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

Addendum

III. Possible reform of investor-State Dispute Settlement

1. Based on a decision at its thirty-eighth session ([A/CN.9/1004](http://undocs.org/A/CN.9/1004), paras. 25 and 104), the Working Group undertook consideration of the following reform options: (i) dispute prevention and mitigation as well as other means of alternative dispute resolution; (ii) reflective loss and shareholder claims; (iii) multiple proceedings including counterclaims; (iv) security for costs and means to address frivolous claims; (v) treaty interpretation by States parties; and (vi) multilateral instrument on ISDS reform.
2. In considering those reform options, the Working Group agreed to adopt the same approach as it had done at its thirty-eighth and resumed thirty-eighth sessions and undertook a preliminary consideration of the relevant issues with the goal of clarifying, defining and elaborating such options, without prejudice to any delegations’ final position. It was clarified that the Working Group would not be making any decision on whether to adopt a particular reform option at the current stage of the deliberations.

A. Dispute prevention and mitigation as well as other means of alternative dispute resolution ([A/CN.9/WG.III/WP.190](http://undocs.org/A/CN.9/WG.III/WP.190))

1. Dispute prevention and mitigation

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

At the national level

1. During the discussion, information was provided on measures taken at the national level to prevent disputes from arising, including awareness-raising activities, policies to prevent disputes from escalating, and frameworks for the management of ISDS cases. The Working Group took note that various models had been developed to gather information about investors’ complaints and to channel them to the relevant governmental entities. Reference was made to the identification of a lead agency, which would function as the channel of communication between the investor and the State and which would coordinate internally with other agencies in the government. Reference was also made to investment ombudspersons and institutions responsible for both the prevention and management of disputes.
2. It was also pointed out that information-sharing among the government agencies was important for dispute prevention so that stakeholders at various levels of a State were well-informed, and that coherence in the implementation and administration of investment-related matters could be achieved. It was mentioned that tools to ensure consistency between domestic legislation and investment treaties that contain international obligations undertaken by States were important. It was suggested that procedures could be established, such as inviting interested stakeholders to comment on draft legislation before enactment. The purpose of such procedures, it was further explained, was to ensure that government officials and legislators would become aware of potential consequences of their decisions and better understand the underlying investment framework. It was said that access to relevant information was provided through shared platforms, handbooks, or training events. The need for guidance on those matters was underlined and reference was made to the APEC Handbook on Obligations in International Investment Treaties, which contained guidance for government officials.

In investment treaties and at the international level

1. It was suggested that States, when negotiating investment treaties, should consider providing for dispute prevention and mitigation as well as pre-arbitration consultation procedures. Diverging views were expressed on the need for mandatory pre-arbitration procedures. It was also said that there would be merit in having duly established mechanisms, preferably in domestic legislation, that would allow disputing parties to make the most use of the cooling off periods (see below, para. 10).
2. Further, it was suggested that lack of awareness about and capacity for dispute prevention and mitigation should be addressed at the international level, for instance through technical assistance and capacity-building activities. It was underlined that government agencies responsible for handling ISDS matters in many developing countries still lacked the know-how to identify looming disputes and ways to manage them. As a means for cooperation, it was suggested that States would greatly benefit from the development of a systematic method of sharing knowledge and practices on dispute prevention. Reference was made to the development of guidelines, of a platform for States to share good practices and know-how, and of dispute prevention provisions. It was pointed out that such technical assistance and capacity-building activities, which would have a positive impact on dispute prevention, could be set up in an efficient way without burdening States. References were made to the Mechanism for the Cooperation and Discussion on Defense and Prevention of Investment Arbitration of the Pacific Alliance, and the Model Instrument on Investment Dispute Management developed by the Energy Charter Conference. A suggestion was made to undertake the development of a multilateral declaration by States on dispute prevention.

Link to other reform options

1. The Working Group noted that the question of dispute prevention and mitigation was closely connected to the reform option of establishing an advisory centre, which could possibly be tasked with dispute prevention and capacity-building activities. It was also noted that the question of dispute prevention and mitigation was closely connected to the topic of treaty interpretation by States parties as disputes might be prevented where investment treaties were coherently interpreted and administered. It was also said that the reform option of a multilateral standing body or mechanism would include features aimed at preventing disputes. [***Comment made by the Third World Network***] Views were expressed that the notion of alternative means to resolve settlement could encompass a discussion of issues, in addition to mediation and conciliation, including, for example, options such as resorting to domestic courts and State-to-State led mechanisms.

Preparatory work on the topic of dispute prevention and mitigation

Introductory remarks

1. The Working Group noted the general interest in having the Secretariat pursue further work on the question of dispute prevention and mitigation. It was noted that States ought to remain free to regulate in the public interest and any solution developed to address dispute prevention and mitigation should not be encouraging them in any way to avoid doing so with the sole goal of avoiding disputes. Capacity building activities and ensuring the flow of information to those who needed it to make decisions were seen as key aspects of dispute prevention. In that light, four questions were underlined: (i) who would need to be better informed (reference was made to officials who acted on the States behalf and to investors); (ii) what they would need to be informed of (for States, international obligations and for investors, relevant rules, policy interests, bureaucratic structures and State perspectives); (iii) how they could be informed; and (iv) by whom they would be informed.
2. [***Comment made by Australia and Chile***] It was underlined that best practices, guidelines or even a model text on dispute prevention or mitigation could be developed that would assist States in their efforts to prevent disputes. In that regard, it was noted that work on best practices had already been done by States and inter-governmental organizations, including by the World Bank, and by non-governmental organizations. Therefore, it was said that in developing what the best practices were, the Secretariat would be mainly responsible for identifying and compiling the relevant information into guidelines, or a model text which may form part of a potential multilateral instrument on ISDS reform.
3. Regarding the suggestion to consider how it might be possible to have an international institution such as the proposed advisory centre take a greater role in assisting States in the implementation of these best practices, it was noted that some delegations considered information-sharing and capacity-building as a key function of the advisory centre, whereas others questioned whether an advisory centre should be more focused on the dispute context.

Way forward

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

2. Alternative dispute resolution methods

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

Cooling-off period

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

Fostering use of mediation

1. The Working Group considered how ADR methods could be promoted and more widely used. To that end, the Working Group considered the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement to a dispute, the legal certainty required for officials to be involved in such settlement and how to ensure that the necessary approval process was set up, including that those negotiating the settlements had the necessary authority to agree to a settlement. It was said that policies as well as the legal framework for encouraging mediation would be necessary. In that context, it was highlighted that the United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention on Mediation”) provided for a useful instrument also in the context of ISDS.
2. [***Comment made by the Energy Charter Secretariat***] In addition, it was clarified that ADR methods were a means to be considered not just before but also during a dispute and it was suggested that guidelines should be developed to encourage arbitral tribunals and disputing parties to explore such methods proactively. In that regard, the International Bar Association’s Rules on Investor-State Mediation, and the Guide on Investment Mediation endorsed by the Energy Charter Conference, were mentioned.  Further, the Working Group considered how to make stakeholders aware of mediation and how to incentivize both investors and States to actively engage in alternative dispute settlement methods. It was said that capacity-building and training of potential mediators and other stakeholders was a key aspect and examples of specialized courses were mentioned. It was suggested that the home State should encourage the investor to find an amicable solution with the host State before engaging in arbitration. It was further suggested that home State and host State could be organized in joint committees to address potential conflicts between an investor and a State.
3. [***Comments made by the Columbia Centre on Sustainable Investment (CCSI)***] It was pointed out that an appropriate balance would need to be found between settlement through ADR methods and other fundamental questions, such as how such methods could lead to regulatory chill, reduced transparency from the settlement of claims behind closed doors, and settlements inconsistent with other areas of domestic and international law and policy. In this context, it was stressed that mechanisms promoting ADR methods should be designed so as to ensure consistency with good governance norms, including as reflected in SDG 16.

Model clauses

1. [***Comment made by the USA***] Regarding references to ADR methods in investment treaties, the Working Group considered whether to undertake the development of model clauses, which would: (i) indicate procedural steps the disputing parties could usefully take;   
   (ii) guide parties on how to conduct a mediation; (iii) include a realistic time frame; and (iv) possibly address mandatory mediation as a prerequisite to arbitration. On that last point, it was pointed out that making mediation mandatory might be detrimental in certain situations and would be at odds with the voluntary nature of the mediation process.
2. It was highlighted that some current treaties already included such model clauses and could serve as a model for the Working Group.

Link to other reform options

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