

## Report

<b>To:</b>	LawAsia and UNCCA
<b>From:</b>	Isabella Seif and Marina Kofman
<b>Re:</b>	Report of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, 29 October – 2 November 2018
<b>Date:</b>	20 February 2019

### I. FOCUS OF THE SESSION

1. In the previous sessions, Working Group III (the “WG”) had identified three areas of concern in Investor-State Dispute Settlement (“ISDS”), relating to (1) consistency, coherence, predictability and correctness of arbitral decisions; (2) arbitrators and decision makers; and (3) costs and duration of proceedings. The aim of the present session was to decide whether it is desirable for UNCITRAL to develop reforms to address the three areas of concerns.

### II. DISCUSSION OF POSSIBLE REFORM OPTIONS

2. There was considerable discussion on the possible reform options available to address the three areas of concern. While the aim of the session was simply limited to whether reform is desirable, States consistently kept discussing what sort of reform options could be considered.
3. There was a noticeable division between the States as to whether the envisaged reform would be systematic or be more conservative. The Observer for the European Union made it known that it supported the implementation of a multilateral investment court. Unsurprisingly, some other EU States indicated their support for a multilateral court also. Other States, such as the United States, were keen to indicate that it is premature to talk about systematic reform at this stage and that it would be kept in mind that reform might be more limited in nature, focusing only on specific concerns.
4. Some States discussed reforms that had already been implemented in newly negotiated or revised international investment agreements (“IIAs”). For example, Australia mentioned that the recently negotiated Comprehensive and Progressive

Agreement for Trans-Pacific Partnership (known more commonly as “**TPP-11**”)<sup>1</sup> includes some interesting dispute resolution features. For example, it imposes a limitation period for launching arbitration claims and provides for the possibility of consolidating concurrent claims.<sup>2</sup> Other States, such as the Netherlands, mentioned new dispute resolution features that had been implemented in their IIAs.

### **III. ADOPTION OF DECISION TO REFORM**

5. After the week of deliberations, the WG decided that it would be desirable for UNCITRAL to develop reforms to address all three of the areas of concern.
6. It was noted that some States had raised issues regarding third-party funding and that, while not previously included as an issue of concern, it might be worth considering whether reforms to address third-party funding would also be desirable. It was decided that the Secretariat would prepare a background note on third-party funding and that it would be decided upon early in the next session whether reform for third-party funding would also be desirable.

### **IV. WORKPLAN FOR THE NEXT SESSION IN NEW YORK**

7. Some States indicated that they considered that reform discussions should take place at the next session in New York. Most notably, Mauritius stated that States should come ready to decide whether they sought systematic reform or more limited reforms. States such as Chile and the United States were against the need to make this decision so early.
8. It was concluded that the next session would be for the States to discuss and decide on a work-plan for the reform, rather decide on the substance of the reforms. The Chair encouraged the States to discuss and work together for the development of a work-plan. The work-plan could include questions of sequencing, priority, coordination with other organisations, questions of multiple tracks and questions of how to meet

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<sup>1</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“**TPP-11**”) (opened for signature 8 March 2018, entered into force for the initial six ratifying States on 31 October 2018). The initial six ratifying States are Mexico, Japan, Singapore, New Zealand, Canada, Australia and Vietnam.

<sup>2</sup> Trans Pacific Partnership Agreement (“**TPP**”) (incorporated into the TPP-11 by operation of Article 1), Article 9.28 on “Consolidation” and Article 9.21 on “Conditions and Limitations on Consent of Each Party”.

more frequently inter-session. It was envisaged that the following session in Vienna in the second half of 2019 would be when States would discuss the substance of the reforms.

## **V. SUGGESTIONS FOR INCREASED ROLE OF LAWASIA**

9. During the discussions, some South Asian States such as Thailand and Pakistan made some interventions. However, the majority of Asian States making interventions were North Asian States, such as Japan, China and South Korea. The delegate from Myanmar made clear that it would appreciate access to some research on ISDS reform from an Asian perspective. It may be helpful going forward to attempt to coordinate with some of the South-East Asian States who appeared less prepared and under-represented at the session. This could take the form of liaising with the State representatives at the next session to understand whether they need assistance and if so, what form of assistance this could take. During the session, some other observer delegations, notably environmental NGOs, appeared to be in informal discussions with some of the delegations from South Asia.