

Annex – Tabular presentation of framework for discussion

Concerns identified by the Working Group	Possible reform options for discussion	Main implications	Impact on the existing ISDS regime
<p>A. Inconsistency and lack of predictability</p> <p>Diverging interpretations of substantive standards</p>	<p>A.1. Enhancing Contracting States' control over their instruments by setting up mechanism(s) for treaty interpretation and related questions aimed at encouraging a more systematic use of:</p> <ul style="list-style-type: none"> - Unilateral interpretations, - Joint interpretations, or - Multilateral interpretations <p>and also aimed at ensuring abidance by arbitrators and decision-makers</p>	<p>Setting up of new mechanism(s) for treaty interpretation and related questions, such as:</p> <ul style="list-style-type: none"> - Ad hoc authoritative interpretation mechanism - Authoritative interpretation by treaty institutions - Mechanism for the release of <i>travaux préparatoires</i> - Renvoi mechanism of interpretative questions 	<p>The option strengthens and generalizes the existing mechanisms for treaty interpretation (and other related mechanisms)</p> <p>Compatible with the existing ISDS regime</p> <p>The option can accompany any other option for reform</p>
<p>Limits of the current mechanisms to address inconsistency and incorrectness of decisions</p>	<p>A.2. Strengthening the involvement of State authorities by establishing/strengthening the framework for State-State preliminary consideration of issues, including:</p> <ul style="list-style-type: none"> - Technical consultations - Decisions by the respective State authorities - Setting up joint review committee by the treaty Parties, - Review/Appeal mechanism or State-State body to apply if the claim cannot be settled at the technical level in a given time period 	<ul style="list-style-type: none"> - Development of a new legal standard for inclusion in investment treaties and/or - Setting up of a multilateral framework, also applicable to existing treaties: - An appellate mechanism or - A body to allow for an appeal of joint State authorities' decisions - Can also address <ul style="list-style-type: none"> Lack of predictability Frivolous claims (see also C.8.) Costs, Abuse of process (see also C.) 	<p>The option strengthens the role of States regarding their treaties, and could limit access to ISDS</p> <p>Compatible with the existing ISDS regime as a pre-dispute mechanism</p> <p>The option can accompany any other option for reform</p>
<p>Lack of framework to address multiple proceedings</p>	<p>A.3. Guidance to arbitral tribunals or claims commissions</p> <p>(i) Where different entities within the same corporate structure have a right of action against a State regarding the same</p>	<p>Development of new legal standards (see A/CN.9/915),</p> <ul style="list-style-type: none"> - Can also address <ul style="list-style-type: none"> Abuse of process Judicial economy 	<p>The role of tribunals is strengthened in options listed under (i), and the role of States is enhanced in options listed under (ii)</p> <p>Possible impact on:</p>

	<p>investment / same State measure and for the benefit of substantially the same interests, possibility to consider developing legal standards regarding:</p> <ul style="list-style-type: none"> - Proactive use of consolidation - Possibility to exchange information between tribunals - Stay of proceedings - Considering the use of <i>lis pendens</i> and <i>res judicata</i> <p>(ii) In situation of concurrent proceeding where a measure by a State has an impact on a number of investors which are not related, possibility to consider:</p> <ul style="list-style-type: none"> - Systemic approach to recurrent disputes by the creation of claims commissions - System of preliminary rulings by specific bodies (see below, A.6.) - Class action for investors 	<p>Costs and Duration (see also C.)</p>	<ul style="list-style-type: none"> - Arbitral institutions, their rules, practices and role - Non-institutional arbitration rules <p>The option can accompany any other option for reform, but may become redundant with option A.9., although some of the features may also apply to the reform option A.9.</p>
<p>Limits of the current mechanisms to address inconsistency and incorrectness of decisions</p>	<p>A.4. Scrutiny system (mechanism or body) for awards prior to issuance</p>	<p>Setting up of a system (mechanism or body) in charge of scrutiny of awards prior to issuance</p> <ul style="list-style-type: none"> - Can also facilitate <ul style="list-style-type: none"> Quality Consistency and control of correctness of decisions 	<p>Possible impact on the role of arbitral institutions</p> <p>Question of non-institutional arbitration to be considered</p> <p>The option can accompany any other option for reform, but may become redundant with option A.9.</p>
<p>Limits of the current mechanisms to address inconsistency and incorrectness of decisions</p>	<p>A.5. Introducing a system of binding precedent</p>	<p>Enforceability</p> <p>Setting up of a new mechanism to introduce binding precedent and practical application</p> <ul style="list-style-type: none"> - Can also address <ul style="list-style-type: none"> Lack of predictability - Can also facilitate <ul style="list-style-type: none"> Control of correctness of decisions 	<p>Compatible with the existing ISDS regime</p> <p>The option can accompany any other option for reform, but may be difficult to implement in an ad hoc ISDS regime</p>

	<p>A.6. System of preliminary rulings by specific bodies</p>	<p>Setting up of a system (mechanism or body) allowing preliminary ruling by other international tribunals or domestic courts</p>	<p>The relationship between specific bodies and the ICSID Convention, as it does not foresee preliminary rulings, should be considered</p> <p>The option can accompany any other option for reform</p>
	<p>A.7. Appellate review mechanism, designed for inclusion in investment treaties (ad hoc system), or agreed to by the disputing parties</p>	<p>Development of an appellate review mechanism</p> <p>Questions of flexibility and scope</p>	<p>The relationship between an appellate mechanism and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) would deserve careful consideration</p> <p>The impact on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) should also be addressed</p> <p>The option can accompany any other option for reform</p>
	<p>A.8. Appellate body, set-up as an institutional mechanism, possibly tasked with a review of awards and decisions made by:</p> <ul style="list-style-type: none"> - Arbitral tribunals - International investment court - Regional investment court - International commercial courts - Domestic courts in case of denial of justice 	<p>Setting-up of a stand-alone appellate body, which would require preparing status to determine its functioning, and an instrument for disputes arising under existing investment treaties</p>	<p>The relationship between an appellate body and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53) would deserve careful consideration</p> <p>The impact on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) should also be addressed</p> <p>The option can accompany any other option for reform</p>
<p>Limits of the current mechanisms to address inconsistency and incorrectness of decisions</p>	<p>A.9. International investment court</p>	<p>Setting-up of a multilateral investment court, which would require preparing status to determine its functioning, and an instrument for disputes arising under existing investment treaties</p> <ul style="list-style-type: none"> - Can also facilitate Control of correctness of decisions - Can also address 	<p>The co-existence or articulation with the existing ISDS regime as well as with regional investment courts would need to be considered</p> <p>The option may make a number of other options for reform redundant</p>

		Arbitrators and decision-makers appointment (see also B.) Ethical requirements (see also B.)	
Other issues			
B. Arbitrators/Decision-makers			
Lack of clarity regarding standards on independence and impartiality, issue conflicts	<p>B.1. Development of a code of conduct and other ethical requirements for</p> <ul style="list-style-type: none"> - Arbitrators and decision makers, and - Possibly other persons involved in ISDS (for instance, counsels, experts) , <p>It would include determining appropriate sanctions in case of non-compliance</p>	Development of a new legal standard, possibly together with an enforcement mechanism aimed at supplementing and harmonizing the existing legal framework, together with soft law guidance on its use	<p>The option strengthens and harmonizes the ethical framework, including the existing soft law framework</p> <p>It could be referred to in investment treaties, and implemented by arbitral institutions, or any newly set-up body</p> <p>The option can accompany any other option for reform</p>
Limitations of challenge mechanisms	<p>B.2. Development of rules and procedures to strengthen existing challenge mechanism</p>	Development of a new legal standard, aimed at supplementing and harmonizing the existing legal framework, together with soft law guidance on its use	<p>Strengthen and harmonize the existing legal framework regarding challenge procedures</p> <p>The impact on arbitral institutions practice and their arbitration rules should be considered</p> <p>The impact on domestic legislation (including the Model Law on International Commercial Arbitration) would also need to be assessed</p> <p>The option can accompany any other option for reform</p>
Limitations of challenge mechanism	<p>B.3. Control system for challenges through arbitration institutions and/or independent body (e.g. international court (first instance), appellate body (first or second instance), other)</p>	Development of a new legal standard aimed at supplementing and harmonizing the existing legal framework	<p>The option strengthens and harmonizes the existing legal framework regarding challenge procedures</p> <p>The impact on arbitral institutions practice and their arbitration rules should be considered</p> <p>The impact on domestic legislation (including the Model Law on International Commercial Arbitration) would also need to be assessed</p> <p>The option can accompany any other option for reform</p>

<p>Constitution of tribunals (limitations of party appointment mechanisms), impact of party remuneration, dissenting opinions and repeat appointments of certain arbitrators, limited number of individuals repeatedly appointed as arbitrators, Lack of diversity</p>	<p>B.4. Appointments through alternative methods, such as:</p> <ul style="list-style-type: none"> - Increased use of appointing authorities with more transparent processes - Use of pre-established list of arbitrators/Decision-makers - Mechanisms used in other international courts and bodies, such as WTO DSU (including appellate body) 	<p>Setting up of a new system (mechanism or body)</p>	<p>The reform option may have a direct impact on party appointment mechanisms</p> <p>The impact on arbitral institutions practice and their arbitration rules should be considered</p> <p>The option can accompany any other option for reform</p>
<p>Limited number of individuals repeatedly appointed as arbitrators, Lack of diversity, Competence and qualifications of arbitrators</p>	<p>B.5. Training, rosters and certifications</p> <ul style="list-style-type: none"> - Enhancing cooperation and coordination among existing regional and international programmes - Development of dedicated programmes to: <ul style="list-style-type: none"> - Train - Renew - Certify... 	<p>arbitrators and decision-makers</p>	<p>The impact on arbitral institutions practice and their arbitration rules should be considered</p> <p>Cooperation among organizations should also be considered</p> <p>See also reform option C.4. in particular the role of advisory centres regarding arbitrators training, certification and selection.</p>
<p>Limited number of individuals repeatedly appointed as arbitrators, Lack of diversity, Competence and qualifications of arbitrators</p>	<p>B.6. Pledge for diversity</p>	<p>Soft law and principles to enhance diversity</p>	
<p>Other issues</p>			
<p>C. Cost and duration</p> <p>Lengthy and costly ISDS proceedings</p>	<p>C.1. Dispute prevention</p>	<p>Development of relevant good practices and institutional information to prevent disputes</p> <p>Can also address excessive financial burden on the parties - limited resources for respondent States and SMEs</p>	<p>The option strengthens and improves good governance and other regulatory practices of States.</p> <p>The options should accompany any other option for reform</p>
<p>Lengthy and costly ISDS proceedings</p>	<p>C.2. Promotion of dispute settlement mechanisms other than arbitration</p>	<p>Promotes early settlement of disputes particularly during the cooling-off period</p>	<p>The option strengthens the existing ISDS mechanisms, currently under-used</p>

	(for instance, mediation and ombudsman facilities)	Development of relevant rules and establishment up of relevant facilities	The options should accompany any other option for reform
Lengthy and costly ISDS proceedings	C.3. Expedited procedures: - for smaller claims and non-complex cases	Development of relevant rules and practice	The option strengthens the existing mechanisms The options can accompany any other option for reform
Lengthy and costly ISDS proceedings	C.4. Advisory centres	Resources for the establishment of relevant facilities to provide support particularly to developing States and SMEs	No impact on the existing ISDS regime The options can accompany any other option for reform
Lengthy and costly ISDS proceedings	C.5. Third party funding	Need for harmonized rules or regulation of third party funding	Impact on the overall ISDS procedure including transparency requirement, security for costs and allocation of costs
Lengthy and costly ISDS proceedings	C.6. Replacement of ad hoc arbitrators by full-time judges (see also option for reform A.9. and B.4.)	Setting up of a permanent mechanism or body	The reform option may have a direct impact appointment mechanism and would require the introduction of a different remuneration mechanism for decision makers The option can accompany any other option for reform
Lengthy and costly ISDS proceedings	C.7. Streamlined procedure and tools to manage costs - Streamlining the procedure including the introduction and implementation of stricter time line - Requiring parties and the tribunal to establish a budget at the outset of a case; - Adopting a ceiling for overall costs; and - Requiring tribunals to provide parties with enhanced, real-time information about the status of a case, including budget.	Introduction of stricter timelines and compliance mechanisms More effective management of costs through information sharing Improved case management by the tribunals	See proposed ICSID Amendments The option can accompany any other option for reform
Lack of a mechanism to address frivolous or unmeritorious claims	C.8. Availability of an effective early or expeditious dismissal mechanism	See option for reform A.2.	See option for reform A.2.

Allocation of cost by ISDS tribunals; difficulties for States in cost recovery and need for rules on security for costs	C.9. Principles/guidelines on allocation of cost and security for costs	Development of a principles and rule that provide guidance to tribunals in allocating costs and ordering security for costs
Others	<p>C.10. Streamline procedure for post-award actions such as interpretation, revision and annulment;</p> <p>Allowing counterclaims by respondent States</p>	
D. Other issues to be considered by the working Group	Other possible solutions	

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