thorough analysis of issues and concerns.

19. It was acknowledged that some States had had the opportunity to consider the wide-ranging ISDS issues in detail and were ready to move the discussion in the Working Group forward. It was however noted that other States might have recently begun their consideration of the issues and might need more time to engage in the deliberations of the Working Group. The Working Group agreed that the process should be respectful of both viewpoints, and should give all delegates the opportunity to participate meaningfully, but without imposing undue delay in making progress with the discussion.

B. Consideration of the arbitral outcomes

Coherence and consistency

20. The Working Group recalled its previous discussion on the question of coherence and consistency of the ISDS outcomes. Two questions had underlined consideration of that matter: one, regarding the desirable level of consistency in ISDS outcomes and, the other, the extent to which undesirable inconsistency was perceived to be a concern.

21. It had been considered that the mere existence of divergent outcomes was not itself a concern, as treaty provisions could be interpreted correctly yet applied differently depending on the facts of the case or the evidence submitted by the parties. Furthermore, the mere fact that similar treaty provisions might be interpreted differently was not considered to be a concern, as when relying on the general principles of treaty interpretation, similar treaty language might be appropriately interpreted differently. Inconsistency was considered more of a concern where the same investment treaty standard or same rule of customary international law was interpreted differently in the absence of justifiable ground for the distinction.

22. Conflicting outcomes were said to be more acute in situations of multiple proceedings, as referred to in paragraph 36 of document [A/CN.9/WG.III/WP.142](#). It had also been noted that coherence and consistency were not to be understood as synonyms of accuracy or correctness of ISDS outcomes. It was further recalled that lack of coherence or consistency was not necessarily a unique feature of ISDS and was also found in domestic as well as international context.

23. It was suggested that the deliberation on these issues should continue possibly linking the above-mentioned questions to the finality of the award as well as the adequacy of the existing review mechanisms. It was noted that existing review mechanisms addressed the integrity and fairness of the process rather than the correctness of the outcomes, and therefore consideration should be given as to whether they were adequate to address issues of consistency, accuracy and correctness of awards.

The notion of incoherence and inconsistency

24. There was broad agreement on the legal and economic benefits of consistency in terms of enhancing legal certainty and the predictability of the investment framework for both the State and the investor. There was also broad agreement that those characteristics, in turn, would promote efficiency in preparing for litigation, and

would be helpful for States in drafting investment treaties or determining measures that could be lawfully taken.

25. Noting that there might be instances in which treaty language could appropriately be interpreted differently, the Working Group was invited to focus its deliberations on situations in which divergent interpretations were problematic, i.e. where there were unjustifiable inconsistencies. The Working Group agreed to consider the prevalence and the impact of unjustifiable inconsistencies. It was highlighted that a specific and clear diagnosis of those elements should be made at the outset, so as to ensure a meaningful and useful outcome of the discussions.

26. It was also agreed that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity.

27. Considering that article 31 of the Vienna Convention on the Law of Treaties required that treaties be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose, the difficulty of achieving consistency in interpreting investment treaties negotiated by different parties, with specific objectives, was noted.

28. However, it was noted that investment standards commonly found in investment treaties were similar. As ad hoc arbitral tribunals were tasked with the interpretation of those standards, the ISDS regime was fragmented, explaining divergent interpretations to some degree. In addition, it was noted that many investment treaties before arbitral tribunals were first-generation treaties, containing vague formulations, which were more susceptible to different interpretations.

Prevalence of inconsistency

29. The prevalence of unjustified inconsistency was queried, and additional research and in-depth analyses to answer the question were recommended.

30. A view was expressed that analyses of published decisions indicated that the prevalence of unjustified inconsistency was relatively low.

31. Examples of inconsistent arbitral decisions on core aspects of investment protection were mentioned. The questions raised in those inconsistent arbitral decisions concerned general concepts and functions of the substantive investment standards that were repeatedly raised. One example was on the application of the most-favoured nation (MFN) clause. The example of the interpretation of the scope and effect of the umbrella clause was also given. Contradictory interpretations of the notions of investment and expropriation were also mentioned.

32. Further examples were given where it was said that divergent decisions could not be justified by the rules of treaty interpretation in international law or by the different facts and evidence in front of arbitral tribunals. It was said that the examples made clear that the concerns related not only to the interpretation of the substantive core protection provisions in investment treaties, but also to the identification and application of principles of customary international law, and sometimes to provisions in treaties such as the ICSID Convention. Additional examples included what were described as inconsistent decisions on whether a State was required to provide security in annulment proceedings, with respect to the treatment of awards in terms of enforcement, and on the ability of States and investors to contract out of ISDS provisions.

Impact of unjustifiable inconsistencies

33. The Working Group turned its attention to the significance of the impact of unjustifiable inconsistencies. States shared their experiences of situations when the same treaty had been inconsistently interpreted by different tribunals, including where the same arguments and evidence had been presented.

34. The following considerations on the impact of unjustifiable inconsistency were also shared.

35. First, unjustifiably inconsistent decisions could be a ground for attacks on the credibility of, and negative public opinion about, the entire ISDS mechanism.

36. Second, the lack of clarity and inconsistency in international investment jurisprudence: (i) made it difficult for States to understand how they must act in order to comply with their legal obligations; (ii) led to challenges in considering new regulations; and (iii) could contribute to regulatory chill. Nonetheless, it was recognized that this was not an issue unique to ISDS and governments always were constrained in the regulations that they adopted under their own domestic laws. The balance in the substantive obligations under investment treaties in that regard, and whether that balance was appropriate or ought to be reconsidered, was also highlighted.

37. Third, States were not the only stakeholders in that system and the interests of investors should also be taken into account. In that regard, delegations confirmed that they had undertaken consultations with their various constituents and stakeholders in preparation for the session. The outcome of the consultations as reported was that predictability was important to investors as well, in that lack of predictability could constitute a risk factor for investors and so inhibit investment. In that context, the general statement underlying the importance of investment and capital flows in the interests of continued sustainable development was recalled (see para. 13 above). It was added that investors valued a dispute settlement system that ensured predictability, given the costs involved.

38. Significant concerns were expressed that the current ISDS regime did not offer adequate guarantees that the investment treaties would be consistently and correctly interpreted and there was a broad view that the mechanisms in place were insufficient.

Review mechanisms

39. The Working Group considered whether the existing review mechanisms adequately addressed the questions raised by inconsistency and lack of correctness. It was recalled that arbitral awards were final and subject to review only in set-aside applications or enforcement procedures in domestic courts and, in the case of ICSID awards, in annulment proceedings. It was pointed out that the jurisdiction of ICSID annulment committees and of domestic courts at the place of arbitration or where enforcement was sought (in case of non-ICSID awards) to review the awards was often limited. It was said that the scope of review was narrow, and that the limited grounds for review might pose systemic problems in ensuring consistency and correctness. In addition, current mechanisms were unlikely to operate so as to harmonize jurisprudence in ISDS cases, even among investment treaties with the same or substantially similar investor protection standards.

40. It was further said that, in the absence of an appeals mechanism, incorrect decisions could not be overturned, meaning that the existing review mechanisms could not ensure legal correctness.

41. Recalling the importance of correctness as well as consistency, it was said that consistency of awards could be derived from their correctness. In that context, it was noted that concerns about consistency and predictability were tied to other concerns about the adequacy of the existing mechanisms to address the unjustifiable inconsistency.

42. The interaction between finality of arbitral awards and their correctness was raised. It was said that any solution to ensure consistency and correctness should not disrupt or undermine the finality of awards and should avoid increasing cost and duration. Other views were that the benefits of finality, including that awards were generally enforceable, meant that a balance between these considerations should be sought.

Preliminary views on possible solutions

43. The Working Group heard some preliminary views regarding how inconsistency could be addressed so that the ISDS framework would become more predictable. Suggestions included the following: (i) amending investment treaties that contained vague wording; (ii) providing solutions to give greater control by State parties to investment treaties, such as joint interpretative statements and guidelines on interpretation of standards; (iii) adopting a systemic approach through institutional solutions (appeal mechanisms or permanent adjudicatory bodies); (iv) considering reforming the domestic framework on investment; (v) introducing or implementing a system of *stare decisis*; (vi) encouraging consolidation where possible, as well as coordination among tribunals; (vii) improving the existing review mechanisms and annulment procedures; and (viii) enhancing the role of domestic courts.

Linkage with other relevant issues

44. The Working Group heard suggestions that in considering the issue further, it would be necessary to strike the right balance between different concerns, and to consider thoroughly the impact of inconsistency on core treaty provisions, and on costs and duration. It was added that other concerns and issues, such as lack of transparency, frivolous claims and issues of third party funding, should be considered as they also had an impact on the overall functioning of ISDS. In other words, these matters should be considered as elements of an overall regime. In that context, it was underlined that efficiency, flexibility and cost-effectiveness should be the guiding principles when considering any reform.

C. Consideration of the arbitrators/decision makers

45. The Working Group undertook its consideration of concerns regarding the appointment of arbitrators and decision makers in ISDS as well as ethical requirements, on the basis of paras. 42–44 of document [A/CN.9/WG.III/WP.142](#).

46. In addition to the information contained in document [A/CN.9/WG.III/WP.146](#), the Working Group was provided with relevant information including statistics by States as well as international intergovernmental and non-governmental organizations. This included, among other things, information about appointments made by appointing authorities, enforcement of applicable ethical requirements, the number of challenges raised against arbitrators and an overview of the profiles of arbitrators. It was suggested that other relevant information, including concerning the appointment of arbitrators in commercial arbitration and of judges in international judicial bodies, should be compiled. Delegations were invited to provide available information on the matter to the Secretariat.

Lack of sufficient guarantees of independence and impartiality

47. The Working Group turned its attention to the question of sufficiency of guarantees of independence and impartiality on the part of arbitrators.

48. As an initial matter, it was generally agreed that the independence and impartiality of arbitrators were of utmost importance and were crucial for the legitimacy of the ISDS regime.

49. In that respect, it was noted that the existing framework for guaranteeing independence and impartiality included provisions in the applicable arbitration rules, which imposed such obligations on arbitrators, required disclosure by arbitrators of potential conflicts of interest, and provided challenge procedures. The example of the UNCITRAL Arbitration Rules was given, which contained a streamlined procedure for challenges, as well as requirements for specific statements on independence and impartiality and disclosure requirements.

50. It was further pointed out that standards on independence and impartiality were the subject of existing and ongoing work by different organizations, which were

frequently applied in arbitration practice. The IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 were mentioned as an example. It was said that improvements aimed at ensuring independence and impartiality of arbitrators were continuously being made, including by arbitral institutions and States Parties to investment treaties. The view was expressed that the existing framework provided adequate mechanisms to ensure independence and impartiality of the arbitrators.

51. In similar vein, it was said that party-appointment conferred legitimacy on the arbitral process and was one of its key features. Party-appointment was described as presenting the parties with the flexibility to designate decision makers based on criteria such as experience and qualifications, specialized knowledge, ability to speak the language of the arbitration, availability and reputation. The appointment of a presiding arbitrator also provided that the overall mechanism would be independent and impartial, it was said.

52. In practice, disputing parties would tend to choose neutral arbitrators, of a nationality different from that of the parties. In the experience of States, the appointment process involved careful consideration, a high level of scrutiny and disclosures. In that context, it was stated that the concern was not on how arbitrators were appointed but rather on how the framework would ensure that they would remain independent and impartial.

53. However, a widely held view was that, in order to be considered effective, the framework should not only ensure actual impartiality and independence of arbitrators, but also the appearance of those qualities. The view was expressed that efforts should therefore include both elements.

54. In that context, it was said that the party appointment mechanism had attracted much criticism, reflecting a perception of bias. For example, it was said that arbitrators in ISDS cases were often characterized as favouring States or investors based on their previous appointments, further contributing to the overall perception that there was lack of impartiality. It was said that party appointment mechanism could lead to polarization in tribunals, where the ultimate responsibility for deciding the case rested with the presiding arbitrator. This contributed to a certain degree of ambiguity in the ISDS system in that it was at odds with the notion of a three-member tribunal providing a unanimous or majority decision.

55. The Working Group considered the causes of perceptions that independence and impartiality of arbitrators were not sufficiently guaranteed, so as to assist in considering possible solutions in due course.

56. It was generally expressed that the perceptions about the lack of independence and impartiality did not derive from concerns about the professionalism of individual arbitrators, but was related to party-appointment and the incentives thereby created. It was said that the asymmetric nature of ISDS could be a source of systemic bias. It was pointed out that arbitrators would be inclined to seek re-appointment, and incentives existed for them to develop what were referred to as positions that would lead to repeat appointments. It was also said that disputing parties had an incentive to appoint arbitrators that would support their positions.

57. The remuneration of arbitrators by the parties, and lack of transparency on that remuneration, were also mentioned as causes of these perceptions. By way of comparison, it was explained that the compensation of judges was often addressed in legislation and considered over time as a core element of judicial independence whereas, by contrast, less attention had been devoted to the compensation of arbitrators. In that context, the Working Group heard a detailed explanation of the remuneration scheme for arbitrators at ICSID.

58. It was said that dissenting opinions were overwhelmingly made by the arbitrator appointed by a losing party, which also contributed to the overall perception of possible bias. The appointments were made ad hoc in a fragmented system, which aggravated the risks of lack of independence and impartiality. In addition, it was said that lack of democratic accountability of the arbitrators posed concerns.

59. While party-appointment was common in State-to-State dispute settlement, the view was expressed that it had not given rise to the same criticisms in that context.

60. It was noted that the role of the presiding arbitrator in ISDS ensured a certain level of neutrality, independence and impartiality.

61. It was also highlighted that some of the concerns about impartiality could be linked to the lack of diversity of arbitrators from the perspectives of gender, geographical distribution, ethnicity, and other matters, and to the fact that the vast majority of disputes were being handled by arbitrators from a specific region even though the cases did not necessarily involve States from that region.

Preliminary views on possible solutions

62. The Working Group heard some preliminary views on possible ways to guarantee the independence and impartiality of arbitrators. At the outset, it was mentioned that improvements to the framework aimed at ensuring the independence and impartiality of arbitrators were constantly being introduced. It was noted that when considering possible solutions at a later stage, the benefits and limitations of the existing framework and of the work carried out by other institutions should be taken into account.

63. Along the same lines, it was said that the benefits of the current system, such as its flexibility and neutrality, should be preserved. It would be likewise important to ensure that the interests of all stakeholders in ISDS were being considered. In that same regard, any solutions would have to ensure a balance of interests of stakeholders, and avoid politicization, since the de-politicization of ISDS was a primary benefit of the current system. It was also emphasized that in considering solutions there would be a need to ensure that balancing elements were appropriately employed.

64. Regarding specific approaches, there was broad agreement on the importance of codes of conduct and other ethical requirements for arbitrators. It was suggested that any improvement to ensure independence and impartiality of the arbitrators should be welcomed as it would be in the interests of both States and investors. Taking note of a number of existing texts on the conduct of arbitrators (including soft law instruments), the need for efforts at a multilateral level was mentioned. In that context, suggestions were made to the effect that UNCITRAL and ICSID might cooperate in developing such a code. Another suggestion was made that a code of conduct for counsel and experts would be useful.

65. Further suggestions included: (i) ensuring that all stakeholders understood the thresholds for when independence and impartiality would be seen to be impaired; (ii) developing requirements for qualifications of arbitrators, their roles and requirements regarding diversity or appropriate regional representation; and (iii) considering different means of appointing arbitrators, including the increased use of appointing authorities or the use of rosters established by States.

66. There were also calls for arbitral institutions to play a greater role in the selection of arbitrators, and to establish more transparent procedures regarding the appointment of arbitrators. It was pointed out that little information about selection methods resulted in limited accountability in the system. It was suggested that the selection criteria should be published along with explanation of the selections.

67. Those who considered that party appointment created systemic concerns suggested that the ISDS regime could envisage appointments/selection of decision makers not being made by the parties but by an independent body. From this perspective, it was said that without the creation of a body with permanent judges, it would be unlikely that the identified concerns could be solved. In that context, it was mentioned that mechanisms used in other international courts and bodies such as the WTO Dispute Settlement Body could be considered.

68. In response to a concern that such a system of appointment of decision makers might be to the detriment of investors, it was said that the appointment process should

be designed so as to ensure diversity, quality, independence and neutrality of the mechanism and that States would bear in mind their positions as potential respondents and as home States of potential investor claimants. It was further mentioned that decision makers selected by States in international bodies do rule against States and that the comparable mechanisms of institutional appointment (by appointing authorities and in annulment committees of ICSID) had not posed such problems.

Limited number of individuals repeatedly appointed as arbitrators in ISDS cases

69. Two distinct aspects of this topic were highlighted. One was the lack of diversity in the appointment of arbitrators involved in ISDS cases and the other was that some of the arbitrators were repeatedly appointed.

70. The lack of diversity was said to be exemplified by a concentration of arbitrators from a certain region, a limited age group, one gender and limited ethnicity. Empirical data from various sources was provided. It was also stated that there was a lack of arbitrators that understood the concerns of the developing States in their policymaking. The possible impact of the lack of diversity on the correctness of decisions made and on perceptions regarding impartiality and independence of the arbitrators were underlined in that context.

71. The Working Group heard the current efforts and initiatives to remedy that situation, including measures taken by States and appointing authorities (including arbitral institutions) to promote diversity of arbitrators. Reference was also made to voluntary commitments in the arbitration community and civil society to promote more equal representation of women in arbitration. It was suggested that such efforts might inform the work of the Working Group as it proceeded to seek possible solutions, and that addressing lack of diversity might contribute to resolving concerns about conflicts of interest.

72. There was general support for diversifying and expanding the pool of arbitrators qualified to serve as arbitrators in ISDS cases. In that light, it was pointed out that States had a role to play when appointing arbitrators and some States shared their practices in that regard. However, it was noted that, as respondents in individual cases, States faced certain limitations as their primary focus would be the circumstances of cases concerned.

73. Another concern raised, connected with the lack of diversity, was that a limited number of individuals made repeated decisions in ISDS cases. However, it was said that the greater concern was the fact that those individuals were regularly being (re)appointed as arbitrators. It was said that such repeat appointments raised problems of arbitrator availability and could be the cause of lengthy (and more costly) proceedings.

74. Similar to the comments made regarding diversity, the role of States in limiting repeat appointments was mentioned, and some States shared their practices in this regard. Other suggestions were that a pool or a permanent roster of arbitrators could address the concern, and that training should be provided to expand the pool of potential international arbitrators. Another view was that a systemic solution would be required.

75. There was a broad view that the lack of diversity and repeat appointments raised concerns. It was highlighted that any possible solution should be balanced against the need to maintain the high quality of arbitrators appointed to ISDS cases.

Absence of transparency in the appointment process

76. It was said that there was a perception of a lack of transparency in the composition of arbitral tribunal, which might be an inherent characteristic of the current party-appointment system, in that parties would not necessarily disclose their appointment strategies to the other party (in the case of a three-member tribunal). However, it was noted that States could make available to the public general criteria for selecting arbitrators as well as information about those that were appointed by the

States. It was noted that dissemination of such information as well as publication of awards made by arbitrators could address the perceived lack of transparency.

77. With regard to appointments made by appointing authorities (including that of the presiding arbitrator), reference was made to initiatives by appointing authorities to provide relevant information. It was noted that efforts to increase transparency would be beneficial, as would harmonizing such efforts. There was broad agreement that ensuring transparency of the appointment process would support the credibility and legitimacy of the ISDS system. In the context of these discussion, a suggestion was made that more transparency regarding the remuneration of decision makers might be a matter for further discussion.

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

78. A number of concerns were raised with regard to this topic, often referred to as “double-hatting”. Statistics provided to the Working Group indicated that the practice was prevalent in ISDS. It was generally noted that the practice posed a number of issues including potential and actual conflict of interest. It was stated that even the appearance of impropriety (for example, suspicion that arbitrators would decide in a manner so as to benefit a party it represented in another dispute) had a negative impact on the perception of legitimacy of ISDS. Some States shared their experience in this regard.

79. Other observations included that domestic legislation in general did not prohibit double-hatting. It was also noted that “triple” or even “quadruple” hatting had been observed in practice, where certain individuals acted as party-appointed experts in certain ISDS cases or advisers to third-party funders. It was consequently suggested that the scope of the issue should be clearly delineated, and that the focus should not be on the practice of double-hatting itself, but rather on the problems that the practice posed (particularly where there was an actual conflict of interest). It was noted that States had attempted to address the question of double-hatting in more recent investment treaties.

80. It was noted that, while some data was available, there was also a need to compile additional data and information about the practice for the Working Group to better understand the nature of double-hatting and to consider possible solutions.

81. There was general agreement that double-hatting to the extent that it created potential or actual conflict of interest was the main issue of concern. The need to balance a number of interests was highlighted, in that possible solutions might involve an element of tension with other issues, such as efforts to expand and diversify the pool of arbitrators. For example, allowing double-hatting might allow potential arbitrators (entrants) to gain experience of ISDS by acting first as counsel in a number of cases. The need for training of potential arbitrators in developing States was again suggested in that regard. From that perspective of inter-connection among different issues, it was said that solutions would require a holistic approach and might need to be of a systemic nature. Another view was that tools such as a code of conduct could address the matter, and that it should not be limited to the functions of arbitrator and counsel but should cover other actors in the field of ISDS, such as experts.

Perception that arbitrators are less cognizant of public interest concerns than judges holding a public office

82. Questions were raised regarding the scope of the issue, including whether it was referring to public policy as embodied in investment treaties or to broader notions (fundamental rights including those of the investors; State’s right to regulate as well as other policies). It was recalled that the mandate of the Working Group did not extend to the substantive provisions of investment treaties, and that the consideration of this question should therefore be limited to procedural aspects.

83. It was generally noted that the qualifications of arbitrators or decision makers in ISDS cases should include an ability to take into account relevant issues of public interest or public policy, which were usually at stake in ISDS cases. It was said that ISDS cases could require expertise in matters of both public and private international law, and also that arbitrators might be called upon to make findings on matters of domestic law. It was recalled that party-appointment provided the parties with the right to select arbitrators on the basis of their consideration of the desired qualifications and experience, though they did not have the same control over those of the presiding arbitrator.

84. It was noted that before the Working Group could identify a perception that arbitrators would be less cognizant of public interest concerns than judges holding a public office as a concern, it would be necessary to identify clearly the meaning of “public interest”. In that regard, it was stressed that there was a need to verify whether that perception was indeed correct before considering whether it posed concerns.

85. It was mentioned that, in the experience of States, arbitrators were not necessarily cognizant of public interest and of the State’s policy. Ad hoc appointments by investors or relevant appointing authorities of arbitrators with commercial arbitration background were raised as concerns in that regard. On the other hand, it was said that lack of knowledge of public international law, of experience and of understanding of public interest concerns by arbitrators should not be assumed. Another view was that, in the current regime, arbitrators might not regard themselves as under a general duty towards an international system of justice, to act in the public interest, or to take into account the rights and interest of non-parties. It was said that arbitrators might consider that their duty and power were limited to solving the dispute at hand.

86. It was suggested that in order to address the question, it might be useful to consider the impact of the design and culture of the dispute resolution framework on the manner in which cases would be handled, and how the public interest would be taken into account. In that context, a comparison was made between the fragmented ISDS regime and the WTO Dispute Settlement Body. It was said that both dispute settlement mechanisms dealt with cases where the protection of economic actors from States’ measures were considered. It was said that whereas adjudicators in the WTO Dispute Settlement Body would have an in-depth knowledge of the States’ positions and their negotiating positions, arbitrators in ISDS cases usually had little knowledge of States’ positions and policies when they negotiated the underlying investment treaty. It was indicated that these structural issues might lead to different outcomes on the interpretation of similar investment protection standards. It was also said that a common set of obligations might also explain any different approach in the WTO.

87. It was further mentioned that that concern was closely related to the arbitrability of the dispute. For example, it was questioned whether public or administrative law disputes could only be heard by standing permanent courts with independent judges and appellate review, as there were States whose domestic law allowed such disputes to be referred to arbitration, i.e. to a private forum to resolve the dispute.

88. It was suggested that further empirical study and analysis on this question would assist the Working Group in its deliberations. In that regard, different views were expressed on the impact of the concern. While it was suggested that a systemic solution might be needed, another view was that there was no single solution that would meet the concerns. It was generally agreed that qualifications of the decision makers were important, and should be kept in mind by the Working Group, but that that particular point would not deserve the development of a specific tool.

Third-party funding

89. Regarding the practice of third-party funding, information was provided indicating that the practice was increasing in ISDS. Serious concerns were expressed in that regard. It was said that such practice raised ethical issues, and might have negative impact on the procedure. It was further pointed out that third-party funders

might gain excessive control or influence over the arbitration process, which could lead to frivolous claims and discouragement of settlements.

90. Possible conflicts of interest between the arbitrators and the third-party funder, which might not necessarily be known to the other party or arbitrators was mentioned, and were considered as important as issues of conflict of interest between the arbitrator and a party. It was noted that the question of conflicts of interest was closely linked to the lack of disclosure and transparency regarding third-party funders. In that context, it was indicated that third-party funding was a complex area, and that there were different forms or types of funding. It was suggested that recent studies and analysis, such as the report of the ICCA-Queen Mary Task Force on Third-Party Funding, provided comprehensive information on the matter.

91. In contrast, it was said that third-party funding could be a useful tool to ensure access to justice, particularly for small- and medium-sized enterprises. It was also said that third-party funding was not a useful tool to ensure access to justice taking into account other options available at the systemic level.

92. The following possible solutions were suggested for further consideration: (i) prohibiting third-party funding entirely in ISDS cases; (ii) regulating third-party funding, for example, by introducing mechanisms to ensure transparency in the arrangements (which could also assist in ensuring the impartiality of the arbitrators). There was general agreement to include the matter of third-party funding and the questions of lack of transparency and of disclosure as well as security for cost to the list of concerns for consideration.

D. Perceptions of States, investors and the public

93. The Working Group considered the question of the perceptions of ISDS by States, investors and the public as outlined in paragraphs 45 to 47 of document [A/CN.9/WG.III/WP.142](#). It was noted that perceptions with regard to a number of issues had already been considered by the Working Group during its deliberations.

94. General remarks were made that the merits and demerits of ISDS had become largely public, with criticisms in leading media focusing on (i) the use of arbitration as opposed to domestic adjudicatory systems to resolve investment disputes, (ii) party-appointment, (iii) the asymmetry of ISDS which was available only to foreign investors. It was also said that ISDS had nowadays become politicized in a growing number of States. In that context, a view was expressed that the legitimacy of ISDS has been repeatedly questioned in various public forums, and that the current ISDS system was perceived to be at odds with global governance and accountability requirements. A further view was that the current regime operated against the interests of developing States.

95. It was said that while perceptions should be taken into account, they should not be the driving force for the current work. It was also said that the right way to deal with the public perception of ISDS, where they were based on false allegations and misunderstandings, was to actively communicate with the public, providing adequate information. It was further said that whether well-founded or not, negative perceptions about ISDS posed concerns and thus would need to be addressed.

96. It was stated that, while public perception was important, perceptions alone would not justify the need for reform and as a subjective concept, would need to be grounded on empirical evidence and facts. In response, it was said: first, that a vast amount of information and studies was available and requiring additional information or further verification of those perceptions could unduly delay progress being made by the Working Group; and second, that negative perceptions could also of themselves justify the need for reform.

97. During the deliberations, the Working Group also heard interventions from invited international non-governmental organizations. These statements highlighted concerns about the impacts of ISDS, including possible regulatory chill, on a range

of issues, including: environmental protection; labour rights; transparency; democracy and the role of the domestic courts; accountability of the investors; and impacts on non-parties and access to justice. It was said that it was important to consider public perception and participation, and to take a holistic view of the system, especially of whether it was achieving its purported objectives, when considering and designing any ISDS reform. It was also said that relevant reforms might include the adoption of filter mechanisms, a public interest carve-out, exhaustion requirements and strategies for addressing substantive issues.

E. Concluding remarks

98. The Working Group welcomed the completion of sections 2 and 3 of document [A/CN.9/WG.III/WP.142](#) during the session. It was emphasized that the government-led process in the Working Group had been supported by the provision of information by States and observer organizations alike, and the Working Group looked forward to ongoing and constructive participation.

99. As regards preparation for the next session of the Working Group, several points were made. The Working Group agreed to continue its work at a measured pace, to allow sufficient time for all States to express their views, and to avoid unnecessary delay. The Working Group noted that to the extent that concerns had been identified for further consideration, this did not presuppose any conclusion by the Working Group as to whether reforms were desirable to address those concerns. The Working Group recognized that this issue of desirability was to be addressed as it continued its work. It was also emphasized that States would have the opportunity to raise additional concerns at future sessions of the Working Group.

100. In terms of specific preparations for the next sessions, a number of ideas were suggested: (i) that the Secretariat could prepare a list of the concerns raised during the thirty-fourth and thirty-fifth sessions of the Working Group, which would allow the Working Group to better organize its work; (ii) that the Working Group would benefit from suggestions on a framework for its future deliberations; (iii) that the Secretariat consider what further information could be provided to States with respect to the scope of some concerns; and (iv) that States might wish to submit papers for the consideration of the Working Group in advance of the next sessions.

V. Other business

101. The Working Group welcomed a proposal from the Government of the Republic of Korea to organize an intersessional regional meeting on ISDS reform with the objectives of raising awareness in the Asia-Pacific region of the current work of the Working Group, and providing input to the current discussions. It was clarified that the meeting would be purely informational and that no decisions would be made. It was noted that the intersessional regional meeting would be organized jointly with the Secretariat as well as other interested organizations. It was stated that the intersessional regional meeting could be held in late August or early September of 2018 in Korea and in conjunction with the Trade Law Forum organized by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP). It was further mentioned that while the focus of the intersessional meeting would be to provide a forum for high-level government representatives from the Asia-Pacific region, it would be open to all those invited to the Working Group. It was also mentioned that the agenda of the intersessional meeting would be made available to States in advance and that a summary report would be submitted to the next session of the Working Group for its consideration.

102. Morocco also expressed its interest in exploring the possibility of hosting a similar meeting at a future time.