ISDS Reform Without Remedy:
A Report from the 51st Session of UNCITRAL WGIII

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The most recent session of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII), held in April 2025, brought to the surface a now-familiar dynamic: ongoing debates over key reform issues were marked by procedural disputes and divergent positions among States and observers. Despite years of effort and a clear mandate to address widespread concerns about legitimacy and imbalance in the investor–State dispute settlement (ISDS) system, a number of key cross-cutting issues—namely, (1) the exhaustion of local remedies, (2) the denial of benefits, (3) shareholder claims, and (4) the right to regulate—faced challenges to remaining on the reform agenda, or risked being reframed in ways that would merely codify existing practice.

These issues are not minor technical points. Alongside topics such as damages assessment and the regulation of third-party funding, they go to the heart of many States' calls for reform. For a significant number of countries—especially those facing frequent ISDS claims—these proposals are key to ensuring adequate policy space, addressing asymmetries in the current regime, and restoring greater balance in the system. However, the session saw a continuation of procedural debates over whether these issues fit within the Working Group's scope, limiting the opportunity for substantive engagement.

Persistent resistance from some States and industry groups

Several States—including Bahrain, Japan, Singapore, Switzerland, the United States, and, to a lesser extent, Canada, the European Union and its Member States, and the Republic of Korea—expressed skepticism about whether these cross-cutting provisions should be discussed within WGIII. Their positions were echoed by industry associations such as the Corporate Counsel International Arbitration Group (CCIAG) and the United States Council for International Business (USCIB), who argued that certain reform proposals fell outside the Working Group's mandate.

While framed as procedural concerns, these objections often constrained the scope of the conversation. It is worth noting, however, that the UNCITRAL Secretariat has consistently indicated that WGIII's mandate includes addressing features of the ISDS system that have generated significant concerns about its legitimacy and viability (paras 45–47 of the 2017 Secretariat's Note). The proposals in question—such as requiring exhaustion of local remedies, restricting reflective loss shareholder claims (a principle firmly rooted in domestic and customary international law), and reaffirming the sovereign right to regulate—are grounded in long-standing critiques and are not novel departures from international practice. They are targeted responses to long-recognized harms and imbalances in the investment treaty system. Yet these efforts are often dismissed as "too substantive," while the power to define what qualifies as procedural—and thus appropriate for WGIII's agenda—remains narrowly controlled.

At its core, this is a debate about agenda-setting. Many developing countries entered the WGIII process having accepted an important limitation: that the Working Group would not address the substantive investment protections themselves, even though many of them consider those protections central to the systemic challenges. Instead, they made a significant compromise to focus on procedural reform. For this reason, many delegations see the cross-cutting provisions—though technically procedural—as essential to ensuring that reforms meaningfully improve the practical functioning of ISDS. Some delegations expressed concern that efforts to narrow the scope of the agenda risked sidelining the issues that matter most to countries seeking a more development-oriented and balanced investment framework. If the core concerns that brought many States to the table are removed from consideration on procedural grounds, the legitimacy and impact of the entire reform process may be called into question.

One of the more pointed interventions came from the delegate of the United States, who stated that provisions on denial of benefits, shareholder claims, and the right to regulate address issues that are too "substantive" to be considered within WGIII. The U.S. delegate also questioned why Working Paper 244 proposed "novel approaches without adequately explaining the need for deviating from practice." But it is precisely because current practices have generated sustained concerns that reform is being pursued. Calls for change are grounded in the lived experiences of States that have confronted the burdens and limitations of the existing system. WGIII was convened in response to the legitimacy and accountability crisis in ISDS.

As several delegations noted during the session, reform requires more than updating procedures—it demands engagement with the structural elements of ISDS that have contributed to the imbalance in outcomes. The right to regulate, for example, is not an ancillary concern, it is a foundational one. As one delegate put it, "this needs to continue to develop because it really is part of the essence of the work of this Working Group when it seeks to reform… we cannot do the same thing [as the past] when we're seeking to reform something for the modern era."

Exhaustion of local remedies: a missed opportunity for meaningful engagement

The discussion of exhaustion of local remedies (draft provision 14) illustrated many of the challenges currently facing WGIII. The version presented in Working Paper 244 was notably weaker than an earlier draft in Working Paper 231. Rather than proposing a clear requirement for investors to pursue domestic remedies before initiating ISDS claims, it merely encouraged parties to consider doing so—something investors are already free to do under current rules.

The Chair opened the discussion by indicating that it was "clear that including mandatory exhaustion would not achieve consensus." While this may have reflected prior conversations, it deterred the possibility of deeper engagement on the proposal, which many delegations had been prepared to discuss. As the European Union representative observed, "we question the effect of the provision—what is the added value?" It's a fair question. The draft includes no obligation, incentive, or enforcement mechanism to promote the use of domestic courts or administrative bodies. Yet, the EU added that "this is indeed a compromise, and we share the spirit of compromise." However, the text as drafted offered little indication of compromise: it is difficult to

identify what, if anything, has been traded. Unfortunately, the provision risked reinforcing the status quo under the appearance of reform.

A broad range of countries—including Brazil, Côte d'Ivoire, Ghana, Kenya, Lesotho, Namibia, Nigeria, Sierra Leone, Thailand, and Zimbabwe—expressed support for a stronger exhaustion requirement. Yet those opposing it framed the current "encouraging" text as a reasonable middle ground. This group included the delegations of Canada, Japan, Switzerland, the United Kingdom, and industry observer, CCIAG—but also the Dominican Republic, India, and Iraq. In our intervention, we highlighted the sharp divergence in views, emphasizing that exhaustion of local remedies is critical for rebalancing ISDS and strengthening domestic institutions for many in the room. However, we also pointed out that other reform proposals—like the appellate or standing mechanism—are advancing on an opt-in basis and suggested that the same approach could apply here. This would allow those States prioritizing local remedies to adopt stronger commitments, without making consensus a barrier.

Sierra Leone proposed a revised text that introduced a two-paragraph approach: one voluntary paragraph encouraging use of local remedies, and another allowing for a 36-month extension to the statute of limitations if such remedies were pursued. While this proposal garnered some interest, it also generated much confusion. Viet Nam, for example, raised a valid concern: what incentive would an investor have to pursue local remedies if doing so only served to extend the limitation period? There were also familiar interventions questioning the reliability of domestic courts. CCIAG, in a sweeping generalization, remarked, "I have been around too many courts in the world, it's not realistic to get local courts to make a decision in 36 months." The discussion did not fully clarify where consensus stood.

The Chair sought to bring the discussion to a quick close, aiming to identify broad agreement on the new language, but several States that had just expressed support for a mandatory requirement were never asked to indicate whether they had shifted from that position. The so-called compromise was introduced abruptly and with little clarity, leaving many delegations without a meaningful opportunity to engage. The result was a draft that many see as providing minimal change, despite strong support for a more ambitious approach. The provisional text currently reads:

1. Prior to submitting a claim to the tribunal, a party may initiate proceedings before a court or competent authority of a Contracting Party where available.
2. Where a claim is submitted for resolution in [local adjudicatory proceedings] [before a court or competent authority] of a Contracting Party, the limitation period [in draft provision 16] shall begin:

(i) after the claimant has obtained a final decision of the court of last resort of that Contracting Party, or

(ii) 36 months following the initiation of local adjudicatory proceedings if no final decision is reached [within] [after the lapse of] that period, [whichever is earlier].

For many States, exhaustion of local remedies is a foundational component of ISDS reform—both to ensure respect for domestic institutions and to reduce unnecessary recourse to international arbitration. The inability to adopt even an opt-in model suggests an ongoing reluctance to challenge entrenched interests—and a persistent deference to a status quo that many view as ineffective and imbalanced.

The draft provision could have required exhaustion of local remedies as a mandatory step. Under the current two conditions—either obtaining a final decision or waiting 36 months without resolution—investors would still retain access to ISDS, meaning the basic right to arbitrate would be preserved. This is what a real compromise would have looked like, i.e., one that balances investor access with the sovereign right—and responsibility—of States to have their domestic institutions adjudicate disputes. It is critical to give these institutions the opportunity to function in investor-State disputes, as it is the only meaningful way to strengthen their rule of law frameworks and improve institutional capacity. After all, the perceived weakness of domestic legal systems in developing countries is often cited by foreign investors and their Home States as justification for bypassing them altogether.

The denial of benefits provision: a test case for real reform

The discussion on the denial of benefits provision (draft provision 17) proved to be one of the most revealing—and debated—moments of the session. On the final day, Argentina introduced a revised version of the Secretariat's draft, broadening the range of situations in which States could withhold treaty protections. The Secretariat's draft already permitted denial of benefits to shell companies and investors engaged in

corruption, fraud, or conduct contrary to the treaty's objectives (paragraph 2). Argentina's addition included language aimed at curbing treaty shopping—specifically, allowing the denial of benefits to investors that restructure solely to gain access to ISDS.

This proposal drew a visible dividing line in the room: nearly 20 States, largely from the Global South, voiced support or urged further discussion, while several developed States expressed concern that such changes went too far or fell outside WGIII's procedural scope.

An especially striking moment came during the intervention from the CCIAG observer, who argued that the denial of benefits provision was "discriminatory"—not against mailbox companies or multinational investors, but against small and medium enterprises (SMEs) and even developing countries themselves. His rationale was that large multilateral corporations from wealthier countries can easily meet the formal criteria required to avoid denial of benefits provisions—such as establishing fully staffed holding companies with boards of directors—whereas SMEs may lack the resources to do so and could therefore be excluded from treaty protections.

While this argument may appear sympathetic to SMEs at first glance, it ultimately missed the mark and misrepresented the reform's intent. The aim of expanding denial of benefits provisions is not to target SMEs or legitimate investors, but to curtail the abuse of the ISDS system by investors, large or small, who manipulate legal structures for treaty shopping, round-tripping, or shielding fraudulent or unlawful conduct. Most developing countries that backed Argentina's proposal were doing so not because they wanted to discriminate arbitrarily among investors, but because they wanted to limit their exposure to meritless or abusive claims that obstruct regulatory and development priorities. If that means placing stricter limits on some types of claims, even at the cost of excluding a subset of investors who fail to meet minimum transparency or conduct-based thresholds, then so be it—it is a targeted response to real, documented risks.

More fundamentally, the CCIAG intervention was problematic in tone and substance. Speaking as if on behalf of developing countries, the representative implied that these States were incapable of discerning their own interests. But the record shows otherwise: it was precisely these delegations—from Latin America and Africa, in particular—that strongly supported Argentina's proposed language. Far from being out of step with their needs, the proposal was grounded in the lived experience of States regularly

targeted by ISDS claims, and it aimed to close well-known jurisprudential gaps. In the end, the intervention revealed less about the risks to SMEs and developing countries and more about how industry groups continue to resist meaningful reform by reframing safeguards as threats. It is one thing to raise implementation concerns—which can be addressed in good faith. It is quite another to dress up obstructionism as advocacy for the Global South.

Fortunately, the strength and breadth of support for Argentina's intervention, whether formally coordinated or not, meant that the broader denial of benefits language may have survived—at least for now—despite sustained pressure to narrow or remove it. Still, there is some concern that the next draft may dilute this provision—perhaps citing "divergence of views" as justification, already noted in the Report of the 51st Session. That would follow a pattern seen with other cross-cutting reform topics, where language has been softened to reflect the lowest common denominator rather than ambition. The Chair, in his closing remarks, noted that even a narrow denial of benefits clause would represent progress, given that many existing treaties lack such provisions. While this may be true in a formal sense, many delegations see the broader reform agenda as an opportunity to move beyond merely documenting existing practices.

Shareholder claims: a fight over process and substance

The treatment of shareholder claims for reflective loss (draft provision 18) continued to spotlight one of the more contentious issues in ISDS reform. Most domestic legal systems and principles of customary international law restrict standing to parties who can demonstrate a direct legal interest in the dispute. ISDS, however, remains an exception—allowing shareholder claims for reflective loss. This has led to duplicative and expansive claims, raising both financial and procedural risks for respondent States.

The question of how to regulate shareholder claims for reflective loss is particularly sensitive for developing countries, many of which have consistently called for structural limits on such claims. Yet the session saw efforts from some delegations and observers to either delay or exclude the proposed reform. Before States had an opportunity to weigh in, the floor was first given to non-State observers, including CCIAG, whose representative has consistently been afforded generous speaking time. His intervention struck a somewhat condescending tone and painted a selective picture of reality—one that conspicuously ignored the systemic risks posed by shareholder claims. But his aim

was clear: to push for the elimination of the provision entirely, and he had the backing of the delegations of ICSID, USCIB, as well as Bahrain. This sequence drew concern from delegates, given that the Working Group is explicitly mandated to be "government-led."

Despite this early framing, many delegations voiced their support for keeping the provision on the table. Nigeria, for instance, highlighted the chaos unleashed when shareholder claims are left unchecked, warning of "endless claims" from marginal shareholders that undermine both corporate accountability and the coherence of the dispute settlement system. India sought clarity on how minority shareholders' losses would be defined and assessed. Argentina, Brazil, Chile, Colombia, Panama, Spain, and Venezuela also contributed thoughtful interventions that reaffirmed the importance of addressing the issue structurally.

Other States offered more cautious views. Switzerland and Singapore, for instance, argued that limiting shareholder standing would exclude most investors from ISDS altogether, but acknowledged that some limits or procedural safeguards may be appropriate. Canada, which has addressed reflective loss in its own Model Foreign Investment Promotion and Protection Agreement (FIPA), remained largely silent—a notable omission, given its past leadership on the issue. The EU and its Member States were similarly restrained. Though they acknowledged that shareholder claims must be addressed, they were less assertive than in prior sessions. They expressed doubts about the adequacy of a standalone provision but offered little in terms of concrete proposals or political backing. This growing hesitation—particularly from actors once seen as reform champions—may reflect reduced ISDS exposure or changing institutional priorities. But it also risks leaving key reform demands without strong advocates at a critical moment. The United States took a more definitive stance, questioning whether the provision belonged in WGIII's mandate, describing it as overly complicated and technical, and therefore, not worth pursuing. While some concerns about complexity may be valid, they also risk becoming a proxy for avoiding reform discussions altogether.

Ultimately, the provision survived—for now. It is slated for renewed discussion in January 2026. But the limited engagement with its core content left many delegations concerned that the window for serious reform may be narrowing.

The right to regulate: balancing policy space and predictability

The right to regulate provision (draft provision 19) similarly drew divided reactions. For many developing countries, affirming the sovereign right to regulate in the public interest—particularly in areas like health, environment, and human rights—is an essential component of any reform package. They pointed to the asymmetry created when States bear legal and financial risks for enacting public interest regulation, while investors face few equivalent constraints.

Opposition came largely from industry observers, particularly the USCIB observer, who argued at length that the provision had no place in the WGIII reform process. Their intervention was echoed by a few developed country delegations, many of whom claimed that the provision exceeded the group's mandate. According to this view, draft language that shields public interest regulation from investor claims would gut the entire investment regime. In any case, some argued, the ongoing discussions at the Organization for Economic Cooperation and Development (OECD) is a more appropriate venue to tackle this topic. Others noted, however, that the OECD lacks global representation and binding authority—and is inaccessible to many States actively participating in ISDS reform at UNCITRAL.

In contrast, many developing countries anchored their support for the provision in prior remarks from the Chair—often stating, "as the Chair has indicated, this *is* within the mandate." But in response to these diverging interpretations, the Chair clarified that his earlier mandate interpretation applied only to shareholder claims, not the right to regulate. The distinction was subtle but important—and left open the possibility that the Chair might view the right to regulate provision as straying from the group's procedural scope. As with earlier sessions, this underscored how influential framing by the Chair and Secretariat can be in shaping negotiation dynamics, even when States hold ultimate decision-making authority.

CCSI intervened as an observer to help reframe the issue. We emphasized that the right to regulate is not only substantively important, but also a procedural concern. Regulatory chill and the asymmetric allocation of regulatory risk are at the heart of the legitimacy crisis facing ISDS. In a world facing cascading public interest challenges—from climate change to public health—States must be able to regulate without fear of legal retribution. Procedural tools like carve-outs, filters, and consent requirements are

not beyond the mandate; they *are* the mandate—precisely the types of structural fixes needed to recalibrate a system long skewed in favor of investor protections.

Leaving the right to regulate out of the final reform package would leave a gaping hole in any credible effort at systemic change. Without it, States—particularly those facing intersecting development and environmental pressures—will remain exposed to legal risks simply for regulating in the public interest. A meaningful reform process cannot afford to ignore that reality.

The bigger picture: where reform stands

This session reaffirmed many of the broader dynamics that have shaped WGIII's reform process. While the agenda remains formally open to proposals aimed at addressing systemic imbalances in the ISDS system, meaningful engagement with these issues often runs up against procedural hurdles or political resistance. Where provisions do advance, they risk being diluted to the point of reinforcing existing practice—offering continuity over transformation—justified by concerns that even modest reforms might somehow deter foreign investment. Yet, the empirical evidence for that claim remains inconclusive, at best. There is little indication that ISDS attracts productive, sustainable investment—and growing evidence that it entrenches extractive and harmful ones.

In that context, proposals aimed at addressing central concerns—such as denial of benefits, shareholder claims, exhaustion of local remedies, and the right to regulate—should be treated as foundational, not peripheral. These issues go to the heart of whether international investment law can be reconciled with democratic governance, environmental protection, and equitable development. And yet, in WGIII, they are often sidestepped, fragmented, or watered down to fit within a framework designed to privilege investors' economic interests.

Despite this, the countries most burdened by the current system remain in the room. They continue to push for reforms that could curb abuse, protect public interest regulation, and restore some balance to an uneven legal regime. That persistence is not a concession to the system—it is a pragmatic attempt to secure what limited justice may still be possible. But it is increasingly difficult to see how this process will deliver the kinds of changes many developing countries—and their publics—have called for. While

the mandate promised systemic reform, the process has too often settled into procedural tinkering that leaves core structural inequities intact.

Rather than continue investing scarce time and resources in a process that may no longer serve their interests, States should begin to consider alternatives. Some have already taken steps to terminate or renegotiate their investment treaties. Others are working toward drafting model agreements that are better aligned with their development and constitutional priorities. States are also exploring regional frameworks or turning to different multilateral spaces to pursue reforms with greater ambition. Multilateralism itself is not the problem—but this particular multilateral process may no longer offer the clearest or most effective path toward meaningful reform.