

UNCITRAL PROCESS ON ISDS REFORM: What to expect at the upcoming working group meeting in New York

Webinar #1 – April 17, 2018

08:00 Bogota	09:00 New York	14:00 Lagos	15:00 Paris
16:00 Nairobi	18:00 Islamabad	18:30 New Delhi	20:00 Bangkok

Background

Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) will meet in New York from April 23 to 27, 2018, to further its mandate on possible reform of investor–state dispute settlement (ISDS). At the meeting, the working group will continue to further its three-fold mandate to identify concerns regarding ISDS, consider whether reform is desirable and, if so, develop recommendations.

IISD is launching its *Webinar Series on Investment Law and Policy* with a first webinar focusing on the upcoming UNCITRAL meeting. The goal of the webinar is to support governments and other stakeholders in building on the UNCITRAL process to work toward a reform agenda that works for sustainable development.

Expert presenters will provide an overview of the previous meeting of the working group on this topic—held in Vienna from November 27 to December 1, 2017—and analyze some of the submissions made and positions taken. It will also provide an opportunity for participants to discuss various options for multilateral reform on investment dispute settlement and beyond and the way forward at UNCITRAL.

Expert presenters

- Nathalie Bernasconi-Osterwalder – Group Director, Economic Law & Policy, IISD
- Robert Howse – Lloyd C. Nelson Professor of International Law, New York University (NYU) School of Law

The session will be moderated by Howard Mann, Senior International Law Advisor, IISD.

Introduction

In 2015–2016 the UNCITRAL Secretariat [conducted a study](#) on whether the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration ([Mauritius Convention](#)) could provide a useful model for possible reforms in the field of investor–state arbitration.

The secretariat presented the result of a study prepared by the Geneva Centre for International Dispute Settlement (the [CIDS Report](#)). After discussions, UNCITRAL decided to retain the issue on its agenda for further consideration.

At its 50th session, in July 2017, [UNCITRAL entrusted its Working Group III with a broad mandate](#) to work on the possible reform of ISDS. The working group would: “(i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the [UNCITRAL] Commission.”¹

The 34th session of the working group, held in Vienna from November 27 to December 1, 2017, addressed the agenda item “possible reform of investor–state dispute settlement (ISDS)” for the first time. Deliberations on this topic will continue at the working group’s 35th session, to be held in New York from April 23 to 27, 2018.

These developments are taking place as many countries and regions are reassessing the ISDS regime. There is an appetite in a number of states to explore domestic, regional and multilateral alternatives to the traditional investor–state arbitration model, including a more permanent and judicialized form of dispute settlement.

Previous Session of the UNCITRAL Working Group III in Vienna

At its 34th session, held in Vienna from November 27 to December 1, 2017, UNCITRAL Working Group III commenced work on consideration of possible reform of ISDS on the basis of a Note by the Secretariat ([A/CN.9/WG.III/WP.142](#)) and submissions from international intergovernmental organizations ([A/CN.9/WG.III/WP.143](#)).

The deliberations and decisions of the working group on certain issues under consideration (including procedural aspects of the arbitral process, outcomes and transparency) are set out in document [A/CN.9/930](#)—summarized below—which contains Part I of the working group report on the work of its 34th session.

It was recalled that the working group’s mandate was to focus on the procedural aspects of dispute settlement rather than on substantive provisions. It was also noted that the work should be based on a thorough analysis of relevant issues, with a full and candid exchange of views to support the consensus-driven approach. Working group members agreed that it should take a “gradual and cautious approach, without undue haste,” “respect the order of the mandate and allow sufficient time for discussion of all issues.”²

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 264. Retrieved from <http://www.uncitral.org/pdf/english/commissionessions/unc-50/A-72-17-E.pdf>

² *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017)*, A/CN.9/930, paras. 22–23. Retrieved from http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf

At the Vienna meeting, the working group considered several concerns relating to the arbitral process and outcomes: the duration and high costs of ISDS proceedings for investors and states; the allocation of such costs, including the significant costs to states in defending claims; the lack of security for costs, resulting in states' difficulties in recovering awards of costs; and the issue of third-party funding, perceived as creating systemic imbalance and failing to ensure a level playing field.³

The deliberations led to preliminary indications of issues that the working group may wish to include in its discussions of possible solutions at a later stage of its mandate:⁴

- Establishing a fund for defence costs or other forms of assistance such as advisory centres to mitigate budgetary impacts of ISDS for developing countries (para. 65).
- Improving cost-effectiveness for the state through engaging legal counsel on better contractual terms, without sacrificing the quality of representation (para. 66).
- Using methods other than arbitration to resolve disputes, including mediation, as potential measures that could reduce time and costs in ISDS (para. 67).
- Where applicable, implementing the approaches above through treaty provisions or through case management in specific cases (para. 68).
- Developing systemic solutions to reduce overall costs through enhanced predictability and greater control over proceedings (para. 69).
- Developing solutions that could be applied on a bilateral and a multilateral basis, which do not need to be mutually exclusive, and which could be supported by soft-law instruments on questions such as the extent of discretionary powers of arbitral tribunals (para. 70).

The importance of transparency in ISDS was also highlighted as a key element of the rule of law, access to justice and the legitimacy of ISDS. States shared their experiences with transparency in ISDS, including the operation of the UNCITRAL Transparency Rules and their treaty practice. To enhance the transparency of arbitral proceedings, two potential areas of work were identified: (1) implementing and promoting transparency standards, including through soft-law instruments, and (2) enhancing the public understanding of ISDS through existing transparency mechanisms. Participants also expressed interest in exploring concerns relating to third-party funding arrangements, transparency in appointment of arbitrators and transparency with respect to the compensation of arbitrators.⁵

Upcoming Session of the UNCITRAL Working Group III in New York

At its 35th session, to be held in New York from April 23 to 27, 2018, the working group is expected to continue its consideration of the issues mentioned above and to adopt Part II of

³ Id., paras. 55–62.

⁴ Id., paras. 63–71.

⁵ Id., paras. 72–81.

its report on the work of its 34th session (A/CN.9/930/Add.1).⁶ The documents that the working group will have before it are listed in the Background Reading section below.

Some states propose that possible ISDS reforms focus on improving procedural aspects of the existing ad hoc investor–state arbitration regime, mainly through bilateral and regional negotiations. Others support that the multilateral process at UNCITRAL be geared toward broader reform efforts to restructure the ISDS regime more fundamentally, while allowing flexibility to accommodate different states’ needs and policy preferences. Some other states, spearheaded by the European Union and Canada, support the creation of a multilateral investment court, including an appellate mechanism. As Working Group III continues to discharge its mandate, UNCITRAL member states will further consider these and other options for possible ISDS reform.

Questions for Discussion

1. What should governments, especially of developing countries, expect—and more importantly, demand—of the UNCITRAL process?
2. Should the UNCITRAL process continue to just address process issues, or do we need a new process to address substantive and procedural issues in a comprehensive way?

Background Reading

A/CN.9/WG.III/WP.144 – *Annotated provisional agenda*, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.144&Lang=E>

A/CN.9/930 – *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-fourth session: Part I*, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf

Draft Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-fourth session: Part II, available for states only at <https://www.unodc.org/missions/en/uncitral/information.html>

A/CN.9/WG.III/WP.142 – *Possible reform of investor–state dispute settlement (ISDS)*, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.142&Lang=E>

A/CN.9/WG.III/WP.143 – *Possible reform of investor–state dispute settlement (ISDS): Submissions from international intergovernmental organizations*, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.143&Lang=E>

⁶ The report is available for states only at <https://www.unodc.org/missions/en/uncitral/information.html>

A/CN.9/WG.III/WP.145 – *Possible reform of investor–state dispute settlement (ISDS): Submissions from the European Union*, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.145&Lang=E>

A/CN.9/WG.III/WP.146 – *Possible reform of investor–state dispute settlement (ISDS): Submissions from international intergovernmental organizations and additional information: appointment of arbitrators*, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.146&Lang=E>

Further Reading

UNCITRAL. (2018). *Working Group III: 2017 to present: Investor-state dispute settlement reform*. Retrieved from http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html

IISD Investment Program. (2017, July). *United Nations Commission on International Trade Law (UNCITRAL), Fiftieth session, Vienna, July 3–21, 2017: Submission by IISD regarding the reform of investment-related dispute settlement*. Geneva: IISD. Retrieved from <http://www.iisd.org/library/united-nations-commission-international-trade-law-uncitral-fiftieth-session-vienna-july-3-21>

IISD. (n.d.). *UNCITRAL and Reform of Investment Dispute Settlement*, available at <http://www.iisd.org/project/uncitral-and-reform-investment-dispute-settlement>

IISD. (n.d.). *Investment-Related Dispute Settlement Expert Meetings*, available at <https://www.iisd.org/project/investment-related-dispute-settlement-expert-meetings>



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