STATEMENT

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UNCITRAL: recent achievements and possible future prospects

It is my pleasure to address the UNCTAD High Level Conference on International Investment Agreements, on behalf of the United Nations Commission on International Trade Law (UNCITRAL), an organ of the General Assembly, whose mandate is to further harmonize and modernize international trade law. Having said so, I will provide you with some insight on recent achievements in the field of investor-State dispute settlement (ISDS), as well as on future prospects. Before I start, I would like to seize this opportunity to thank the UNCTAD Secretariat for giving us the opportunity to address the Conference, and for the close and fruitful cooperation received over the years.

I. Recent achievements

Regarding recent achievements by UNCITRAL in the field of investment arbitration, most of you will be well-aware of UNCITRAL's adoption of the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules") (together with a new article 1(4) of the UNCITRAL Arbitration Rules (as revised in 2010)) in 2013.[1]

The Transparency Rules provide for the procedure to be followed to ensure an open and transparent arbitral proceeding, while ensuring also that confidentiality and integrity of the arbitral process will be preserved. The preparation of the Transparency Rules was done in response to the criticism often heard that investor-State arbitration was conducted outside of the public spotlight. The Rules are an important means to strengthen the legitimacy of the ISDS process and to enhance good governance, by increasing accountability and access to processes that have an impact on issues of public relevance.

The Transparency Rules have been available since April 2014 for inclusion by States in their investment treaties. They are also available for use by parties to a dispute that would arise under an investment treaty. Based on the information available on the UNCTAD database of investment treaties,[2] since the Transparency Rules came into effect in April 2014, 77 investment treaties have been concluded, out of which 50 treaties have been published. Of these published treaties, 24 incorporate the Transparency Rules either by referring explicitly to them, by literally reproducing their text as treaty provision, or by referring to the UNCITRAL Arbitration Rules.

On 1 April 2014, the Transparency Registry was set-up under article 8 of the Transparency Rules for the publication of information and documents related to treaty-based investor-State arbitration. The Registry functions are

[1] See Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/70/17), Chapter III and Annex I; see also General Assembly resolution 68/109 of 16 December 2013. The text is available on the Internet at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html
[2] See the International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA

undertaken by the UNCITRAL secretariat. It is now fully operational thanks to donor funding of the European Union and OFID (OPEC Fund for International Development).[3]

In order to ensure a wider application of the Transparency Rules, UNCITRAL prepared a Convention designed to facilitate their application to the roughly 3,000 existing investment treaties, thereby providing States with an efficient mechanism to apply the Transparency Rules to their existing investment treaties, should they wish to do so.

Indeed, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention", "Transparency Convention")[4], adopted by the General Assembly on 10 December 2014, and opened for signature on 15 March 2015, is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the Transparency Rules to arbitrations arising out of those treaties. The Mauritius Convention allows the Transparency Rules to be applied to all existing bilateral, regional, and multilateral investment treaties, and in all available arbitral fora, if both the respondent State and the investor's home State are contracting parties to the Mauritius Convention or, alternatively, if the investor (as claimant) accepts the unilateral offer of the respondent State to apply the Transparency Rules. There are currently 17 States which have signed the Convention, with Mauritius having ratified it; in this context,I would like to take the opportunity of that presentation to call on Governments to consider adoption of that important Convention. The secretariat of UNCITRAL remains available to provide any information should it be required in that respect.

In essence, the Mauritius Convention can be described as introducing the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument. It introduces a flexible regime as it foresees a limited number of reservations that Contracting Parties could formulate. The Mauritius Convention is an instrument that incorporates into the existing myriad of investment treaties the notion of transparency in investor-State dispute settlement, a procedural aspect generally not addressed under the vast majority of investment treaties. It supplements existing investment treaties with an uniform regime on transparency embodied in the Transparency Rules.
This is precisely the characteristic of the Transparency Convention that triggered further analyses by UNCITRAL on whether the Transparency Convention approach could be used for further reforms of the field of investor-State dispute settlement.

In that context, it may be recalled that the UNCTAD's 2016 World Investment Report identifies progress made regarding the drafting and negotiations of International Investment Agreements ("IIA"). It also concludes that "despite significant progress, much remains to be done"[5]. One of the challenges identified is the increasing fragmentation of the IIA regime. The report highlights that "ultimately only coordinated activity at all levels (national, bilateral and regional, as well as multilateral) will deliver an IIA regime in which stability, clarity and predictability serve the objectives of all stakeholders: effectively harnessing international investment relations for the pursuit of sustainable development. In the absence of such a coordinated approach, the risk is that IIA reform efforts will become fragmented and incoherent."[6]

[3] The UNCITRAL Registry, available on the Internet at http://www.uncitral.org/transparency-registry/registry/index.jspx
[4] See Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17), para. 106; see also General Assembly resolution 69/116 of 10 December 2014. The text is available on the Internet at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html
[5] See World Investment Report 2016 - Investor Nationality: Policy Challenges, p. xii, to be found under http://investmentpolicyhub.unctad.org/Publications/Details/145
[6] Ibid, p. 116

In line with this objective of avoiding the development of fragmented dispute settlement systems, UNCITRAL considered, at its forty-ninth session (New York, 27 June-15 July 2016) whether the Transparency Convention could be used as a model for implementing broader reform initiatives of the investor-State dispute settlement framework, in the event that it would be decided, at a later stage, to carry out reforms at a multilateral level.

II. Possible future prospects[7]

At its forty-ninth session, UNCITRAL held a preliminary discussion regarding possible future work in the area of international dispute settlement. The Commission considered the topics of (i) possible reform of investor-State dispute settlement system; (ii) concurrent proceedings; and (iii) code of ethics/conduct for arbitrators.

(i) Possible reform of investor-State dispute settlement system

UNCITRAL considered that topic on the basis of a report by the Center for International Dispute Settlement (CIDS) of the University of Geneva and the Graduate Institute of International and Development.[8] The aim of the report is to provide a framework for discussion if States were to decide to reform the existing investor-state dispute settlement system. Based on legal research, it offers a roadmap for possible reform initiatives aimed at either replacing or supplementing the investor-State arbitration regime with a permanent investment tribunal and/or an appeal mechanism for investor-State arbitral awards.

The report identifies the main legal challenges and possible difficulties which would arise in the design of a permanent investment tribunal or an appeal mechanism. It seeks to map the main options available to States in reforming ISDS. Two scenarios are considered in-depth in the report: the design of a permanent investment tribunal and the set up of an appeals mechanism for investor-state arbitral awards. While inspired by similar concerns, these two options reflect different philosophies of reform. The creation of an appeal mechanism for investor-state arbitral awards would maintain most of the basic features of current investor-state arbitration. By contrast, the creation of a permanent investment tribunal with essentially court-like features entails a more radical change from the existing model. The report also considers whether some of the objectives that are normally pursued through an appeal could be addressed through alternative reform options, in particular preliminary rulings, en banc determinations and consultation mechanisms.

The final part of the report addresses how States may extend the new dispute settlement options to their existing and future investment treaties. With regard to existing treaties, the report discusses the possibility to borrow the mechanism of the Mauritius Convention. Although it is not the only model that could be envisaged for these purposes, an opt-in convention modelled around the Mauritius Convention, with certain adaptations, would achieve the extension of the new dispute settlement options to investment treaties. Such opt-in convention would be primarily aimed at the existing investment treaty network, but would be without prejudice to the possibility that States may refer in their future investment treaties to the new dispute settlement options, if and to the extent to which States may deem appropriate.

A mechanism centered around a multilateral opt-in convention would present the advantage of releasing States from the burden of pursuing the potentially complex and long amendment procedures set out in the thousands of

[7] The Report of the 49th Session will be published at the UNCITRAL Website under: http://www.uncitral.org/uncitral/commission/sessions/49th.html by the end of September 2016
[8] The report of the CIDS is available on the Internet at http://www.uncitral.org/uncitral/commission/sessions/49th.html: See also document A/CN.9/890

existing investment treaties. The drafting of such convention raises, however, a number of treaty law issues, which the report discusses.
In a nutshell, the report seeks to provide a first analysis of the issues that would need to be considered if a reform initiative of the investment arbitration framework is pursued. It endeavors to highlight the complexities of the process as well as the avenues to resolve them. It purports to offer a basis on which further study, analysis and choices can build.

UNCITRAL decided to review how the project might be best carried forward, if approved as a topic of future work at the 2017 annual session of UNCITRAL, taking into consideration the views of all States and other stakeholders, including how this project might interact with other initiatives in this area and which format and processes should be used. In so doing, broad consultations will be undertaken in the year to come.

(ii) Concurrent proceedings

The second topic on the agenda of UNCITRAL in the field of international dispute settlement relates to concurrent proceedings. Concurrent proceedings may result from different factors such as: (i) the involvement of multiple parties located in different jurisdictions in an investment or a contractual arrangement; (ii) the existence of multiple legal bases or causes for claims; and (iii) the availability of multiple forums and the lack of coordination among those forums.

The procedural legal framework (investment treaty, arbitration rules, and arbitration law) rarely includes guidance to arbitral tribunals on how to deal with concurrent proceedings. In most cases, where there is no agreement between the parties to take into account the potential for concurrent proceedings, an arbitral tribunal may believe that it has to render a final decision on the merits without being able to coordinate with other tribunals.

The UNCITRAL Arbitration Rules, in article 17 (1), contain the principle that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." Most institutional arbitration rules contain a similar provision. It is currently suggested that work could be undertaken with the aim of clarifying, or expanding upon, the discretionary powers that arbitral tribunals may exercise when faced with concurrent proceedings. The purpose could be to provide arbitral tribunals with possible tools that could be used for managing such situations. The work could cover in a flexible manner initiatives that an arbitral tribunal might, depending upon the circumstances, consider taking, such as:

- Seeking information from another tribunal, or ordering parties to inform the arbitral tribunal of other related proceedings,
- Coordinating parallel arbitrations (for instance, holding joint hearings or presenting a common set of evidence),
- Staying proceedings, or declining jurisdiction, for instance, based on a finding that claims are inadmissible (e.g. because a parallel action is already pending elsewhere),
- Assessing if there was an abuse of rights, and
- Ordering consolidation, when admissible.

The work could also highlight the limits of such initiatives, given the role of party consent to arbitration and its relationship to a tribunal's authority to decide matters.

Guidance to arbitral tribunals could be provided in the form of a soft law instrument including a list of options for arbitrators and the methodology to deal with concurrent proceedings situations, leaving it to the tribunal to assess

which option would be relevant in the case at hand. Any guidance could also clarify why the arbitral tribunal would take certain measures if the situation of concurrent proceedings is not perceived as detrimental by the parties and the basis of a tribunal's authority to take such measures in the absence of the parties' agreement for it to do so. The work could also take the form of a protocol to be used by parties as part of their agreement to arbitrate. So , in conclusion on that topic, UNCITRAL agreed that its secretariat should continue to explore the topic and further develop possible work that could be undertaken with regard to concurrent proceedings as mentioned in section IV of document A/CN.9/881.[9]

(iii) Code of ethics for arbitrators

With the development of international arbitration and the variety of sources and texts on ethics, no guidance has been provided on which approach arbitrators should adopt, for instance whether arbitrators dealing with international arbitration should disregard their home jurisdictions' ethical rules in favour of international texts. As noted by UNCITRAL at its forty-eighth session, arbitral tribunals could be bound by more than one standard on ethics depending on the nationality of the arbitrators, affiliation with bar associations as well as on the place of arbitration.[10] Therefore, concurrent norms may apply, without any clear indication on which one shall prevail.

The expansion of international arbitration has also resulted in the diversification of parties involved in the arbitration process. As such, their perspectives on ethics or conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction or with the general practice in international arbitration. The increased complexity of recent disputes involving multiple parties and complicated transactions lead to new and more subtle questions. While there seems to be a general agreement about the fundamental ethical standards of international arbitration, in practice, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. Increased regulation of the arbitral procedure and increased transparency of the process have also an impact on parties' expectations in relation to ethical conduct of arbitrators.

In that light, UNCITRAL requested its secretariat to continue exploring the topic further, in close cooperation with experts including those from other organizations working actively in that area and to report back to UNCITRAL . UNCITRAL will consider further the following questions:

a) Whether there is a need for a harmonized and authoritative source on ethics in international arbitration;
b) Whether the purpose of undertaking work in the field of ethics in international arbitration would be to reduce any identified uncertainty and inconsistency in the existing ethical standards, and their application; if so, whether a new instrument should cover any or all of (i) persons concerned (in addition to the arbitrators), (ii) content of ethical standards (limited to impartiality and independence, or expanded to encompass other obligations), (iii) methods and extent of disclosure, (iv) challenge procedures, (v) effect of breach of ethical standards, (vi) enforcement mechanisms (how should ethical rules be enforced and by whom (arbitrators, parties, institutions, others)?
c) Whether existing instruments sufficiently define the scope of disclosure and the disqualification process: what level of detail should be provided in relation to disclosure and the procedure for challenging an arbitrator? Could impartiality and independence as well as other obligations be waivable, and if so, under which conditions?

[9] Available on the Internet at: http://www.uncitral.org/uncitral/commission/sessions/49th.html
[10] Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 150, available on the Internet at http://www.uncitral.org/uncitral/commission/sessions/48th.html

d) Whether the consequences of non-compliance with ethical standards are addressed in sufficient detail in existing instruments.

Work on the topic may encompass both commercial and treaty-based investor-State arbitration, nevertheless taking account their obvious differences. In addition UNCITRAL will further consider whether work on the topic should address the substance of ethical standards, or provides for rules to determine which of the existing ethical standards would be applicable.

In conclusion, UNCITRAL decided to retain these three topics (possible reform of investor-State dispute settlement, concurrent proceedings and code of ethics) on its agenda for further consideration at its fiftieth session, in 2017. It further requested that the secretariat, within its existing resources, continue to update and conduct preparatory work on all the topics so that the Commission would be in a position to make an informed decision whether to mandate its Working Group II (Dispute Settlement) to undertake work in any of the topics.