

Kluwer Arbitration Blog

UNCITRAL Working Group III: An Introduction and Update

Esmé Shirlow (Associate Editor) (Australian National University) · Monday, March 23rd, 2020

Next week was due to be the 39th session of the United Nations Commission on International Trade Law's (UNCITRAL) Working Group III, and its sixth session considering the issue of reform to investor-State dispute settlement ('ISDS'). The session has since been postponed indefinitely, in light of the current global COVID-19 pandemic. In lieu of Working Group III's meeting in New York, we are running a series of posts this week to discuss some of the key reforms that the Working Group ('WG') has under consideration. These are all topics to which the WG will return when its meetings resume. This post provides an introduction to the series. It sets out some background related to the WG process to date, and then introduces the posts you will see throughout this week as part of our series.

Working Group III: The Process So Far

In [July 2017](#), the Commission turned the issue of ISDS reform over to WG III. This WG comprises member States, observer States, and observer international and non-governmental organisations. As [previously explained](#), the WG has divided its task into three phrases, as follows: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in light of any identified concerns; and (c) third, if the WG were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The first and second stages have now been completed, with the WG having determined that reform is desirable. Such reform is considered necessary to respond to a range of issues that have been identified and discussed during the WG's meetings. These include issues associated with the [duration and cost](#) of investor-State arbitration proceedings, and related issues such as [security for costs](#); issues of [predictability and consistency](#) between arbitral decisions; concerns related to processes for the [appointment of arbitrators](#), including issues associated with their independence, diversity, and qualifications; and problems raised by [third-party funding](#) arrangements.

At its sessions in October 2019 and January 2020, the WG [discussed](#) a range of possible reform options, including the establishment of an advisory centre, creation of

a code of conduct, development of an appellate and/or standing court mechanism, and reforms to address issues of third-party funding. It also agreed on a schedule for the discussion of these – and additional – reform options, [agreeing](#) to dedicate its 39th session in 2020 (now postponed) to considering the following areas of reform:

- dispute prevention and mitigation as well as other means of alternative dispute resolution;
- treaty interpretation by States parties;
- security for costs;
- means to address frivolous claims;
- multiple proceedings including counterclaims; and
- reflective loss and shareholder claims (together with the Organisation for Economic Cooperation and Development).

As noted above, this session was due to take place in New York from 30 March to 3 April 2020, but has been [indefinitely postponed](#) due to the unfolding COVID-19 situation.

A Preview into Our WG III Series

We have invited a group of contributors to explore different aspects of the WG III process over the course of this week. We hope that this series will provide a useful forum – particularly now that the WG’s session is not proceeding as scheduled – for our contributors and readers to engage with the WG reform process, and to debate its merits, scope, and limits.

Our first three posts consider institutional reforms, examining the WG’s development of reforms focussed on the establishment of standing and appellate review mechanisms.

On Tuesday, we will have a [post](#) by Andreea Nica that introduces the WG’s discussions concerning the possible establishment of a multilateral investment court. The post examines the background to this proposal, and analyses some of the key issues associated with its implementation including issues of enforcement, financing, and the selection and appointment of adjudicators.

This will be followed on Wednesday by a [post](#) by Associate Professor Fernando Dias Simões (The Chinese University of Hong Kong), which examines how institutional modifications interact with issues associated with adjudicator selection and appointment. That post examines the relationship between institutional reforms and concerns about the politicisation of ISDS, and identifies a number of mechanisms that could be incorporated as part of broader institutional reforms to ensure that adjudicators can be chosen due to their professional skills and merit, not their political leanings.

In Thursday’s [post](#), Marike Paulsson (Albright StoneBridge Group) explores whether the creation of an appellate mechanism would respond to concerns about ISDS

procedures, or rather create more difficulties. She highlights a number of issues potentially associated with the creation of an appellate mechanism, including issues of cost, duration, and uncertainty.

Our next two posts in the series examine key procedural reforms under development by WG III.

In Friday's [post](#), Johan Sidklev and Bruno Gustafsson (Roschier Attorneys Ltd) explore the WG's discussions of security for costs and frivolous claims. The WG intended as part of its 39th session to consider security for costs as a mechanism for averting frivolous claims in ISDS. Friday's post examines how any reform of the standards for ordering security for costs might address the conflict between the interest of adequate costs recovery for States, and policy considerations relating to, among other things, an investor's access to justice.

This will be followed by a [post](#) on Saturday by Dr. Anna De Luca (Macchi di Cellere Gangemi (ICSID conciliator)) examining the WG's proposals concerning counterclaims. Her post highlights the implications of this reform option, including for asymmetry in investment arbitration and the UNCITRAL WG III's analysis of procedural versus substantive reform options.

Our contributors this week offer a diverse set of perspectives on a number of important and emerging issues under consideration by the WG. We hope you enjoy the series!

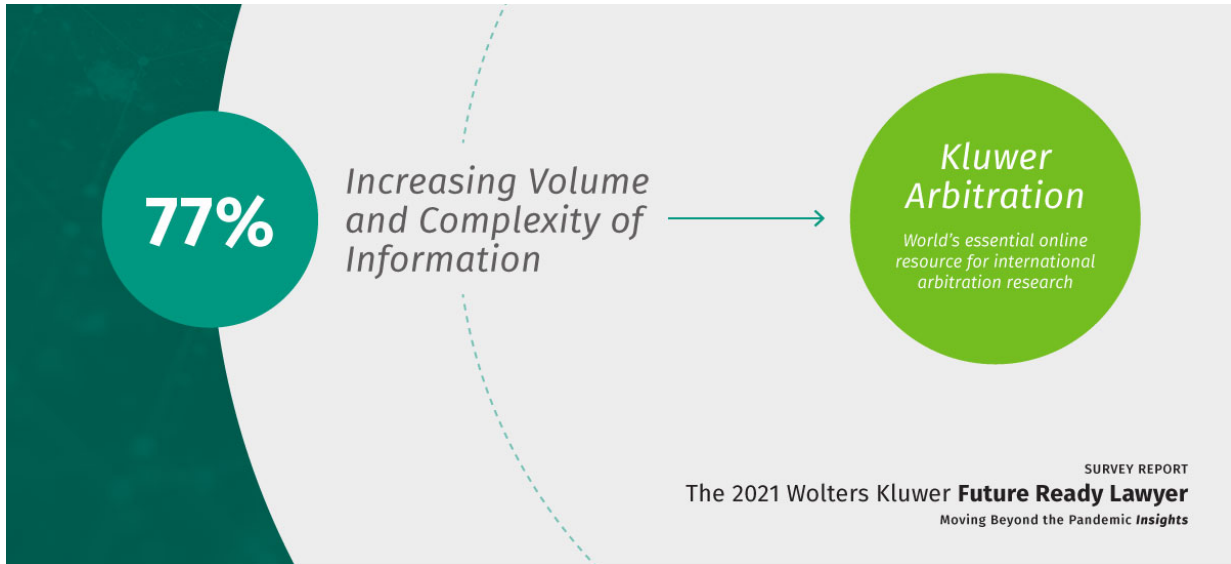
To see our full series of posts on the UNCITRAL WG III reform process, [click here](#).

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