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Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements

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[1] This document was submitted to UNCITRAL Working Group III on ISDS reform in accordance with paragraph 83 of document A/CN.9/970 (Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 37th session (New York, 1-5 April 2019)). That paragraph, and the discussion it reflects, invited submissions by states and other stakeholders on reform options so as to inform UNCITRAL's efforts identifying and prioritizing particular solutions UNCITRAL will develop in the next phase of its work. The text was drafted by Brooke Güven (CCSI) and Lise Johnson (CCSI), with helpful input from Lorenzo Cotula (IIED), Thierry Berger (IIED) and Nathalie Bernasconi-Osterwalder (IISD).

Context and summary

Governments across the globe have acknowledged broad concerns with investment treaties, in particular older-generation agreements. In the context of UNCITRAL's Working Group III (WGIII), states and other stakeholders have jointly identified certain fundamental concerns with one of the most challenging elements incorporated in investment treaties: investor–state dispute settlement (ISDS). One option for governments to address these concerns and limit their risks under investment treaties is to identify those treaties deemed problematic and agree with partners to terminate them. Another option is for state parties to agree to suspend the application of ISDS by explicitly withdrawing consent to arbitration. Unilateral and consensual terminations at the bilateral level are already on the rise and have outpaced the number of new treaties signed in recent years. However, termination and/or withdrawal of consent from ISDS at the multilateral level could be a simpler and more systemic way to address and manage the concerns of states in relation to their outdated stock of investment treaties and concerns about ISDS. In light of the concerns identified in WGIII, this multilateral approach should be among the solutions for states to consider independently or in conjunction with other solutions.

The need to consider these options arises from issues of both **timing and effectiveness**: Any reform option designed to address procedural mechanisms that would apply to existing treaties (including a multilateral court, which requires a convention establishing such a court to be drafted, with subsequent signature and ratification) will likely take years to come into force. If and when it does come into force, its effectiveness may be limited because (1) major capital-exporting states may not ratify any implementing convention and (2) investors will likely retain the ability to "treaty shop" around any such convention by routing investments through states not party to any new instrument. These issues make it crucial to explore nearer-term and more systemic solutions in order to solve concerns about existing treaties, even alongside longer-term processes.

In addition to issues of timing and effectiveness, considering multilateral termination and withdrawal of consent can also offer interested states a set of options that **more holistically respond to fundamental issues and concerns** regarding the overall costs and benefits of the present international investment agreement (IIA)–ISDS system and its asymmetrical nature.[2] UNCITRAL's WGIII is limiting its assessment to procedural, and not substantive, concerns about ISDS, and, as a result, solutions suggested in this context will address procedural, and not substantive, issues. Therefore, in light of the broader range of issues that are central to many of the calls for reform of the IIA–ISDS system, several of the solutions suggested in connection with WGIII to date seek relatively minor changes (e.g., proposing codes of conduct for arbitrators or guidance for more efficient case management). Many broader concerns about the IIA–ISDS system stem from the extensive legal privileges that ISDS affords mobile capital and the negative impacts that those legal privileges can have on the economic development objectives of states, as well as the rights and interests of different stakeholders within those states. It is thus important to recognize termination and withdrawal of consent to ISDS as legitimate and rational options for states seeking to reduce their concerns about outsized costs and risks of the current IIA–ISDS system while ongoing discussions of new procedural

[2] See Lise Johnson, Lisa Sachs, Brooke Guven, and Jesse Coleman, 'Clearing the Path: Termination and Withdrawal of Consent as Next Steps for Reforming International Investment Law' (CCSI 2018) <http://ccsi.columbia.edu/2018/04/24/clearing-the-path-withdrawal-of-consent-and-termination-as-next-steps-for-reforming-international-investment-law/> accessed August 20, 2018.

mechanisms continue. Concrete strategies for governments to integrate multilateral termination and withdrawal of consent in the reform agenda can help provide space to address and respond to these issues and can enable states to more clearly focus their attention on crafting international investment instruments better designed to catalyze and govern investment for sustainable development.

The draft text below illustrates one way this can be done. Modelled after the EU's initiative to terminate intra-EU bilateral investment treaties and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS), a legal instrument based on the text below would enable states to efficiently and legally (1) secure international termination of existing IIAs or (2) amend existing IIAs so as to restrict access to ISDS (while leaving underlying treaty obligations and the possibility of state-to-state dispute settlement in place). States could also use this approach to limit ISDS to certain causes of action, amending IIAs to retain consent to ISDS for some claims (e.g., direct expropriation after exhaustion of domestic remedies) while eliminating it for others (e.g., fair and equitable treatment).[3]

The text below provides for two opt-in solutions that states could select on a treaty-by-treaty, opt-in list basis. Similar to the matching mechanism contained in the BEPS treaty, to the extent treaty counterparties each select either termination (Option A) or withdrawal of consent to arbitrate (Option B) to apply to a specific treaty (or treaties), such matching outcome would apply to the designated treaty/ies. To the extent one treaty party designates a specific treaty for withdrawal of consent (Option B) and its treaty counterparty designates such treaty for termination (Option A), withdrawal of consent (Option B) will be the default option for such treaty. Further opt-in options could be added into this template if desired by its parties. Parties could also include language in this treaty to provide for unilateral declarations with respect to covered investment treaties (with respect to either Option A or Option B) if a treaty counterparty does not designate such treaty or become a party to this instrument.

Withdrawal of consent and termination can be used to achieve near-term solutions to the widely recognized and relatively intractable problems of the current IIA–ISDS system. While states, in parallel, explore medium- and long-term solutions in ongoing IIA and ISDS reform processes, this mechanism could complement those ongoing efforts. States could choose to ultimately reinstate some form of ISDS if and when a new instrument on multilateral reform is agreed, while protecting themselves (and their taxpayers) from ISDS cases as negotiations on such an instrument are proceeding. States could also choose to move forward after termination and/or withdrawal of consent and pursue other strategies for attraction and governance of investment.

[3] This follows the approach taken in the recent renegotiation of the North American Free Trade Agreement, which, for most investors and investments, limits ISDS to claims of direct expropriation, national treatment and the most-favoured nation treatment obligation after exhaustion. Flexibility to decide whether and how to amend treaties to limit access to ISDS for certain types of claims could be achieved through an approach such as that proposed by Colombia in its submission to the WGIII, 14 June 2019, A/CN.9/WG.III/WP.173.

Treaty Withdrawing Consent to Arbitrate and Terminating Bilateral Investment Treaties

THE CONTRACTING PARTIES,

RECOGNIZING the necessity of designing and implementing appropriate investment policies, including transparent and fair investment dispute settlement regimes, to maximize the potential of cross-border investments to contribute to sustainable development within and across countries;

CONSIDERING that investment treaties commonly contain provisions under which an investor from one state may, in the event of a dispute concerning investments in another state, bring proceedings (ISDS proceedings) against the latter state before an arbitral tribunal;

MINDFUL that governments have identified a wide range of concerns arising from such ISDS proceedings;

RECOGNIZING that efforts are underway at domestic and international levels to craft effective solutions to address such concerns;

CONSIDERING that the development of such solutions may be a lengthy process and that there is uncertainty regarding the content, scope, implementation and ultimate effectiveness of such solutions; and

CONSCIOUS of the challenges that may arise by requiring states to bilaterally renegotiate existing bilateral or plurilateral investment treaties to implement reforms;

WHEREAS:

(1) Each Contracting Party has made, or may make, a notification pursuant to the terms of Article [__] [*Notifications*] listing certain investment treaties to which it is a party (each a "Covered Investment Treaty");

(2) Each Covered Investment Treaty may contain notice periods or other conditions for amendment, modification or termination of the treaties;

(3) Each Covered Investment Treaty may provide that investor–state arbitration is available for a certain period after denunciation or termination of the bilateral investment treaty (each such clause a "survival clause");

(4) Investor–state arbitration clauses exist in each Covered Investment Treaty;

(5) The commitments to offer to arbitrate, or to arbitrate, are commitments between the state parties to each Covered Investment Treaty, and do not create rights held by foreign investors;

(6) Due to concerns about the conduct of ISDS proceedings under investment treaties, the Contracting Parties desire to address their concerns by formally withdrawing their consent to those proceedings with respect to certain Covered Investment Treaties, or terminating in their entirety certain Covered Investment Treaties, or taking such actions in the future.

(7) Each Contracting Party has made, or may make, a notification pursuant to the terms of Article 1 [*Application of Withdrawal of Consent or Termination Provisions*] designating each Covered Investment Agreement as an Option A Treaty or Option B Treaty.

(8) Investors from a Contracting Party that have initiated investor–state arbitration prior to the entry into force of this Treaty or its application to a Covered Investment Treaty, and where the outcome of such arbitration is still pending, may have decided not to pursue a parallel action before the competent domestic court, either due to a provision in the bilateral investment treaty prohibiting such parallel action or for reasons of opportunity. As a result, domestic actions based on national law may now be time-barred. For reasons of equity, the Contracting Parties consider it appropriate to stipulate in their national legal orders that such investors may still bring actions in national courts, even where they would otherwise be time-barred but would not have been on the date the ISDS proceeding was initiated, within six months from the entry into force of the present Treaty, provided that they formally withdraw their arbitration claim by the time they bring such an action;

RECOGNIZING the need for an effective mechanism to amend and terminate existing treaties in a synchronized and efficient manner across the network of Covered Investment Treaties without the need to bilaterally renegotiate each such Covered Investment Treaty;

HAVE AGREED AS FOLLOWS:

ARTICLE 1 – Application of Withdrawal of Consent or Termination Provisions

1. **Option A (Termination)** – Each Contracting Party may choose to apply all provisions of this Treaty to any or each of its Covered Investment Treaties in a notification pursuant to Article 7 [*Notifications*]. For Contracting Parties selecting Option A for certain Covered Investment Treaties (each an "Option A Treaty"), Article 5 [*Termination of bilateral investment treaties*] of this Treaty shall only apply between or among Contracting Parties with respect to their Option A Treaties. All other provisions of this Treaty shall apply between and among all Contracting Parties' Covered Investment Treaties, as applicable.

2. Option B (Withdrawal of Consent) – Each Contracting Party may choose to apply all provisions of this Treaty other than Article 5 [*Termination of bilateral investment treaties*] to any or each of its Covered Investment Treaties in a notification pursuant to Article 7 [*Notifications*]. For Contracting Parties selecting Option B for certain Covered Investment Treaties (each an "Option B Treaty"), Article 5 [*Termination of bilateral investment treaties*] shall not have any force or effect with respect to such Option B Treaties. All other provisions of this Treaty shall apply between and among all Contracting Parties with respect to their Covered Investment Treaties, as applicable.

3. Each Covered Investment Treaty must be designated as either an Option A Treaty or an Option B Treaty pursuant to the terms of Article [__] [*Entry into Force and Effectiveness*].

4. Each Contracting Party may at any time expand its selection of Covered Investment Treaties, and shall designate each additional Covered Investment Treaty as an Option A Treaty or as an Option B Treaty, through a notification pursuant to Article 7 [*Notifications*].

5. With respect to Covered Investment Treaties that have been designated as Option B Treaties, each Contracting Party may at any time change the designation of such Covered Investment Treaty to an Option A Treaty through a notification pursuant to Article 7 [*Notifications*].

ARTICLE 2 – Waiver of Notice Periods or Other Conditions for Amendment, Modification or Termination

The Contracting Parties hereby waive each and every provision of each Covered Investment Treaty requiring a notice period or other condition precedent to the effectiveness of an amendment, modification or termination of each such treaty, other than conditions of mutual ratification, approval or acceptance.

ARTICLE 3 – Amendment of Survival Clauses

Each Covered Investment Treaty is hereby amended to eliminate each and every survival clause contained therein.[4]

ARTICLE 4 – Withdrawal of Consent to Arbitrate

1. Each signatory to this Treaty hereby withdraws its consent to investor–state arbitration contained in and under each Covered Investment Treaty.

2. Each signatory to this Treaty hereby waives its rights to challenge other signatories' decisions to withdraw consent to investor–state arbitration contained in and under each Covered Investment Treaty as a breach of that investment treaty.

3. For greater legal certainty, each Covered Investment Treaty is hereby amended to eliminate each Contracting Party's consent to investor–state arbitration contained therein.

4. The withdrawal of such consent is without prejudice to each Contracting Party's ability to consent to investor–state arbitration on a case-by-case basis for each Covered Investment Treaty that has not been terminated pursuant to Article 5.

ARTICLE 5 – Termination of Bilateral Investment Treaties

Each Option A Treaty is hereby terminated and has no further legal effect.

ARTICLE 6 – Grace Period for Bringing Actions before National Courts

1. An investor who has filed a claim for arbitration whose arbitration proceeding is based on a Covered Investment Treaty and was pending on the date of Entry into Force of this Treaty pursuant to Article [__] (or the addition of the relevant Covered Investment Agreement pursuant to Article 2 and Article [__] hereof, whichever is later in time) may still bring an action in the competent national court, even where it would otherwise be time-barred but would not have been on the date the investor–state arbitration was initiated, within six months from the date of application of this Treaty in

[4] For various reasons (such as political acceptance of termination or withdrawal of consent), states may wish to retain rights conferred on covered investors under the survival clauses in their treaties and thus may not desire to terminate the survival clause immediately. Parties may alternatively wish to retain but significantly shorten the survival clause. If so, Article 3 should be removed or altered to indicate the desired amendment to the survival clause and, if relevant, related elements of the treaty language altered throughout.

respect of the relevant Covered Investment Treaty, provided that the investor withdraws its arbitration claim by the time it brings such an action.

2. Those actions brought in national court pursuant to Article 6(1) shall be limited to the subject matter covered by the arbitration proceedings.

3. Those actions shall be directed against the competent authorities of the responding Contracting Party.

ARTICLE 7 – Notifications

1. All notifications made pursuant to this Treaty shall be made to the Depositary pursuant to the instructions contained in Article [__] [*Depositary*].

2. All notifications relating to a Covered Investment Treaty or designating a treaty as such must include a description of the treaty, along with any amending or accompanying instruments thereto; each identified by title, names of the parties, date of signature and, if applicable at the time of the notification, date of entry into force.

3. If notifications are made at the time of signature, they shall be confirmed upon deposit of the instrument of ratification, acceptance or approval, unless the document containing the notifications explicitly states that it is to be considered definitive.

4. If notifications are not made at the time of signature, a provisional list of expected notifications may be provided at that time.

ARTICLE [__] – Reservations

ARTICLE [__] – Interpretation and Implementation

ARTICLE [__] – Amendment

ARTICLE [__] – Signature and Ratification, Acceptance or Approval

1. As of [_____], this Treaty shall be open for signature by all states.

2. This Treaty is subject to ratification, acceptance or approval.

3. The term "Contracting Party" means a state for which this Treaty is in force pursuant to Article [__] [*Entry into Force and Effectiveness*].

4. The term "Signatory" means a state that has signed this Treaty but for which the Treaty is not yet in force.

ARTICLE [__] – Entry into Force and Effectiveness

1. This Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by two signatories. The instruments of ratification, approval or acceptance shall be deposited with the Depositary.

2. For each signatory that thereafter deposits its instrument of ratification, approval or acceptance, this Treaty shall apply from the day following the date of deposit.

3. The entry into force and application of this Treaty to any Contracting Party does not require the designation of any Covered Investment Treaty.

4. The provisions of this Treaty shall have effect with respect to each Contracting Party with respect to a Covered Investment Treaty from the latest of dates on which this Treaty enters into force for each of the Contracting Parties to the Covered Investment Treaty, if so designated.

5. For a new Covered Investment Treaty resulting from notification pursuant to Article 2(4) or a redesignation of an Option B Treaty to an Option A Treaty pursuant to Article 2(5), the provisions of this Treaty shall have effect with respect to each Contracting Party with respect to a Covered Investment Treaty one month from the date the Depositary receives the notification required pursuant to the respective article.

6. Without prejudice to the effectiveness of each other provision of this Treaty, for each Option A Treaty, Article [__] [*Waiver of Notice Periods or Other Conditions for Amendment, Modification, or Termination*] shall be deemed to have entered into force immediately prior to Article [__] [*Amendment of Survival Clauses*], which shall be deemed to have entered into force immediately prior to Article [__] [*Withdrawal of Consent to Arbitrate*], which shall be deemed to have entered into force immediately prior to Article [__] [*Termination of Bilateral Investment Treaties*].

7. Without prejudice to the effectiveness of each other provision of this Treaty (other than Article [__] [*Termination of Bilateral Investment Treaties*], which has no force or effect for such treaties), for each Option B Treaty, while all provisions shall be simultaneously effective, Article [__] [*Waiver of Notice Periods or Other Conditions for Amendment, Modification, or Termination*] shall be deemed to have entered into force immediately prior to Article [__] [*Amendment of Survival Clauses*], which shall be deemed to have entered into force immediately prior to Article [__] [*Withdrawal of Consent to Arbitrate*].

ARTICLE [__] – Depositary

1. [_____] shall be the Depositary of this Treaty.

2. The Depositary shall notify the Contracting Parties and Signatories within [one calendar month] of:

a. Any signature pursuant to Article [__] [*Signature and Ratification, Acceptance or Approval*];

b. The deposit of any instrument of ratification, acceptance or approval pursuant to Article [__] [*Signature and Ratification, Acceptance or Approval*];

c. Any notifications pursuant to Article [__] [*Notifications*];

d. Any proposed amendment to this Treaty pursuant to Article [__] [*Amendments*];

e. Any other communication related to this Treaty.

3. The Depositary shall maintain publicly available lists of:

a. Covered Investment Treaties (including designations of Option A Treaty or Option B Treaty); and

b. Notifications made by the Contracting Parties.

In witness whereof the undersigned, being duly authorized thereto, have signed this Treaty.