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An Update on the ISDS Reform: the 37th Session of the UNCITRAL Working Group III Investor-State Dispute Settlement Reform

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Reform of Investor-State Dispute Settlement (ISDS) system has become the focus of various initiatives of different international organizations and groups in the past years. Currently, there are various developments taking place at various levels of the ISDS system. For example, (i) the new generation of international investment treaties—in particular, the new Free Trade Agreements signed by the EU, such as the [Comprehensive Economic and Trade Agreement between EU and Canada \(CETA\)](#), the [EU-Singapore FTA and Investment Protection Agreement](#), and the [EU-Vietnam FTA and Investment Protection Agreement](#), as well as the new models of Bilateral Investment Treaties, such as the [Dutch Model Bilateral Investment Treaty](#); (ii) the amendment process of the [Arbitration Rules of the International Centre for Settlement of Investment Disputes \(ICSID\)](#), the most comprehensive one up to date; (iii) the mandate of the [United Nations Commission on International Trade Law \(UNCITRAL\) Working Group III \(Investor-State Dispute Settlement Reform\)](#) in assessing the concerns with the ISDS system and in finding possible solutions to address them; and (iv) the initiatives of other institutions and organizations in dealing with particular issues relevant in the context of investment protection and promotion and arbitration, such as the project of [The Hague Rules on Business and Human Rights Arbitration](#), led by Judge Bruno Simma.

The UNCITRAL Working Group III began its work in November 2017 and comprises member States, observer States, as well as observer intergovernmental and non-governmental organizations.

The mandate of the Working Group III was set at the 50th session of the UNCITRAL in July 2017. As such, the Working Group III was entrusted with a broad mandate which would ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led. (para. 264 of the [Report of the United Nations Commission on International Trade Law, 50th session, A/72/17](#)) Further, the Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. (para. 264 of the [Report of the United Nations Commission on International Trade Law, 50th session](#)) For this, the Working Group III meets twice-yearly to tackle its broad mandate. The Group made substantial progress in its previous three sessions, by identifying concerns and considering whether reform in those areas was desirable.

These concerns fell into three categories: (1) concerns pertaining to consistency, coherence, predictability and correctness of arbitral awards ([UNCITRAL Working Paper no. 150](#)); (2) concerns pertaining to arbitrators and decision-makers ([UNCITRAL Working Paper nos 151 and 152](#)); and (3) concerns pertaining to cost and duration of ISDS cases (with focus on arbitration proceedings; [UNCITRAL Working paper no. 153](#)). The 37th session in New York was devoted to addressing and identifying some additional concerns and creating a workplan for carrying out phase three of the mandate—developing possible ISDS reform options.¹⁾

ISDS Concerns

Starting the week off in New York, the Group discussed a fourth area of concern—third-party funding. While there is no universally accepted definition, third party funding generally includes some form of payment by an actor outside of the disputing parties that covers one side of the legal fees and costs of the proceedings in exchange for compensation (which is contingent upon the outcome of the dispute). It was pointed out that third-party funding is by no means ubiquitous, as funding mechanisms are diverse and continuously evolving. The Group acknowledged and discussed the dynamic nature of third-party funding and expressed a need for the Group to work on a clear definition in order to better outline the scope of UNCITRAL’s work on reform in this area. Opinions were divided between adopting a broad definition of third-party funding, which would allow for it to naturally adapt to evolutions in the market, or a narrow one, which, arguably, would allow for more clarity and precision.

Further, States emphasized that while third-party funding may be a useful tool, there are several concerns raised in relation to it, which include an increase in frivolous claims, lack of impartiality of the arbitrators, the impact on ISDS costs and security for costs, and a potential negative impact on both the possibility for an amicable settlement and foreign direct investment flows more generally. States expressed the need to change and regulate these funding mechanisms, with many emphasizing the need for disclosure and more transparency. Others in the group cautioned that more evidence and research is needed for regulation, in order to understand the nature of the relationship between the concerns raised and the actual impact of third-party funding, as a causal relationship remains unclear. Other States urged to find a balance between the advantages and disadvantages of third-party funding, while highlighting that transparency should be at the heart of ISDS proceedings, including when it comes to third-party funding. States and observers also indicated that the new generation of international investment treaties, such as the new EU Free Trade Agreements, address in detail the issue of third-party funding, but it would be beneficial to have a uniform approach to the issue.

The Group decided that UNCITRAL reform on third-party funding was indeed desirable, and targeted reforms should also be considered alongside other related concerns such as costs and arbitrator impartiality. The Group also decided to work on a clear definition of third-party funding, which would encompass all forms of funding.²⁾

Several other ISDS concerns were raised including, the calculation of damages, exhaustion of local remedies, counterclaims, non-disputing party participation and other methods outside of arbitration for settling investor-State disputes. The Group decided not to specifically address any of these concerns on their own, as many of them fall under one or more of the existing three broad

categories of concern. In keeping with the previous Working Group sessions, the Group also highlighted the importance of the ongoing substantive international investment treaty reform and the need to balance States' fears of ISDS claims against their ability to regulate legitimate public policy concerns, such as environmental and social protection. Many delegations emphasized the overlap between those substantive reforms and the procedural mandate of the Working Group and urged the Group to keep these substantive issues in mind. It was agreed while the Group would be guided by those underlying concerns, substantive issues such as investor obligations and regulatory chill fall outside the scope of the Working Group. As such, the Group decided that no additional reforms will be formally recorded at this stage.

Workplan: developing a road map for possible solutions

For the vast majority of the week in New York, the Group discussed proposals for the workplan that will guide their work going forward on reform options and solutions. The discussion included the need to allocate further time to the sessions of the Working Group, in addition to the two weeks in Vienna and New York, as well as the need to employ technological tools, such as teleconference, videoconference, etc., to the discussions, in order to mitigate any risk related to inclusiveness, especially with the view of the additional time proposed for the sessions of the Working Group. Emphasis was also placed on the benefits of having intersessional meetings, which would also involve institutions and other stakeholders.³⁾

While the debate included various hybrid proposals for a workplan that would guide the work on options and solutions to the identified concerns, the Group split broadly into two sides based on desired reform outcomes of ISDS: the first group advocating for comprehensive, structural reform, including an investment court and appellate body; and the second group preferring to begin work immediately to reform the current system in a step-by-step process, starting with concerns that already have wide consensus in the Group.⁴⁾

In view of working amicably towards progress, the Group agreed to pursue both work streams simultaneously, in order to give ample opportunity for both sides to pursue solutions. The Group compromised to create a three step workplan for developing solutions: (1) delegations need to submit solutions to be developed including a timeline of priorities to UNCITRAL by 15 July 2019; (2) the Group will subsequently discuss the submitted proposals and create a project schedule at the next session in October 2019 in Vienna; (3) once the project schedule is created, the Group will begin to substantively discuss and develop potential solutions for recommendation to the Commission.⁵⁾

Takeaways

Discussions in the Working Group III are still at an early stage and it is expected that some contour of the ISDS reform will become visible in Vienna, at the 38th session of the Working Group. Until then, it is perhaps relevant to highlight here some of the general points raised by the States and observers at the 36th session of the UNCITRAL Working Group III. States acknowledged that specific criteria must accompany any suggested solution and a distinction must be kept between

well-founded concerns, which are supported by facts and empirical research, and unfounded concerns, which are based on perceptions. Ignoring this distinction might result in an aggravation of the concerns, rather than in a solution to them. Further, and as highlighted as well at the 37th session of the UNCITRAL Working Group III, it has to be acknowledged that some of the concerns raised with respect to ISDS can be resolved within the framework of international investment treaties, through amendments or interpretive statements.⁶⁾

At the early stage of the UNCITRAL Working Group III work, UNCITRAL highlighted that some doubts have been expressed on the desirability and feasibility of a work on possible ISDS reforms, considering the diverse body of more than 3,000 international investment treaties with significantly different approaches to both substantive investment protection and ISDS mechanisms. (para. 244 of the Report of the United Nations Commission on International Trade Law, 50th session) Arguably, such diversity in approaches reflects thoughtful decisions by sovereign States on what approach best suited their particular legal, political, and economic circumstances and, for this, past attempts, such as the OECD Multilateral Agreement on Investment, to find a uniform solution had failed. (para. 244 of the Report of the United Nations Commission on International Trade Law, 50th session)

For these reasons, no doubt that one would accompany with great interest the future discussions in the UNCITRAL Working Group III. While some states will support the evolution of ISDS, other will be inclined to push for a revolution. Certainly, there are States still to assess and decide on a particular position and, as such, middle solutions are likely to emerge.

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References

- The authors attended the 37th session on behalf of the observers Queen Mary University of London*
- ?1 *(Dr Crina Baltag) and the MAA/Moot Alumni Association (Cristen Bauer and Dr Crina Baltag). The opinions expressed in this post are of the authors only.*
- ?2 [Report of Working Group III \(Investor-State Dispute Settlement Reform\) on the work of its thirty-seventh session \(New York, 1-5 April 2019\), A/CN.9/970, paras 17-25.](#)
- ?3 [Report of Working Group III \(Investor-State Dispute Settlement Reform\) on the work of its thirty-seventh session \(New York, 1-5 April 2019\), A/CN.9/970, paras 42 et seq.](#)
- ?4 [Report of Working Group III \(Investor-State Dispute Settlement Reform\) on the work of its thirty-seventh session \(New York, 1-5 April 2019\), A/CN.9/970, paras 63 et seq.](#)
- ?5 [Report of Working Group III \(Investor-State Dispute Settlement Reform\) on the work of its thirty-seventh session \(New York, 1-5 April 2019\), A/CN.9/970, para. 83.](#)
- ?6 [Report of Working Group III \(Investor-State Dispute Settlement Reform\) on the work of its thirty-sixth session \(Vienna, 29 October-2 November 2019\), A/CN.9/964.](#)

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