# Structural Barriers and Power Dynamics in UNCITRAL WGIII: Upholding the Status Quo?

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## Abstract

This paper critically examines whether the UNCITRAL Working Group III reform process in investor-State dispute settlement (ISDS) is procedurally inclusive and meaningfully accessible to developing countries, which are disproportionately subject to ISDS claims. Drawing on attendance and participation patterns across five negotiating sessions between September 2022 and January 2024, the analysis reveals persistent disparities in engagement among States. While high-income countries continue to dominate the process, developing countries have nonetheless made strategic interventions and secured limited gains, despite facing significant obstacles. Their ability to participate meaningfully, however, is constrained by deeper systemic disadvantages – including resource disparities, language and expertise gaps, delegation instability, and limited access to regional preparatory processes. Rather than establishing causality, the paper traces how these conditions shape the terrain of participation, offering insight into the broader dynamics and limitations of multilateral investment treaty reform.

## Keywords

investment treaties – ISDS – power asymmetry – UNCITRAL WGIII reform process

## 1 Introduction

The globalisation of economic activities in the post-colonial era, among other things, led to the rapid adoption and expansion of protectionist treaties.[1] These treaties' investment protections provide a vast array of broad standards of treatment that regulate the foreign investor-State relationship, by way of substantive rights provided to investors and obligations imposed on States. They also regulate investor-State disputes that may arise through arbitration mechanisms. The overarching aim behind the norms and principles of these investment treaties is the creation of a system of legal safeguards against potentially harmful policies and governance of host countries that may undermine the economic interests of foreign investors, enforceable at the international level.

In the view of its architects and present-day proponents, investment treaties were (and remain) a necessary and valuable tool for global economic governance. Because they are designed to protect the interests of transnational capital, they are presumed to promote foreign investments that can then foster economic development in countries in need. Without such instruments, the argument goes, foreign investors would face "weak rules-based governance … where there are no independent courts [that are] able to control governments' abuse."[2]

Empirical research developed over the past two decades, along with the experiences of many host States, however, suggests that investment treaties have not conclusively led to increased investment flows nor to achieving the development needs of many host countries.[3] On the contrary, evidence suggests that investment treaties have actually undermined States' ability and

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1 Kenneth J Vandevelde, 'Brief History of International Investment Agreements' (2005) 12 UC Davis Journal of International Law and Politics 157, 171; Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law' (2013) 5(2) Goettingen Journal of International Law 455.

2 Email from Professor and Arbitrator GS to the OGEMID listserv (28 February 2024).

3 Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, 'Costs and Benefits of Investment Treaties: Practical Considerations for States' (Columbia Center on Sustainable Investment, 2018) <https://ccsi.columbia.edu/content/costs-and-benefits-investment-treaties-practical-considerations-states>; Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence' (2018) OECD Working Papers on International Investment 1, 16–17 <https://www.oecd-ilibrary.org/docserver/e5f85c3d-en.pdf> both accessed 12 September 2024; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 World Development 1567.

duty to regulate in the public interest,4 weakened the rule of law,5 and exacerbated inequality.6 The primary tangible benefit of these treaties has been the persistent protection of the economic interests of foreign investors, highlighting the controversial purpose, effectiveness, and cost of maintaining such a protectionist regime.7

These systemic shortcomings are not evenly felt across all countries, however; rather, they reflect and reinforce stark global asymmetries. Despite their purported neutrality, the distribution and effects of investment treaty protections are deeply asymmetric.8 Most ISDS proceedings are initiated by investors from high-income, capital-exporting countries against lower-income, capital-importing States.9 These imbalances reflect broader patterns in

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4 Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 TEL 229; Julia Calvert and Kyla Tienhaara, 'Beyond "Once BITten, Twice Shy": Defending the Legitimacy of Investor-State Dispute Settlement in Peru and Australia' (2022) 30(5) Review of International Political Economy 1799.

5 Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Bloomsbury Publishing 2018) 59–61; Mavluda Sattorova, 'The Impact of Investment Protection Standards on the Rule of Law: Strengthening or Weakening the Domestic Rule of Law?' in August Reinisch and Stephan W Schill (eds), *Investment Protection Standards and the Rule of Law* (OUP, 2023) 353; Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 Intl Review of Law and Economics 107, 108.

6 Lisa Sachs and Lise Johnson, 'Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities' in José Antonio Ocampo (ed), *International Policy Rules and Inequality: Implications for Global Economic Governance* (Columbia University Press 2019) 112.

7 Jason Webb Yackee, 'Do BITs Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 379; Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020).

8 Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66(1) World Politics 47. The authors offer evidence that the content of bilateral investment treaties 'reflect deliberative strategies on the part of powerful states.' They conclude that geopolitics is 'an important part of powerful states' economic agreements and dispute-settlement design' and that the regime, as a result, 'disproportionately benefits capital exporters.' See also Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19(3) JIEL 561, 574, 576, where the authors demonstrate an underlying asymmetry in treaty negotiations between developed and developing countries, suggesting that the latter 'seem to have little say over the content of the treaties they sign' and that, therefore, 'richer countries tend to be the rule-makers in BIT negotiations while poorer states tend to be the rule-takers'.

9 These observations are made by the authors based on their analysis of publicly-available data from UNCTAD's Investment Policy Hub, particularly the database of treaty-based investor–State dispute settlement (ISDS) cases as of 31 July 2023. The analysis includes

global investment flows, where foreign capital overwhelmingly moves from developed to developing countries. As a result, the legal and financial risks associated with investment treaties fall disproportionately on the latter, while the benefits accrue to private investors based in wealthier States.

This disparity is compounded by differences in case outcomes. Investors are significantly more likely to succeed in disputes against developing countries than against developed ones, suggesting that treaty obligations and ISDS processes pose heavier burdens on lower-income States. Several factors may account for this asymmetry. First, arbitrators often lack deep contextual understanding of the domestic legal and political environments of respondent States – particularly those in the Global South – raising concerns about their ability to adjudicate disputes that require sensitivity to local governance dynamics and public interest concerns.[10] Second, developing countries' heavier reliance on foreign investment may naturally lead to greater exposure to disputes under their investment treaties. Third, lower-income countries may lack the legal capacity or financial resources to mount a strong defence, particularly when faced with complex claims and well-resourced opposing counsel. Finally, real or perceived weaknesses in the rule of law or domestic institutions – judged against Global North standards – may prompt tribunals to take less deferential approaches to State conduct, penalising developing countries for governance challenges without contributing to institutional improvement.[11]

The financial consequences are especially severe for developing countries.[12] ISDS awards can amount to sums that rival or exceed national spending on essential services like healthcare,[13] and the costs of litigation and potential liabilities strain budgets already stretched by debt, climate adaptation, and social development needs. Beyond the financial strain, the mere threat of

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case-level information on claimants, respondent States, case outcomes, and award amounts, enabling the identification of asymmetries in the initiation, success rates, and financial impacts of ISDS claims across countries classified by income level. UNCTAD Investment Policy Hub, 'Investment Dispute Settlement Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 12 December 2023.

10 Malcolm Langford, Daniel Behn and Ole Kristian Fauchald Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) JIEL 301; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) EJIL 387.

11 Sattorova 2018 (n 5).

12 Martins Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83(6) Modern Law Review 1246.

13 Cecilia Olivet, 'Why Did Ecuador Terminate All Its Bilateral Investment Treaties?' (Transnational Institute, 25 May 2017) <https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties> accessed 12 September 2024.

an ISDS claim can lead to regulatory chill, discouraging governments from enacting policies that might impact investor operations or expectations, even when such measures serve the public good.14 These fiscal pressures not only entrench structural inequalities between States but also erode governments' capacity to pursue long-term, sustainable development strategies.

These outcomes are symptomatic of deeper flaws in the investment treaty regime itself, particularly the ISDS mechanism, which imposes obligations on developing countries that are often unrealistic to implement15 and seldom balanced by commensurate benefits.16 This, coupled with the significant diversion of government officials' time and resources away from domestic priorities and toward navigating complex arbitration processes, makes a strong case for either meaningful reform or complete withdrawal.17 It is therefore not surprising that this regime has faced intense criticism over the past two decades18 – criticism that focuses not only on individual cases but on the system's asymmetric structure and its disproportionate impact on developing States. While some recent bilateral and multilateral initiatives have attempted to rebalance the regime by reaffirming States' regulatory space or introducing limited investor obligations,19 such reforms largely preserve the system's core asymmetries and do little to address its underlying structural logic.

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14 Tienhaara (n 4).

15 Jonathan Bonnitcha and Zoe Phillips Williams, 'The Impact of Investment Treaties on Domestic Governance in Developing Countries' (2024) 46 Law & Policy 140.

16 Johnson and others, 'Costs and Benefits of Investment Treaties' (n 3).

17 Ladan Mehranvar, with Martin Dietrich Brauch, Achyuth Anil, Anna-Sophie Kloppe, Lucas Clover Alcolea, and Madeleine Songy, 'Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions' (Columbia Center on Sustainable Investment, October 2024) <https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/publications/ccsi-breaking-free-investment-treaties.pdf> accessed 12 March 2025.

18 These include the issue of arbitrator bias: Langford and others (n 10); whether investment treaties attract (or not) investment: Josef C Brada, Zdenek Drabek and Ichiro Iwasaki, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2021) 35(1) Journal of Economic Surveys 34; Lorenz Reiter and Christian Bellak, 'Effects of BITs on FDI: The Role of Publication Bias' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 181; the ability of ISDS and investment treaties to depoliticise disputes: Geoffrey Gertz, Srividya Jandhyala and Lauge N Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties Depoliticize Investment Disputes?' (2018) 57(2) World Development 239; whether investment treaties and ISDS strengthen the rule of law in host States: Sattorova 2018 (n 5); and the risk of regulatory chill: Tienhaara (n 4).

19 At the bilateral level, see the Government of India, 'Model Text for the Indian Bilateral Investment Treaty' (March 2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download>. At the international level, the

This paper assesses the procedural inclusivity of a key multilateral reform initiative at its midpoint: the ISDS reform process underway at the United Nations Commission on International Trade Law (UNCITRAL). In 2017, UNCITRAL's Working Group III (WGIII) was tasked with "a broad mandate to work on the possible reform of investor-state dispute settlement."[20] As a UN-led forum, the process is expected to reflect the interests of all member States and to respond to longstanding concerns with the regime.[21] This study focuses on the extent to which the reform process enables meaningful participation by a broad range of governments – particularly those from developing countries that are disproportionately subject to ISDS claims.

The next section situates UNCITRAL's WGIII process within broader efforts to reform the international investment regime, highlighting both the asymmetries that underpin it and the multilateral opportunities it presents for more inclusive and coordinated change. Given this context, we then pursue three key objectives. First, we examine the role of agenda-setting in WGIII – a key determinant of which issues are included or excluded from the reform process, and thus a critical mechanism through which some States shape the scope and framing of negotiations in ways that may privilege their interests.

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most prominent reforms taking place are at the United Nations Commission on International Trade Law (UNICTRAL) Working Group III on the Reform of ISDS and the Organisation for Economic Co-operation and Development (OECD) Initiative 'The Future of Investment Treaties.' UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' (2024) <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 12 September 2024; OECD, 'The Future of Investment Treaties' (OECD, 2023) <https://www.oecd.org/investment/internationalinvestmentagreements.htm> both accessed 12 September 2024.

20 United Nations, 'Report of the United Nations Commission on International Trade Law (UNCITRAL) on the Work of its Fiftieth Session,' UN Doc A/72/17 (2017) para 264 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/PDF/V1705889.pdf?OpenElement> accessed 12 September 2024.

21 There have been many submissions made by various delegations during the WGIII reform process. These can be found at 'UNCITRAL: Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state>. For instance, see Submission from the Government of Thailand, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' (8 March 2019) <https://documents.un.org/doc/undoc/gen/v19/013/91/pdf/v1901391.pdf>; Submission from the Government of Morocco (4 March 2019) <https://documents.un.org/doc/undoc/ltd/v19/012/95/pdf/v1901295.pdf>; Comments by the Government of Indonesia (9 November 2018), <https://documents.un.org/doc/undoc/ltd/v18/075/93/pdf/v1807593.pdf>; Submission from the Government of South Africa (17 July 2019), <https://documents.un.org/doc/undoc/ltd/v19/072/51/pdf/v1907251.pdf>; and Submission from the Government of Ecuador (17 July 2019), <https://documents.un.org/doc/undoc/ltd/v19/072/09/pdf/v1907209.pdf> all accessed 12 September 2024.

Second, we explore how structural conditions embedded in multilateral legal processes – such as disparities in financial and human resources, legal and technical expertise, language proficiency, delegation continuity, and access to preparatory or coalition-building opportunities – can affect States' ability to participate meaningfully in the WGIII process. Drawing on institutionalist theory, studies of international legal and organisational practice, and insights from the broader literature on multilateral negotiations, we supplement this analysis with our own direct observations during WGIII sessions, informal conversations with State delegates, and email correspondence. These structural barriers tend to disproportionately constrain delegations from lower-income countries, limiting not only their presence but also the extent and consistency of their participation.

Third, we assess patterns of State engagement during the 43rd to 47th WGIII Sessions. Following a methodology adapted from Susan Block-Lieb and Terence Halliday,[22] we examine attendance based on official participant lists issued by the UNCITRAL Secretariat[23] and measure active engagement through the frequency of formal interventions delivered by each delegation. While we do not attempt to trace causal influence on negotiation outcomes – which may be shaped by a range of factors, including informal influence or strategic alliances, etc. – we focus instead on procedural inclusivity: who is present, who speaks, and who is heard. This allows us to evaluate the visibility and voice of different delegations, particularly those historically marginalised in global economic governance. We conclude the section by examining notable exceptions to general patterns of marginalisation, often linked to the efforts and expertise of specific individuals within delegations.

To contextualise these participation patterns within the broader structure of the investment treaty regime, we draw on the 1303 publicly known, treaty-based investor–State dispute settlement (ISDS) cases reported by UNCTAD's Investment Policy Hub as of 31 July 2023.[24] To conduct this analysis, we rely

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22 Susan Block-Lieb and Terence C Halliday, *Global Lawmakers* (Cambridge University Press 2017).

23 UNCITRAL, 'Working Group III (ISDS Reform), Forty-third Session, List of Participants' (5 September 2022) A/CN.9/WG.III/XLIII/INF/1; UNCITRAL, 'Working Group III (ISDS Reform), Forty-fourth Session, List of Participants' (23 January 2023) A/CN.9/WG.III/XLIV/INF/1; UNCITRAL, 'Working Group III (ISDS Reform), Forty-fifth Session, List of Participants' (27 March 2023) A/CN.9/WG.III/XLV/INF/1; UNCITRAL, 'Working Group III (ISDS Reform), Forty-sixth Session, List of Participants' (9 October 2023) A/CN.9/WG.III/XLVI/INF/1; UNCITRAL, 'Working Group III (ISDS Reform), Forty-seventh Session, List of Participants' (22 January 2024) A/CN.9/WG.III/XLVII/INF/1.

24 UNCTAD (n 9).

Table 1 The economic classification of countries based on their per capita GNI (2022)

| Economic classification | GNI per capita (USD) 2022 | Number of countries included |
|---|---|---|
| High-income country | > 36,191 | 29 |
| Upper middle-income country | 13,846–36,190 | 30 |
| Middle-income country | 4,466–13,845 | 54 |
| Lower middle-income country | 1,136–4,465 | 55 |
| Low-income country | < 1,135 | 26 |

on UNCTAD's comprehensive case-level data on ISDS proceedings, which provides information on claimant and respondent States, outcomes, and procedural details. Respondent States are classified by income level – high-income, upper middle-income, middle-income, lower middle-income, or low-income – using categories adapted from the World Bank's 2022 Gross National Income (GNI) per capita data (expressed in USD),25 as shown in Table 1. Because the high-income category encompasses a wide range of countries, we further subdivide it based on the median GNI per capita (USD 36,191),26 allowing for a clearer distinction between high-income and upper-high-income States. A full list of countries within each income category is provided in Annex 1.

## 2 Asymmetries in UNCITRAL's WGIII Reform Process

Given the asymmetries of the current ISDS regime, it is no surprise that critics have called the rules of international investment law unequal, unfair, and unjust.27 Even some proponents recognise the regime's ongoing public

25 Nada Hamadeh, Catherine Van Rompaey and Eric Metreau, 'World Bank Group Country Classifications by Income Level for FY24 (July 1, 2023–June 30, 2024)' (30 June 2023) World Bank Blogs <https://blogs.worldbank.org/opendata/new-world-bank-group-country-classifications-income-level-fy24#:~:text=The%20World%20Bank%20Group%20assigns,of%20the%20previous%20calendar%20year> accessed 12 September 2024.

26 Based on World Bank, 'GNI per Capita for 2020 (Current USD)' <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD> accessed 12 September 2024.

27 James Thuo Gathii and Harrison Otieno Mbori, 'Reform and Retrenchment in International Investment Law: Introduction to a Special Issue' (2023) 24 JWIT 535, 539; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) (Van Harten argues that ISDS creates a system of "special rights" for foreign investors that are not

legitimacy crisis.28 In light of these sentiments, whether arising from accumulated experience, shifting political will, or a growing recognition that traditional investment treaties are increasingly misaligned with the development priorities of the majority of States, a number of governments have employed various strategies to dilute or eliminate the negative impacts of the regime. These strategies have included terminating treaties,29 withdrawing from the International Centre for Settlement of Investment Disputes (ICSID) Convention,30 renegotiating the substantive and/or procedural elements of treaties,31 creating

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available to domestic businesses, individuals, or even States themselves. He characterises ISDS as a "privatized system of adjudication" that lacks transparency, consistency, and accountability, fundamentally privileging powerful investors over public interests); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press 2008) (Schneiderman critiques how ISDS "locks in" neoliberal economic policies by restricting the ability of democratic governments to regulate in the public interest. He argues that investment treaties, enforced through ISDS, act as a constitutional framework for global capital, limiting the redistributive and regulatory capacities of States, particularly those in the Global South); Muthucumaraswamy Sornarajah, *The International Law on Froeign Investment* (4th edn, Cambridge University Press 2017) (Sornarajah argues that ISDS entrenches post-colonial economic hierarchies by allowing corporations from the Global North to sue Global South governments over regulatory decisions that prioritise public welfare. He describes ISDS as an inherently "unequal and unfair" mechanism that undermines State sovereignty and disproportionately impacts developing nations); Lorenzo Cotula, *The Great African Land Grab? Agricultural Investment and the Global Food System* (Zed Books 2013) (Cotula critiques ISDS in the context of land rights, arguing that it enables foreign investors to challenge regulations that protect Indigenous and rural communities from land dispossession. He highlights how ISDS perpetuates inequalities by insulating transnational capital from accountability while leaving local populations vulnerable to exploitation).

28 See, for eg, Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler, and Daniel Behn, 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions' (2020) 21(2–3) JWIT 167; Shuping Li and Wei Shen, 'Legitimacy Crisis and the ISDS Reform in a Political Economy Context' (2022) 15(1) Journal of East Asia and International Law 31.

29 Mehranvar and others (n 17).

30 Nicolas Boeglin, 'ICSID and Latin America: Criticism, Withdrawal and the Search for Alternatives' (2013) Brettonwoods Project <https://www.brettonwoodsproject.org/2013/12/icsid-latin-america/> accessed 12 March 2025.

31 For instance, the 'Agreement between the United States of America, the United Mexican States, and Canada (USMCA)' (1 July 2020) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 12 September 2024.

new model BITs,32 or clarifying the meaning of treaties through binding joint interpretations33 or non-binding unilateral interpretations.34

At the multilateral and plurilateral levels, countries have come together in various fora to discuss well-meaning reform options for the regime and ISDS in particular.35 Such fora have the potential to provide an opportunity for a more efficient and stream-lined approach to reforming the problematic features that permeate the regime. In addition, high-income countries may have the resources and bargaining power to negotiate or terminate treaties bilaterally or regionally, without risking diplomatic relations or economic consequences. However, negotiations to reform or terminate treaties at the multilateral level provide an opportunity for developing countries to overcome obstacles, like the lack of bargaining power in bilateral negotiations, and allow them to forge alliances with other developing countries to exert more influence on agenda-setting and negotiation outcomes.36 Renegotiating dozens of treaties individually is often prohibitively time-consuming and politically complex, so the ability to collectively reform existing agreements in one multilateral process is especially beneficial to developing countries.

The contributions by developing countries in these multilateral negotiations would ideally expose the real harms of the investment treaty regime as experienced by the 'losers' of the current system and bring about effective and meaningful changes. Such changes should not only promote quality investment that will lead to sustainable development outcomes in host countries but also respect host States' right to regulate in the public interest, especially in the face of changing circumstances.37 One multilateral forum in which such

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32 Government of Canada, 'Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model' (2021) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng> accessed 12 March 2025; Prabhash Ranjan and Pushkar Anand, 'The 2016 Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 Northwestern Journal of International Law & Business 1.

33 UNCTAD, 'World Investment Report 2018: Investment and New Industrial Policies' (2018) UN Doc UNCTAD/DIAE/PCB/INF/2018/1 <https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf> accessed 12 September 2024.

34 Ladan Mehranvar and Lise Johnson, 'Missing Masters: Causes, Consequences and Corrections for State's Disengagement from the Investment Treaty System' (2022) 13(2) JIDS 264.

35 The most prominent are the UNICTRAL Working Group III on the reform of ISDS and the OECD initiative 'The Future of Investment Treaties' (see n 19).

36 Emily Jones, Carolyn Deere-Birkbeck and Ngaire Woods, *Manoeuvring at the Margins: Constraints Faced by Small States in International Trade Negotiations* (Commonwealth Secretariat 2010) 12.

37 UNCITRAL, 'Statement of the Group of G77 and China Delivered by Ms. Veronica Gomez, Charge D'Affaires A.I. of the Permanent Mission of Ecuador at the UNCITRAL

reform discussions are currently taking place is UNCITRAL's WGIII, which is the focus of the remainder of this paper.

UNCITRAL's organisational and membership structures are designed to foster inclusive participation, ensuring that all interested countries can engage in its working groups. Beyond its official membership, which consists of 70 Member States elected every six years by the UN General Assembly,38 UNCITRAL's Secretariat extends invitations to all other UN Member States to participate in negotiations, allowing both Member and Observer countries to attend and intervene on equal footing.39 In addition, the Secretariat invites interest groups, inter-governmental and non-governmental organisations to contribute to the discussions. This inclusivity can enhance transparency and broaden participation, setting UNCITRAL apart from some other negotiation processes, such as bilateral talks or ongoing climate negotiations, where non-State stakeholders often lack direct access to the negotiations, or forums like the Organisation for Economic Cooperation and Development (OECD)'s Track 2 initiative on modernising investment treaties, which is not a negotiating forum and does not include participation by all UN Member States.

State delegations in UNCITRAL's WGIII serve dual roles: some act as protectors of outward investment, establishing transnational obligations and depoliticised dispute resolution mechanisms to safeguard their investors abroad, while others primarily operate as respondents, bound by arbitration clauses in their investment treaties (or national laws and/or investment contracts). The balance between these roles often informs each State's position, with some prioritising investor protections, for example by codifying the status quo, and others focusing on mitigating ISDS-related financial and regulatory constraints. Initially, during the early stages of UNCITRAL WGIII negotiations, major capital-exporting States, such as the Member States of the European Union (EU), the United States (or US), and Canada had both offensive and defensive interests in ISDS, as the North American Free Trade Agreement (NAFTA) remained intact and the intra-EU Bilateral Investment Treaty (BIT) Termination Agreement had not yet been fully signed or ratified.40 However, since about 2020, it has become increasingly clear that most States

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WG III (Investor-State Dispute Settlement Reform), 29 October–2 November 2018,' (29 October 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/g77wgiiifinal_291018.pdf> accessed 12 September 2024.

38 UNCITRAL, *A Guide to UNCITRAL* (United Nations 2013) para 3.

39 Susan Block-Lieb, Terence C Halliday and Josh Pacewicz, 'Delegations and Delegates' in Block-Lieb and Halliday (n 22) 161, 168.

40 European Commission, 'EU Member States Sign an Agreement for the Termination of Intra-EU Bilateral Investment Treaties' (5 May 2020) <https://finance.ec.europa.eu/publi

within WGIII now fall predominantly into either an offensive or defensive category, with very few maintaining a strong dual interest.

In this context, it seems intuitive that those States bearing the heaviest burden of ISDS claims – some to the point of having their public finances severely impacted – would be the most committed to pushing for substantive and effective reforms, and therefore would show up and participate actively during WGIII sessions. Moreover, one might expect that net capital-exporting countries (often those in the high-income category) would also actively participate in the negotiations, whether due to their offensive interests in preserving strong investor protections or an underlying sense of shared responsibility to move the process forward, even despite their own reduced exposure to the risks posed by the regime.

## 3 Agenda-Setting in UNCITRAL's WGIII Reform Process

During the consultation process undertaken by the UNCITRAL Secretariat regarding possible ISDS reforms, "it was reiterated that criticisms of the current ISDS regime in essence reflect concerns about the democratic accountability and legitimacy of the regime as a whole."41 Beyond the asymmetries discussed above, the ISDS mechanism raises several concerns for States and their constituencies. For instance, ISDS can undermine domestic adjudicatory decisions and domestic laws and institutions; it can create conditions that reduce critical and necessary policy space for governments regulating in the public interest; it offers an exclusive forum for resolving disputes that is dedicated solely to foreign (or mailbox) investors; it allows for substantial monetary awards to be awarded to private investors affected by sovereign conduct; and it lacks adequate institutional standing for investment-affected third parties.42 Yet, its purported benefits, including its role in promoting investments,43

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cations/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en> accessed 12 March 2025.

41 UNCITRAL, 'Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)', Note by the Secretariat (20 April 2017) UN Doc A/CN.9/917, para 12 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/69/PDF/V1702369.pdf?OpenElement> accessed 12 September 2024.

42 Gus Van Harten, Jane Kelsey and David Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter' (2019) Osgoode Digital Commons 328; Gathii and Mbori (n 27).

43 Johnson and others (n 3).

depoliticising investment disputes,44 and improving the rule of law,45 have all been called into question. Given these broad concerns about the very essence of the regime, non-governmental organisations urged the WGIII to "take a holistic view of the system, especially of whether it was achieving its purported objectives, when considering and designing any ISDS reform."46

Criticisms of the regime centred on both the substance of investment treaties and the practice of ISDS. It was noted in the Commission's 2017 Report that work on ISDS reform "should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States' right to regulate, fair and equitable treatment, expropriation and due process requirements."47 However, WGIII confirmed that, while "critical questions on possible ISDS reform involved the underlying substantive rules,"48 it was confined to the procedural aspects of dispute settlement rather than dealing with substantive provisions.49

This narrowing of scope exemplifies a key function of institutional agenda-setting as a mechanism of control. Drawing on work by institutional theorists like John Odell,50 Amrita Narlikar,51 as well as Michael Barnett and Martha Finnemore,52 we understand agenda-setting not simply as the technical act of identifying issues for discussion, but as a political exercise through which dominant actors shape the boundaries of acceptable discourse. By defining procedural reform as the only legitimate object of deliberation, WGIII

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44 Gertz and others (n 18); Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties Depoliticization of Investment Disputes' (2018) 33(1) ICSID Rev 14.

45 Sattorova 2018 (n 5); Bonnitcha and Williams (n 15).

46 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-fifth Session,' UN Doc A/CN.9/935 (14 May 2018) para 97 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/59/PDF/V1802959.pdf ?OpenElement> accessed 12 September 2024.

47 UNCITRAL, UN DOC A/72/17 (n 20) para 257.

48 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-fourth Session,' UN Doc A/CN.9/930/Rev.1 (19 December 2017) para 20 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/83/PDF/V1802983 .pdf?OpenElement> accessed 12 September 2024.

49 ibid.

50 John S Odell, *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge University Press 2006).

51 Amrita Narlikar, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO' (2006) 29(8) The World Economy 989.

52 Michael Barnett and Martha Finnemore, 'The Power of Liberal International Organizations' in Miriam Krieger, Lynne Chandler Garcia, John Riley and Will Atkins (eds), *American Defense Policy* (Johns Hopkins University Press 2021) 111.

effectively insulated the substantive power structures of international investment law, many of which are embedded in treaty provisions negotiated under conditions of asymmetry, from contestation.

This kind of agenda control in WGIII negotiations exemplifies what Barnett and Raymond Duvall term "networked power": the ability to shape the conditions under which actors operate by structuring the rules, procedures, and scope of engagement.53 Rather than acting directly on other participants, institutional power operates through the negotiation framework itself, setting boundaries around what issues can be raised and pursued.

A number of governments (especially developing country delegations) voiced their discontent with the narrowing of the reform process. The South African submission urged the WGIII not to "divorce the procedural from substantive concerns as they are intricately related."54 Their submission explained that "any discussion on ISDS has to be located in a wider context and reform dialogue – to include reform of the terms of the underlying treaties, because reforming ISDS is in itself not sufficient to solve the current problems the regime faces" given that many "problems of the current regime can only be tackled through a reform of substantive standards."55 Thailand had similar concerns, suggesting that the Working Group "should focus not only on procedural but also substantive matters,"56 while Indonesia feared that discussions built on a substance-procedure dichotomy "may actually defeat the purpose of having a meaningful ISDS mechanism as it is difficult to separate between substance and procedure."57

The persistent exclusion of substantive treaty norms from the reform agenda – despite repeated calls by several States – illustrates how formal

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53 Michael Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59(1) Intl Org 39. While the term *networked power* is not used explicitly in the typology developed by Barnett and Duvall, the concept aligns most closely with what they describe as institutional and productive power – forms of influence that operate through embeddedness in social and institutional networks. The phrase *networked power*, as used here, draws on this conceptual terrain and reflects more recent developments in scholarship on global governance and transnational legal ordering, where informal influence is often exercised through sustained participation, social capital, and relational positioning within multilateral forums.

54 Submission from the Government of South Africa (n 21) para 20.

55 ibid, para 19.

56 UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Government of Thailand,' A/CN.9/WG.III/WP.147 (11 April 2018) para 1 <https://documents.un.org/doc/undoc/ltd/v18/022/46/pdf/v1802246.pdf> accessed 12 September 2024.

57 Comments by the Government of Indonesia (n 21) para 1.

mandates can pre-empt deeper structural critiques while preserving an appearance of procedural neutrality and consensus.

The Working Group soon identified three categories of concern within the narrow scope of procedural reforms, for which ISDS reform was deemed desirable: concerns relating to the lack of consistency, coherence, predictability, and correctness of arbitral decisions; concerns relating to arbitrators and decision-makers; and concerns relating to costs and duration of ISDS cases.58 States also agreed by consensus that UNCITRAL's work must address other reform options, including the exhaustion of local remedies and counterclaims, and issues such as damages, impacts of ISDS on third parties, and regulatory chill. The concerns underlying these "cross-cutting issues" are widespread and profound,59 as is also evident in submissions to and commentary on UNCITRAL WGIII from a range of stakeholders, such as a group of UN Special Procedures Mandate Holders,60 over three hundred civil society organisations from around the world,61 and several academics.62

However, the treatment of these cross-cutting issues thus far further underscores the agenda-setting problem. Despite consensus on their importance,

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58 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-sixth Session (29 October–2 November 2018),' UN Doc A/CN.9/964 (6 November 2018) para 22, <https://documents.un.org/doc/undoc/gen/v18/075/12/pdf/v1807512.pdf> accessed 12 September 2024.

59 Lorenzo Cotula and others, 'UNCITRAL Working Group III on ISDS Reform: How Cross-Cutting Issues Reshape Reform Options' (15 July 2019) UNCITRAL Submission <https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system> accessed 12 September 2024.

60 'Mandates of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; the Special Rapporteur on the Right to Development; the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment; the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights; the Special Rapporteur on the Rights of Indigenous Peoples; the Independent Expert on the Promotion of a Democratic and Equitable International Order; and the Special Rapporteur on the Human Eights to Safe Drinking Water and Sanitation' (7 March 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/public_-_ol_arm_07.03.19_1.2019_0.pdf> accessed 12 September 2024.

61 'Global Civil Society Sign-on Letter on UNCITRAL's Investor-State Dispute Settlement Reform Discussions' (30 October 2018) <http://www.s2bnetwork.org/wp-content/uploads/2018/10/UNCITRAL-Global-Letter-Oct-30-2018.pdf> accessed 12 September 2024.

62 Gathii and Mbori (n 27); Van Harten and others (n 42); Daria Davitti, Jean Ho, Paolo Vargiu and Anil Yilmaz Vastardis, 'COVID-19 and the Precarity of International Investment Law,' (*Medium*, 6 May 2020) <https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878> accessed 12 September 2024.

these issues – whose earnest take-up might lead to a diminished role for ISDS in investment disputes – have largely been sidelined63 and are now bundled together with the reform of "procedural rules."64 Moreover, nearly every WGIII session that touches on cross-cutting issues is accompanied by a tangential debate over whether these issues are in fact substantive rather than procedural, and thus fall outside the scope of the ISDS reform process altogether. This persistent reframing not only delays meaningful discussions but also further undermines efforts to address the broader systemic concerns that many States, particularly those from the Global South, have consistently raised. Odell's research on trade negotiations has shown that powerful actors frequently shape not only what is discussed but also how it is discussed, ensuring that certain concerns never gain sufficient traction.65

For those States (and non-State actors) that had a more ambitious vision for this reform process and the hope that it would meaningfully transform the regime – for example, by dismantling the continued dominance and protection of private transnational and mobile capital from the Global North in the Global South66 – exiting the scene was the only viable option. Many civil society organisations and scholars, as well as some State delegations, have adopted this strategy, not wanting to be part of any reform proposal that could "create new dangers for governments by institutionalizing problematic substantive investor rights."67 This dynamic reflects not only tactical frustration but also

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63 Lisa Sachs and others, 'The UNCITRAL Working Group III Work Plan: Locking in a Broken System?' (4 May 2021) Columbia Center on Sustainable Investment Blog <https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system> accessed 12 September 2024. Discussion on some (but not all) of the cross-cutting issues did take place at the 46th Session in October 2023, but the primary challenge appeared to stem from diverging views in the room regarding the scope of the mandate. The debate, which has taken place repeatedly in WGIII discussions, revolved around whether the cross-cutting issues fell within the mandate, as interpreted by the Working Group.

64 UNCITRAL Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Provisions on Procedural and Cross-cutting Issues,' UN Doc A/CN.9/WG.III/WP.244 (8 July 2024) <https://docs.un.org/en/A/CN.9/WG.III/WP.244> accessed 20 April 2025.

65 Odell (n 50).

66 Harrison Mbori, 'Exit Is the Only Way Out: A Polemic Response to John Nyanje's "Hegemony in Investor-State Dispute Settlement – How African States Need to Approach Reforms"'(*Afronomicslaw Blog*, 10 September 2020) <https://www.afronomicslaw.org/2020/09/10/exit-is-the-only-way-out-a-polemic-response-to-john-nyanjes-hegemony-in-investor-state-dispute-settlement-how-african-states-need-to-approach-reforms/> accessed 12 September 2024.

67 Public Citizen, 'Recommendations for UNCITRAL ISDS Discussions', UNCITRAL Submission (15 July 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_publiccitizen.pdf> accessed 12 September 2024.

deeper patterns of structural power in global economic governance. As Barnett and Duvall describe, structural power operates by positioning actors within systems that shape their capacities, interests, and possibilities for action.68 In this case, Global South countries often enter negotiations at a structural disadvantage, forced to operate within pre-set constraints that limit their ability to meaningfully influence the rules that ultimately bind them.

For those that remain, there was a recognition among government delegates that "an important principle that should guide the Working Group's discussions … is inclusiveness," where "[b]oth members and non-members of UNCITRAL … participate fully regardless of their level of development [in order] to ensure that all concerns raised are considered in the process."69 In their 2019 submission to the Secretariat, the EU and its Member States reiterated the importance of "sustain[ing] and encourag[ing] efforts to ensure that delegates of developing and least developed countries can fully participate in these deliberations;"70 and repeated the statement made by Ecuador, on behalf of the Group of 77 and China, that:

> the effectiveness and legitimacy of this process rest on the active and wide participation of both developing and developed states to present their experiences and visions on the direction and content of any possible reform.71

Indeed, in discharging its mandate, WGIII was to "ensure that the deliberations […] would be Government-led, with high-level input from all Governments, consensus-based and fully transparent."72

Given the substantial uncertainties and reservations surrounding the legitimacy of the current regime, marked by inherent imbalances in structure and

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68 Barnett and Duvall (n 53).

69 Comments by the Government of Thailand (n 56) para 3.

70 UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and Its Member States EU Submission,' A/CN.9/WG.III/WP.159 (24 January 2019) para 9 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/004/13/PDF/V1900413.pdf?OpenElement> accessed 12 September 2024.

71 'Statement of the Group of G77 and China Delivered by Ecuador at the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) 36th Session' (29 October 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/g77wgiiifinal_291018.pdf>. See also UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-sixth Session,' A/CN.9/964 (6 November 2018) para 16 <https://documents.un.org/doc/undoc/gen/v18/075/12/pdf/v1807512.pdf> both accessed 12 September 2024.

72 UNCITRAL, UN Doc A/72/17 (n 20) para 264.

impact, coupled with a noticeable absence of public trust, any initiative aimed at reforming ISDS demands a highly inclusive, transparent, and consequently, credible approach.73 Inclusivity and transparency are not just desirable features but necessary conditions for normative legitimacy in the reform of a regime that has long privileged the interests of capital-exporting States and foreign investors.74 Yet, institutions can meet these formal criteria in appearance while falling short in practice. In this case, while the Working Group interpreted its mandate narrowly to include only the procedural aspects of ISDS reform – excluding the substantive aspects in dire need of reform and the notable asymmetries in investment treaties more directly – it pledged that the *process* would be transparent and inclusive of *all* governments, regardless of their level of development. As Narlikar has observed in her work on developing country participation in multilateral negotiations, however, formal commitments to inclusivity often mask the deeper structural disadvantages that shape the actual negotiation outcomes.75

In the next two sections, we assess whether WGIII has lived up to its stated commitment to procedural inclusivity. Our focus is not on whether particular States have successfully shaped the final outcomes of the negotiations, but rather on whether the process itself provides equitable opportunities for all States – regardless of their level of development – to engage meaningfully. By examining dimensions such as attendance and participation, we explore whether the procedural design and practical realities of WGIII allow for broad and balanced involvement, or whether structural disadvantages continue to limit the ability of some States to fully participate. In this sense, our analysis

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73 José Manuel Álvarez Zárate and Maciej Żenkiewicz, 'Last Chance for the Global South? Pursuing the South's Interests in Reforming the Investor-State Dispute Settlement System in the Multilateral Arena', SouthViews No 186 (10 October 2019) <https://us5.campaign-archive.com/?u=fa9cf38799136b5660f367ba6&id=ed5eb5a761> accessed 12 September 2024. International organisations are aware of the connections between procedural and substantive legitimacy as they undertake reforms to counter criticism. As Barnett and Finnemore note, "[i]n response to concerns that opaque procedures give voice to the powerful (who have resources to learn the ropes) but silence the weak (who do not), many [international organisations] have attemped to increase transparency, democratic deliberation, and local participation and representation. Opening decision-making processes can do more than increase procedural legitimacy, though. It is intended to produce policies that will better serve those previously excluded and so be more substantively legitimate." See Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) 169.

74 Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) Ethics & International Affairs 405.

75 Narlikar (n 51).

is concerned with the fairness and legitimacy of the process, rather than with attributing influence or responsibility for specific negotiated outcomes.

## 4 Asymmetry in Institutional Negotiation Processes

Critical scholarship in international law and institutional theory has long emphasised that global governance institutions, while formally committed to inclusion and cooperation, often reproduce hierarchies of power and privilege.76 While multilateral forums like UNCITRAL's WGIII may uphold principles of universal membership and equal formal rights to participate, the structures, procedures, and operational norms of such institutions tend to advantage certain kinds of delegations over others.77 These asymmetries ultimately shape who can meaningfully engage with the process and potentially influence the outcomes – not just who is present in the room.

Institutionalist theorists, such as Allen Buchanan and Robert Keohane, have argued that legitimacy in global governance rests not only on formal consent by States but also on procedural fairness, epistemic reliability, and accountability to those affected by such decision-making processes.78 Building on this insight, as well as insights from Block-Lieb and Halliday on international lawmaking,79 this section identifies five interrelated characteristics of what may be considered an "ideal-type" delegation, to borrow from another scholar, Danielle Falzon,80 in the WGIII process. These characteristics are not intended to imply causality or to determine influence; rather, they are traits that appear to be structurally privileged by the institutional design and normative frameworks of a multilateral forum such as UNCITRAL. They include: (1) access to financial and human resources to support sustained engagement; (2) legal and technical expertise in international investment law and ISDS; (3) proficiency in working languages and informational infrastructure

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76 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Makau Mutua, 'What is TWAIL?' (2000) 94 Proceedings of the ASIL Annual Meeting 31; BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) EJIL 1; Buchanan and Keohane (n 74).

77 Caroline Fehl and Katja Freistein, 'Organising Global Stratification: How International Organisations (Re)Produce Inequalities in International Society' (2020) 34 Global Society 285.

78 Buchanan and Keohane (n 74).

79 Block-Lieb and Halliday (n 22).

80 Danielle Falzon, 'The Ideal Delegation: How Institutional Privilege Silences "Developing" Nations in the UN Climate Negotiations' (2023) 70 Social Problems 185.

to digest complex documentation; (4) continuity of delegates across sessions; and (5) access to preparatory processes and informal coalitions that structure influence within and beyond formal sessions. While drawn from observed participation trends, these characteristics should not be read as predictive, but as indicative of structural conditions that can shape formal participation and its potential effectiveness.

International legal processes often reproduce such structural advantages. For example, in her analysis of climate negotiations, Falzon identifies four "normative ideals" of country delegations that tend to be structurally privileged in international forums: wealth, national stability, subject-matter expertise, and English proficiency.[81] These characteristics are not simply technical or apolitical; rather, they function as gatekeeping criteria that condition the degree to which a State's participation is institutionally legible and effective. Delegations that approximate these traits are more likely to navigate the procedural and discursive norms of international negotiations successfully. Our own observations suggest that these traits appear particularly relevant in the WGIII context as well. In addition to Falzon's traits, we find that coalition access – whether through regional blocs, informal groupings, or preparatory consultations – also structures how and to what extent States engage with the WGIII process.

These patterns are consistent with the findings of Block-Lieb and Halliday, whose extensive empirical research on UNCITRAL's working groups on insolvency, international transport, and secured transactions underscores how formal invitations to participate do not necessarily translate into meaningful engagement.[82] Drawing on direct observations, interviews with a broad range of participants, and detailed analyses of draft and final texts, their longitudinal study offers rich insights into how UNCITRAL functions as a lawmaking institution. While the organisation presents itself as an open and inclusive forum – welcoming all UN Member States and relevant non-State actors to participate equally – their analysis shows that procedural openness alone does not ensure equitable participation. In practice, engagement by State delegations is highly uneven, shaped by structural and institutional constraints, such as financial limitations, small delegation sizes, and restricted access to technical expertise in complex areas of commercial law.[83] Halliday and Block-Lieb caution that even in ostensibly inclusive processes, informal power dynamics and resource asymmetries can lead to the concentration of influence among a

81 ibid.

82 Block-Lieb and Halliday (n 22) 92–160, 161–92.

83 ibid 161–92, 265–321.

small subset of well-resourced States, often with the United States as the most dominant actor.84

Similar dynamics are evident in other international negotiation arenas. In climate change negotiations, for instance, developing countries often enter the process at a structural disadvantage, despite their formal inclusion. Scholars have documented how their participation is constrained by limited negotiating capacity, restricted access to timely scientific and technical information, and heightened vulnerability to external diplomatic and financial pressures.85 As Joyeeta Gupta notes, these structural barriers leave many developing country negotiators increasingly disenfranchised in a 'multi-speed world,' where disparities in capacity and access systematically weaken their ability to influence outcomes on equal terms.86

In the case of the World Trade Organisation's Joint Statement Initiatives (JSIs), many smaller developing countries participate not necessarily to shape the outcome, but to remain informed and avoid exclusion from emerging governance norms.87 In practice, their engagement may be largely procedural or symbolic, constrained by structural inequalities and informal, convenor-led processes, as well as the absence of institutional sources of power, such as regional coalitions.88 Participation, in such cases, becomes defensive rather than agentic – a means of staying informed rather than shaping the rulebook. Such forums reveal how even procedurally open processes can obscure deeper structural exclusions.

How does UNCITRAL WGIII compare? Unlike the OECD's Multilateral Agreement on Investment, which was negotiated in secret almost exclusively among developed countries about 30 years ago,89 or the more recent JSIs,

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84 ibid 318.

85 David Ciplet, J Timmons Roberts, and Mizanur R Khan, *Power in a Warming World: The New Global Politics of Climate Change and the Remaking of Environmental Inequality* (MIT Press 2015); Joyeeta Gupta, 'Increasing Disenfranchisement of Developing Country Negotiators in a Multi-Speed World' in Jessica F Green and W Bradnee Chambers (eds), *The Politics of Participation in Sustainable Development Governance* (United Nations University Press, 2006); Adil Najam, Saleemul Huq and Youba Sokona, 'Climate Negotiations beyond Kyoto: Developing Countries Concerns and Interests' (2003) 3 Climate Policy 221; Hayley Stevenson and John S Dryzek, *Democratizing Global Climate Governance* (Columbia University Press 2014) 72–77.

86 Gupta (n 85).

87 Shamel Azmeh, 'Developing Countries and Joint Statement Initiatives at the WTO: Damned if You Join, Damned if You Don't?' (2024) 55(3) Development and Change 375.

88 ibid 394.

89 Public Citizen, 'The Alarming Multilateral Agreement on Investment (MAI) Now Being Negotiated at the OECD' (no date) <https://www.citizen.org/article/the-alarming-multi

which involve self-selected subgroups outside the multilateral framework, WGIII has made deliberate efforts to include all UN Member States and a range of non-State stakeholders. Its formal inclusivity is more extensive, and in principle, it offers greater opportunities for participation by Global South delegations. However, as in the forums discussed above, institutional features and resource disparities continue to shape the depth and consistency of that participation. While WGIII may be procedurally more inclusive, it still privileges certain kinds of delegations over others.

### 4.1 *Resource Capacity*

Generally speaking, the structure of international legal negotiations tends to favour States with greater financial and institutional resources. In the WGIII context, three aspects of resource capacity appear particularly relevant to shaping whether and how delegations are able to participate meaningfully.

First, while delegation size alone does not necessarily determine influence or effectiveness, it is often correlated with a State's financial capacity. Wealthier countries are able to send larger teams, allowing for broader coverage of agenda topics, internal specialisation, and sustained presence throughout the negotiation week. In contrast, lower-income countries may struggle to field even a minimal delegation. For example, at the 44th and 45th WGIII sessions, the 21 high-income countries in attendance – including the EU – were represented by a total of 87 and 97 delegates, respectively. In contrast, the eight low-income countries that attended the 44th Session collectively sent 14 delegates, while the six low-income countries that attended the 45th Session sent 15 delegates in total. The disparity is even starker at the country level: the United States, home to the highest number of ISDS claims initiated (around 16%), sent ten delegates to each of these two sessions, nearly matching the total number of delegates from all low-income countries combined. Meanwhile, several low-income countries with high ISDS exposure, such as Tanzania, did not attend either session.

Unlike other international negotiations, such as the climate talks, which often require intensive schedules and multiple delegates to cover simultaneous sessions, WGIII negotiations fortunately do not run parallel tracks. As a result, the size of a delegation does not automatically translate into an advantage. Indeed, larger delegations at WGIII do not always participate more

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lateral-agreement-on-investment-mai-now-being-negotiated-at-the-oecd/> accessed 20 April 2025; Stephen J Kobrin, 'The MAI and the Clash of Globalizations' (1998) 112 Foreign Policy 97; Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34(3) Intl Law 1033.

frequently or effectively. For example, while the US delegation, with ten representatives, made 43 interventions during the 44th Session – the highest of any delegation – Uzbekistan, despite having an equally large delegation, intervened only once. Conversely, smaller delegations from Sierra Leone (three representatives) and Morocco (a single delegate) were notably active during the same session. These examples underscore that delegation size alone does not determine engagement; rather, it may interact with other factors such as technical expertise, preparation, and political prioritisation. Nevertheless, wealthier countries enjoy a structural advantage: they can staff delegations with topic-specific expertise, rotate participation to reduce fatigue, and engage flexibly in both formal proceedings and informal consultations.90

Other dynamics also influence the relationship between wealth and delegation size. Smaller countries, with smaller population sizes, may lack the capacity for specialisation in highly technical areas like ISDS or face constraints in engaging in international negotiations, regardless of their financial capacity.91 For instance, while Iceland, a high-income and small-population country,92 may have the resources to send a delegation to WGIII, it has not attended any sessions under analysis.93 This suggests that absence may reflect strategic non-participation or a perceived lack of relevance of the agenda, even for well-resourced countries. After all, Iceland has never been involved in an ISDS case – either as a respondent or as a home State under its investment treaties.94 By contrast, developing countries affected by ISDS but lacking sufficient resources may be absent not by choice, but by default, effectively excluded due to capacity constraints rather than deliberate disengagement.

Second, sustained engagement in WGIII requires significant logistical and financial commitment. Each year, the UNCITRAL Commission meets in New York City or Vienna to finalise and adopt draft texts submitted by its six working groups, among other tasks.95 In addition to this annual session, WGIII holds two or three negotiation sessions per year, each lasting a week (with the exception of the 43rd Session, which lasted two weeks), also in

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90 Block-Lieb and others (n 39) 180.

91 Jones and others (n 36) 9.

92 According to the World Bank list of Small States (May 2021) <https://thedocs.worldbank.org/en/doc/922761504726183951-0290022020/original/CountrylinksofSmallStates.pdf> accessed 20 January 2025.

93 UNCTAD (n 9).

94 On the constraints faced by small States in international negotiations, see Jones and others (n 36).

95 UNCITRAL, 'Commission Sessions' (2024) <https://uncitral.un.org/en/commission> accessed 12 September 2024.

New York City or Vienna. Furthermore, inter-sessional meetings take place at least once a year, often multiple times, where State delegations and observers informally discuss agenda topics, typically in the capital of the organising State.96 Finally, the UNCITRAL Secretariat organises several informal online meetings ahead of negotiations to discuss relevant topics97 or review draft texts,98 with these sessions lasting anywhere from one to four hours over one to two days.

In other words, for State delegations to fully engage in WGIII sessions, they must commit at least four full weeks per year to formal negotiations, in addition to multiple days or even weeks of optional informal participation. Moreover, formal negotiations are held in particularly expensive cities – New York or Vienna – both located in the Global North. According to *Forbes*, New York City ranks as the third most expensive city in the world,99 making the cost of travel, accommodation, and extended participation a significant, and therefore prohibitive, financial burden on developing countries.

In response to this challenge, UNCITRAL has established a trust fund, similar to other multilateral processes,100 designed to facilitate the participation of representatives from developing countries in the Working Group's deliberations, as well as provide translation services for informal sessions, ensuring inclusivity and transparency in the process.101 Contributions to this

96 The forty-seventh inter-sessional meeting was organised by Belgium and was held on 7 and 8 March 2024 in Brussels. UNCITRAL, 'Summary of the Inter-sessional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of Belgium,' A/CN.9/WG.III/WP.242 (28 March 2024) <https://documents.un.org/doc/undoc/gen/v24/020/34/pdf/v2402034.pdf> accessed 12 September 2024.

97 For eg, UNCITRAL, 'Forum on Dispute Prevention' (7 July 2023) <https://uncitral.un.org/en/forumondisputeprevention> accessed 12 September 2024.

98 For eg, UNCITRAL, 'Working Group III: ISDS Reform Informal Meeting – Draft Codes of Conduct' (7–8 March 2023) <https://uncitral.un.org/en/content/working-group-iii-isds-reform-informal-meeting-draft-codes-conduct> accessed 12 September 2024.

99 Laura Begley Bloom, 'Ranked: The World's 10 Most Expensive Cities to Live According to a New Report' (*Forbes*, 30 November 2023) <https://www.forbes.com/sites/laurabegleybloom/2023/11/30/ranked-the-worlds-10-most-expensive-cities-to-live-according-to-a-new-report/?sh=1f3ff7783946> accessed 12 September 2024.

100 For eg, UNFCCC, 'Trust Fund for Participation in the UNFCCC Process' (02 October 2017); and the WTO Global Trust Fund, see WTO, Press Release, 'Austria Gives EUR 200,000 to Help Developing Economies Engage More Fully in International Trade' (3 February 2025) <https://www.wto.org/english/news_e/pres25_e/pr973_e.htm> accessed 4 February 2025.

101 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-seventh Session,' A/CN.9/1161 (12 February 2024) para 14 <https://documents.un.org/doc/undoc/gen/v24/008/72/pdf/v2400872.pdf> accessed 12 September 2024.

fund have been made by entities such as the EU, France, the German Federal Ministry for Economic Cooperation and Development, and the Swiss Agency for Development and Cooperation.102 However, the specifics of how the fund is utilised, including the total amount disbursed and the number of countries benefiting from it, remain unclear due to a lack of publicly available details. Informally, we have learned that the fund covers in-country expenses on a *per diem* basis, while travel to and from New York City or Vienna remain uncovered, though this information is unverified.

It is important to note that several WGIII negotiations were held remotely due to COVID-19. However, beginning with the 43rd Session in September 2022, delegates participating remotely could no longer make active interventions and were restricted to observing the proceedings only. In several previous sessions, both in-person and remote delegates could actively participate, but this changed due to cost constraints. Several governments requested the continuation of active online participation for those unable to attend in person due to financial or other limitations, but the Secretariat could not accommodate this request. As a result, since September 2022, only in-person delegates have been able to make live interventions. Despite this limitation, online attendance still plays a supportive role, allowing countries with fewer resources to follow negotiations, build strategy, and provide remote support to their in-person delegates while reducing costs.

Starting with the 47th Session in January 2024, however, only some WGIII sessions have accommodated online attendance. The inability to follow negotiations online could significantly hinder delegates' ability to effectively track and engage in the negotiations. On average, 44% of delegates attended the 43rd, 44th, and 45th sessions virtually,103 with a notably higher proportion of online attendance from lower-income countries. For example, among middle-income country delegates attending these three sessions, 65%, 58%, and 74%, respectively, joined online.

Finally, meaningful participation in WGIII negotiations demands significant preparation, a requirement closely linked to States' financial and institutional resources. For example, during the 47th Session, delegates were expected to review and engage with three separate working papers covering

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102 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Fortieth Session,' A/CN.9/1054 (4 and 5 May 2021) para 22 <https://uncitral.un.org/sites/uncitral.un.org/files/wg_iii_resumed_40th_session_final_003.pdf?utm_source=chatgpt.com> accessed 12 March 2025.

103 It is important to note that the lists of participants provided by the Secretariat do not always differentiate between online and in-person attendance. The differentiated data is, however, available for these three sessions (43rd, 44th and 45th Sessions).

different reform topics.[104] This agenda placed considerable demands on delegations to prepare thoroughly for each issue and to revise their positions in response to evolving draft provisions. In addition, the Secretariat invites written submissions between sessions, but these demands further strain limited capacities. During the 47th Session, for example, 26 such submissions were received,[105] yet none came from low-income countries, and only one from a lower middle-income country (Viet Nam). In contrast, nine non-State actors, including prominent institutions like the Energy Charter Secretariat[106] and the World Bank's ICSID, submitted detailed comments.[107] While such institutional submissions vary in emphasis, several reflect well-resourced perspectives that tend to align with or reinforce aspects of the existing ISDS framework. This gap may point to disparities in resources and institutional capacity – or to different strategic priorities or constraints – among the various actors participating in the reform process.

These patterns highlight how WGIII's formal openness can obscure more subtle but persistent disparities in epistemic access and strategic engagement. What matters most is not merely the existence of formal procedural rules, but the capacity to navigate them effectively – a capacity unevenly distributed across States. Wealthier States, or those with greater resource capacity, are typically better positioned to digest dense documents, draft timely responses, and shape the interpretive framing of reform proposals. Their capacity to intervene across multiple stages of the process, both formally and informally, can give them disproportionate influence over agenda-setting and norm development, while States with fewer resources may be relegated to reactive or marginal roles.

For countries with limited human and financial resources, maintaining sustained engagement in such a demanding process can be particularly difficult. While participation ultimately reflects national priorities, i.e. governments that consider ISDS reform at UNCITRAL a national priority are more likely to

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104 These are the 'Draft statute of an advisory centre', the 'Draft guidelines on prevention and mitigation of international investment disputes', and the 'Draft guidelines on prevention and mitigation of international investment disputes'. UNCITRAL, A/CN.9/1161 (n 101).

105 UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform'(n 19).

106 The World Bank Group and the Energy Charter Secretariat, 'Enabling Foreign Direct Investment in the Renewable Energy Sector' (World Bank and Energy Charter Secretariat, 2023) <https://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Renewable_Energy_FDI_Final__032923.pdf> accessed 12 September 2024.

107 ICSID Secretariat, 'Statement for the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform' (16 January 2024) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_icsid.pdf> accessed 12 September 2024.

allocate dedicated staff and funding, structural constraints condition the feasibility of making WGIII participation a political priority. Ironically, it is often the countries most negatively affected by ISDS that face the greatest barriers to shaping its reform.

### 4.2 *Access to Language*

Proficiency in English is often framed as a "a norm of cultural modernization and development,"[108] making it a structurally advantageous trait for delegations engaged in international negotiations. Although the WGIII process allows for formal discussions in any of the six official UN languages (Arabic, English, French, Mandarin Chinese, Russian, and Spanish), English functions as the de facto working language, particularly in informal consultations, drafting processes, and preparatory communications.

The dominance of English in international fora exemplifies what Pierre Bourdieu terms "linguistic capital" – a form of symbolic power that confers credibility, authority, and influence in elite institutional spaces.[109] In global governance forums like WGIII, English does not merely facilitate communication but operates as a gatekeeping mechanism, shaping who can participate effectively and under what conditions. Fluency in English enables delegates to actively engage in time-sensitive deliberations and propose drafting changes in real time in a way that is accessible to the majority in the room, including the Chair and the Secretariat. Delegates without such fluency may rely on delayed translations or risk passively acquiescing to text they cannot fully interrogate, particularly when working papers are amended on the floor and consensus is needed for finalisation, while those with stronger English skills often propose text directly in English, even when it is not their preferred language, simply to be understood and effective in the negotiation setting.

Document dissemination practices further entrench this asymmetry. All formal documents are initially drafted in English and only later translated into other UN languages. However, some "unofficial documents", as well as written submissions made by State delegations and observers, remain in English (or the original language) only. Draft reports from the sessions, which summarise discussions and are circulated for comment before being finalised, are also available only in English. Delegates must therefore understand and respond in English to register objections or clarifications. This practice reinforces the

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108 Falzon (n 80) 192.

109 Pierre Bourdieu, 'The Economics of Linguistic Exchanges' (1977) 16(6) Social Science Information 645.

procedural advantage of delegations with strong English proficiency or access to resources for rapid internal translation.

Despite these systemic patterns, English proficiency does not operate as an absolute barrier in WGIII. Many delegations from non-English-speaking countries have a high level of English proficiency. For example, Guinea, a French-speaking country, sent a delegation of three English-speaking experts who played a leading role in earlier sessions (36th to 38th) and even hosted an intersessional meeting in 2019 covering recent developments and initiatives in Africa. However, Guinea has not participated since the 38th Session, held in January 2020.110 Likewise, French-speaking countries such as Côte d'Ivoire and the Democratic Republic of the Congo have actively and consistently participated in past and more recent WGIII negotiations. These examples suggest that English proficiency alone may not determine active participation.

Still, informal interviews with delegates suggest that language remains a meaningful constraint, particularly in informal discussions or among members of a potential coalition or actual region where interpretation is not available. Several African Union delegations, for instance, have pointed to internal language divides in the African continent as a challenge to building coordinated positions. It is true that this challenge affects delegates from countries at all levels of development whose first language is not English.111 However, while many high-income States can hire fluent English-speaking legal experts or secure real-time translation assistance, lower-resourced States often cannot, compounding disparities in real-time participation.

As observed in other international forums, including climate negotiations, access to language can intersect with financial, informational, and institutional

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110 While we cannot definitively confirm why Guinea ceased attending WGIII sessions after January 2020, it is likely due to domestic political upheavals. In 2020, Guinea experienced significant unrest following a controversial constitutional referendum that allowed President Alpha Condé to run for a third term, sparking widespread protests and violent crackdowns. The highly contested October 2020 presidential election further deepened political instability, with opposition allegations of fraud and increased repression. These tensions culminated in a military coup in September 2021, which ousted Condé's government. Given these events, it is plausible that Guinea's disengagement from WGIII was a result of shifting national priorities and political instability. See 'Guinea holds controversial referendum marred by violence, boycott' (*Al Jazeera*, 23 March 2020) <https://www.aljazeera.com/news/2020/3/23/guinea-holds-controversial-referendum-marred-by-violence-boycott?utm_source=chatgpt.com> accessed 12 March 2025; and 'Guinea coup: Military arrests president, dissolves government' (*Al Jazeera*, 6 September 2021) https://www.aljazeera.com/news/2021/9/6/guinea-coup-military-arrest-president-dissolve-government?utm_source=chatgpt.com accessed 12 March 2025.

111 Falzon (n 80) 199.

disparities to shape both the process and substance of participation. Legal scholars have described this as the "cultural embeddedness" of international legal discourse: where dominant legal languages, especially English, not only facilitate certain negotiation styles but also reflect and reinforce epistemological biases rooted in Eurocentric legal traditions.[112] In this view, language functions not as a neutral medium but as a strategic resource, one that advantages wealthier delegations and those aligned with prevailing legal-cultural norms.

In short, the ability to fully engage with WGIII's legal and procedural content is conditioned in part by linguistic access. While not determinative in every case, this access interacts with other structural factors to influence who can participate meaningfully – and on what terms.

### 4.3 *Subject-Matter Expertise*

In international legal negotiations, subject-matter expertise functions as a key enabler of procedural participation. Delegations with deep knowledge of the legal and technical issues under discussion are generally better positioned to engage meaningfully with complex texts, identify strategic opportunities, influence the framing of proposals, and ultimately shape negotiation outcomes in ways that align with their interests or priorities.[113] In UNCITRAL WGIII, where draft provisions are reviewed and edited in real-time during formal – and sometimes informal – meetings, fluency in the relevant legal terminology and familiarity with existing model treaties, arbitral jurisprudence, and policy debates are especially important. Participation in such negotiations is not only about being present but about being able to respond precisely and persuasively in a highly technical and time-sensitive environment.

This reflects what legal sociologists have described as epistemic capital, a form of symbolic and functional authority that derives from technical expertise, which operates as both a substantive resource and a mode of influence.[114]

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112 Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 The Hastings Law Journal 805; Makau wa Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harv Intl L J 201; Susan Šarčević, *New Approaches to Legal Translation* (Kluwer Law International 1997).

113 Falzon (n 80) 193; Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015).

114 Yves Dezalay and Bryant G Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002); Emanuel Adler and Steven Bernstein, 'Knowledge in Power: The Epistemic Construction of Global Governance' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press 2005) 294–318.

In global governance forums like WGIII, legal expertise is thus not simply instrumental but constitutive of how authority is recognised and exercised. Delegations able to speak the "language of the law" are better equipped to engage in norm-shaping activities, especially when interpretive ambiguities are being clarified or new legal texts are being developed.

A State's ability (or willingness) to mobilise this kind of expertise depends on a variety of institutional and financial factors. While some governments dispatch senior officials or legal experts from specialised ministries – such as those responsible for investment policy – others rely on generalist diplomats based at their Permanent Missions in New York or Vienna. Delegates from such Missions may not always possess the specialised expertise required to navigate complex negotiations, particularly in technical areas like ISDS, where familiarity with legal drafting and the interpretive history of investment treaty provisions is essential. While their general diplomatic skills are valuable, and often crucial for conveying national positions, they may not fully compensate for a lack of specific legal or technical knowledge. In contrast, delegates from specialised government departments – such as ministries responsible for investment policy or treaty negotiations, or State attorneys' offices that handle ISDS cases – tend to have better access to relevant data, expert consultations, and practical insights into the development of ISDS caselaw. This enables them to participate more actively in shaping the content and trajectory of negotiations.

As shown in Table 2, the percentage of delegates coming from Permanent Missions varies significantly across income groups.

The data in Table 2 suggests that high-income countries rely less on non-specialised public servants, whereas lower-income countries are more likely to send representatives already stationed in New York City or Vienna. One likely explanation is the high cost of participation, which makes it more practical for resource-constrained States to rely on mission-based staff rather than deploying specialised officials from their capitals. While this strategy can reduce financial burdens, it may also limit a delegation's capacity to engage in the more technical aspects of WGIII deliberations.

This variation reflects not just material constraints but structural inequalities in how knowledge is accessed, organised, and deployed in international legal settings. Higher-income countries can supplement their delegations with external legal and technical advisors, including private-sector lawyers, arbitration specialists, or academic experts, who bring deep legal expertise and strategic capacity to the negotiating table. Delegations from countries like Switzerland, Japan, and Bahrain regularly include such actors, while Armenia is a rare example among developing countries, having enlisted the support

Table 2 Average percentage of delegates from Permanent Missions or Embassies sent to the 43rd–47th WGIII Sessions

| Economic classification | Percentage of delegates from Permanent Missions or Embassies |
|---|---|
| High-income | 14.74% |
| Upper middle-income | 25.29% |
| Middle-income | 20.44% |
| Lower middle-income | 30.06% |
| Low-income | 31.73% |

of an English-speaking academic based in the UK for select sessions. These arrangements can enhance a State's participation but also raise concerns about representational legitimacy and potential conflicts of interest, particularly when external advisors are affiliated with commercial interests.

Importantly, the presence or absence of legal expertise should not be reduced to a question of wealth alone. While wealthier countries may have greater access to specialised expertise, the decision to rely primarily on government officials rather than external advisors is not solely a matter of financial constraints. Because the UNCITRAL process is explicitly government-led, some States may deliberately prioritise maintaining direct control over negotiation positions instead of outsourcing expertise to private-sector actors. This approach aims to preserve the integrity of the process by ensuring that national interests, not those of external legal or commercial entities, guide decision-making, even if it means operating with more limited technical capacity. This reflects a broader tension in international legal practice between technocratic expertise and sovereign control, a dynamic explored in scholarship on global administrative law and transnational legal ordering,115 and one that manifests in how States determine who speaks on their behalf, with what expertise, and backed by what institutional capacity.

In WGIII, this tension plays out in decisions about who speaks for the State, under what knowledge regime, and with what institutional backing. While

115 Terence C Halliday and Gregory Shaffer, *Transnational Legal Orders* (Cambridge University Press 2015) 3–72; Benedict Kingsbury, Nico Krisch, and Richard B Stewart, 'The Emergency of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Gregory Shaffer, 'Transnational Legal Process and State Change: Opportunities and Constraints' (2010) Institute for International Law and Justice Working Paper 2010/4.

subject-matter expertise facilitates effective engagement with the process, its distribution is shaped by structural conditions that privilege certain forms of legal knowledge and institutional organisation. These asymmetries do not necessarily determine outcomes, but they condition the terms of participation, shaping whose contributions are intelligible, timely, and influential in the evolving landscape of ISDS reform.

### 4.4 *Delegation Continuity*

Continuity in delegation, particularly the repeated participation of the same individuals across multiple negotiation sessions, can significantly enhance procedural inclusivity in multilateral forums. In contexts like UNCITRAL WGIII, where negotiations unfold over several years, stable participation supports the development of deep knowledge of institutional processes and the sustained engagement necessary for effective participation.[116]

National bureaucratic stability plays a key role here, allowing delegates to build expertise incrementally, maintain familiarity with evolving issues, and track the shifting dynamics of both textual developments and coalition strategies. Delegates who attend repeatedly are better positioned to understand the historical context of negotiations, recall previous compromises, and contribute to cumulative learning. In contrast, high turnover within delegations can disrupt the accumulation of knowledge and limit the capacity for sustained and meaningful engagement.

This continuity gives rise to what is often referred to as "institutional memory": the accumulated, practice-based knowledge that enables actors to navigate the nuanced terrain of international negotiations. It includes not only recollection of past decisions and compromises or evolving group dynamics, but also informal relationships, tacit understandings, and familiarity with unwritten procedures that structure how negotiations unfold. In this sense, institutional memory is not merely a technical convenience, but a form of political capital that shapes how norms are created, interpreted, and contested over time.

Delegations from countries such as Canada, the EU, Japan, Singapore, Switzerland, the US, and Viet Nam have demonstrated consistent attendance across the WGIII sessions under analysis (and beyond), often with the same core representatives. This consistency has likely helped them deepen relationships within the Working Group, track negotiation shifts, and strategically position themselves within both formal and informal deliberations. These advantages are not attributable to continuity alone; they also reflect broader

116 Falzon (n 80) 193.

structural factors such as political stability, institutional capacity, and strong national mandates on investment policy. By contrast, many developing countries have attended less consistently, with participation patterns potentially shaped by a combination of other factors, like political transitions, funding constraints, and shifting domestic priorities. Even when present, these delegations often experience frequent changes in composition, limiting the continuity needed to build institutional memory and sustain long-term engagement in the negotiation process.

As shown in Table 3, these disparities in continuity are stark. Of the 26 low-income countries reviewed, fewer than 4% sent at least one delegate to all five sessions; by contrast, 45% of high-income countries did. In addition, delegations from low- and lower middle-income countries had almost no continuity in delegate composition. Only the Democratic Republic of the Congo was represented by the same two individuals across all five sessions. By comparison, 13 high-income countries collectively sent the same 31 individuals across all five sessions. While these data do not demonstrate causality, they suggest that high-income States are better equipped to maintain consistent representation, which may in turn support more stable and informed engagement in deliberations.

The reputational and relational capital of individual negotiators further reinforces this dynamic. While formal sessions typically last six hours per day, time constraints and extended interventions often leave limited room for real progress. When formal meetings fail to reach consensus, additional consultations and corridor discussions frequently take on greater importance. In these settings, delegates who have built trust over time, and who understand the formal and informal contours of the process, are more likely to be included in

Table 3 Number of delegates attending all five negotiations rounds (43rd–47th WGIII Sessions)

| **Economic classification** | **Total number of countries** | **Total number of delegates** |
|---|---|---|
| High-income | 13 | 31 |
| Upper middle-income | 9 | 15 |
| Middle-income | 10 | 22 |
| Lower middle-income | 4 | 5 |
| Low-income | 1 | 2 |

key conversations.117 In contrast, delegations that cycle through different representatives or attend inconsistently face a steep learning curve and may find themselves marginalised in these behind-the-scenes negotiations.

This reflects what Barnett and Duvall describe as "networked power", a form of influence that emerges not through coercive control or formal authority, but through embeddedness in social and institutional networks.118 In multilateral legal settings, such networked power is often cultivated through sustained presence. Thus, delegation continuity does not guarantee influence, but it does shape who can effectively engage with, interpret, and contest evolving legal norms.

### 4.5 *Access to Preparatory and Coalition-Building Processes*

Beyond financial resources, technical expertise, linguistic proficiency, and delegation continuity, another factor that appears to shape procedural engagement in WGIII is access to informal and regional preparatory processes that facilitate coordination and coalition-building among States.

Delegations that participate in such preparatory processes often enter the negotiations with more coherent positions, greater strategical clarity, and a stronger ability to influence discussions. A key example is the EU and its Member States, which operate as a highly synchronised bloc. Although the EU participates as an Observer in the Working Group, it often speaks on behalf of all 27 Member States, presenting a unified position developed through extensive internal preparation. These preparations begin well in advance of formal negotiations and continue during the sessions themselves, including the drafting of interventions, efforts to reconcile differing positions ahead of time, and regular coordination meetings during the sessions to refine messaging and strategy.

This model offers two significant advantages. First, it allows the EU to amplify its presence and influence through coordinated messaging, often reinforced by aligned interventions from individual Member States. Second, it reduces the burden on national delegations: even if a Member State is not represented at a session, its position is still conveyed through EU interventions. As a result, EU Member State delegations can afford to be small and intermittent without losing representational continuity or influence.119

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117 ibid 193; Jones and others (n 36) 23.

118 Barnett and Duvall (n 53).

119 It should be noted that EU participation is not uniform across Member States. France has consistently played a vocal role, followed by Austria, but to a much lesser extent. In contrast, despite their significant exposure to ISDS cases, Spain, Italy, and Czechia have

This form of strategic coordination aligns with the concept of "orchestration" in global governance, where powerful institutions or actors mobilise intermediaries, such as regional organisations, to pursue collective goals without direct control.120 Orchestration allows for greater agenda-setting capacity, collective framing, and sustained engagement – advantages often inaccessible to less institutionalised regional groups and delegations.

Such a coordinated approach may offer a useful model for resource-constrained countries seeking to maximise their influence in the negotiations and leverage limited bargaining power.121 In fact, there is some indication that the Latin American bloc and, increasingly, the African Union countries, are organising preparatory meetings to enhance cohesion and amplify their collective voice. However, unlike the EU, which holds formal authority to negotiate and speak as a unified bloc on matters within its competence, these other regional groups are primarily coalitions of proximity and shared interests rather than formal legal entities with collective negotiating power. As such, their efforts, while valuable, operate under the concept of soft interdependence,122 a mode of coordination without binding commitments, making them more susceptible to internal divergence and external pressures.123 This lack of legal unity can limit their ability to sustain collective leverage, particularly when strategic alignment is needed in real time.124

Existing research suggests that forming regional alliances can help developing countries overcome resource limitations and amplify their influence in multilateral forums.125 While such strategies have emerged only sporadically

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remained largely silent, even when present. Poland was highly active during the 47th session and the session immediately following (which falls outside our current analysis), but has since receded. This variability suggests that even within highly institutionalised blocs, the depth of engagement remains uneven.

120 Kenneth W Abbott, Philipp Genschel, Duncan Snidal and Bernhard Zangl, *International Organizations as Orchestrators* (Cambridge University Press 2015) 3–36.

121 Amrita Narlikar and Pieter van Houten, 'Know the Enemy: Uncertainty and Deadlock in the WTO' in Amrita Narlikar (ed), *Deadlocks in Multilateral Negotiations: Causes and Solutions* (Cambridge University Press 2010) 142–63; John S Odell and Susan K Sell, 'Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001' in Odell (50) 85–114.

122 Robert O Keohane and Joseph S Nye, *Power and Interdependence* (4th edn, Longman 2012) 19–31; Joseph Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs 2004).

123 Amrita Narlikar and John S Odell, 'The Strict Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade Organization' in Odell (n 50) 115–44.

124 Thomas Risse, 'Transnational Actors and World Politics' in Walter Carlsnaes, Thomas Risse, and Beth A Simmons (eds), *Handbook of International Relations, Second Edition* (Sage Publications Ltd 2013) 426.

125 Jones and others (n 36) 45.

in WGIII, they have at times produced notable results. For example, during the 45th session, a coalition led by Sierra Leone, comprising African Union countries, Pakistan, and Jamaica, almost derailed negotiations on the Code of Conduct.126 The group firmly opposed the proposed "cooling-off" period to address double-hatting, using coordinated resistance to challenge the preferences of several developed country delegations.127 In another instance, developing countries successfully pushed for negotiations on cross-cutting provisions to begin with the assessment of damages – widely regarded as the most consequential issue for them – despite resistance from many developed countries, some of whom argued that damages did not even fall within the Working Group's mandate. Both these episodes demonstrated that situational or issue-based coalitions – ad hoc alignments around shared priorities – can, at key moments, disrupt prevailing dynamics and assert alternative agendas, even in forums typically dominated by wealthier or more powerful States.128

Such cases remain exceptional in WGIII. Their success often hinges on temporary alignments of interest, charismatic leadership, or diplomatic momentum rather than institutional continuity. Without sustained investment in shared infrastructure, formal mandates, or regional legal expertise, these coalitions remain vulnerable to dissolution and co-optation. However, given the disparities in resources, expertise, and negotiating infrastructure among delegations, informal coordination and regional alignment can play (and have played) a critical role in shaping not just what is said, but how positions are articulated and advanced, and by whom. Countries that struggle to engage consistently in WGIII sessions may benefit from investing in sustained pre-session preparation, network-building, and regional coalition strategies to better articulate and defend their shared interests.

To conclude, although UNCITRAL WGIII is widely regarded as one of the most procedurally inclusive multilateral processes to date, structural barriers

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126 Lea Di Salvatore and Ladan Mehranvar, 'Unlocking Expectations: UNCITRAL Working Group III Finalized its First Drafts – Does it Deliver?' (Columbia Center on Sustainable Investment Blog, 31 May 2023) <https://ccsi.columbia.edu/news/unlocking-expectations-uncitral-working-group-iii-finalized-its-first-drafts-does-it-deliver> accessed 12 March 2025.

127 ibid.

128 Abram Chayes and Antonia Handler Chayes, 'On Compliance' in Beth A Simmons and Richard H Steinberg (eds), *International Law and International Relations* (Cambridge University Press 2007) 65, 72–73; JP Singh, 'The Evolution of National Interests: New Issues and North-South Negotiations during the Uruguay Round' in John S Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge University Press 2006) 41–84; Robert Wolfe, 'Can the Trading System be Governed? Institutional Implications of the WTO's Suspended Animation' (2007) The Centre for International Governance Innovation Working Paper No 30.

such as resource constraints, limited technical capacity, and unequal access to informal coordination remain a significant obstacle to equal participation. Many lower-income countries engage actively and contribute meaningfully to the process, but often with less consistency, institutional support, and strategic coordination than their wealthier counterparts. What remains exceptional is not the presence of engagement, but the infrequent success of developing country coalitions in shaping negotiation outcomes that align with their interests or priorities. Structural factors alone do not fully determine patterns of participation; domestic political priorities, leadership transitions, or strategic decisions also play a role. Still, the recurrence of certain constraints underscores the importance of addressing these asymmetries. Without more sustained efforts to mitigate underlying disparities, WGIII's procedural openness risks becoming symbolic rather than substantive, and the ISDS reform process may ultimately reinforce, rather than rectify, the global inequalities it initially sought to address.

## 5 Participation Asymmetry in UNCITRAL's WGIII Reform Process

The decisions of UNCITRAL and its working groups are made through a consensus-based process rather than by vote-counting. Delegations engage in extensive deliberations, continuing discussions until no delegate wishes to voice further objections. In essence, consensus is assumed unless a negotiator objects,129 meaning any State can break consensus by expressing disapproval of a text, agenda, or process. While this approach can be time-consuming and painstakingly slow, it is meant to reflect the spirit of diplomacy by ensuring all voices are heard. In practice, however, it often ends up protecting the interests of more powerful States, which are fewer in number and better positioned to shape consensus. Notably, the shift toward consensus-based decision-making was, in part, a response to the ability of developing countries to outvote developed countries in majority-based processes – prompting Global North actors to promote consensus as a more controllable mode of governance.130

Consensus-based decision-making presents several challenges for developing countries. First, achieving consensus assumes both presence and effective participation, yet many developing countries struggle with limited resources, making consistent engagement difficult. Second, consensus is reached through open discussions rather than a secret ballot, which can

129 Block-Lieb and Halliday (n 22) 1.

130 Azmeh (n 87) 379–80.

discourage some countries from voicing objections.131 Power imbalances in wealth, subject-matter expertise, and negotiation experience may lead some delegations to remain silent, either due to a lack of technical knowledge or fear of political or economic repercussions from opposing (more powerful) countries.132 Since silence is interpreted as agreement, this dynamic further marginalises less powerful States. Third, much of the consensus-building happens in informal discussions throughout the negotiating day, often conducted in English and dominated by delegations with established expertise and strong networks within the Working Group. Newer or less experienced delegations, particularly those with language barriers, may be excluded from these critical exchanges, limiting their ability to potentially shape outcomes. These constraints can ultimately reinforce existing global inequalities in decision-making, making it harder for developing countries to assert their interests and priorities in the reform process.

The remainder of this section presents our analysis of the first major challenge posed by consensus decision-making: the actual presence and participation of State delegations in the five WGIII Sessions under consideration. Our goal is to gauge the extent of effective participation in the WGIII negotiations, even within the limited scope of reform topics under discussion. To do so, we collected data on State attendance from official reports of those sessions133 and tracked the number of interventions made by each delegation – whether a Member or Observer State – during the 43rd to 47th WGIII Sessions. These sessions took place after COVID-19 restrictions were lifted, allowing for in-person negotiations.134

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131 Narlikar (n 51) 1014.

132 ibid 1014–15.

133 The reports for each session are available at UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' (n 19). It is important to note that this data may not be accurate as some delegations may have registered for in person attendance but followed the negotiations online without notifying the Secretariat, or did not follow the negotiations at all. Based on our own observations, there were some delegates that are included in the official report as being present at the Session, but did not actually attend the Session.

134 While we treat each State delegate and Observer as distinct entities in the analysis, this does not apply to the EU and its Member States. The EU and its Member States have adopted a unified approach at WGIII, with delegates from the EU speaking on behalf of both the EU and its Member States. As a result, we have consolidated the interventions from the EU and its Member States in this section to keep the data consistent across all delegations.

### 5.1 *Participation of Top Respondent States in WGIII Sessions*

The ISDS reform process aims to address several identified issues, with the expectation that meaningful reforms will help rebalance a skewed regime that has overwhelmingly favoured investor protections over State regulatory autonomy. Logically, the States that have borne the brunt of ISDS claims and awards – the most impacted by the regime – should be among the most vocal in the WGIII negotiations. These States, which did not originally determine the content or expectations of the investment treaty regime,[135] now have the opportunity to help shape or influence the new content and expectations arising from the reform process. Their active participation could lend legitimacy to a process that has been historically dominated by capital-exporting countries, ensuring that reforms do not merely entrench existing ISDS structures but instead address systemic imbalances in the system. A strong presence and active participation from these frequently targeted States would also send a signal that reform is not merely an exercise in procedural refinement but an effort to rectify fundamental inequities.

However, our analysis of participation data reveals that many of the States frequently targeted in ISDS disputes are either absent from WGIII sessions or remain silent during discussions. Figure 1 presents the top 20 respondent States implicated in ISDS claims[136] and the corresponding number of interventions they have made in the five WGIII Sessions under investigation.

According to official UNCITRAL reports, two of the top 20 respondent States – Kazakhstan and Kyrgyzstan – did not attend any of the five sessions under consideration, making their participation impossible. The reasons for their absence remain unclear despite enquiries. Notably, Kyrgyzstan attended at least four earlier WGIII sessions when key reform issues were still being discussed, and Kazakhstan participated in one of those sessions. Another country effectively absent from all five sessions is Bolivia. Although Bolivia appeared on the attendance list for the 43rd Session, its participation was remote, preventing it from making any interventions. In previous WGIII sessions, Bolivia had been more engaged. In our communication with Bolivian representatives, they expressed strong interest in the reform process, particularly as it relates to their dispute settlement clauses in their national laws and contracts since Bolivia is no longer party to investment treaties. However, they described financial constraints as a 'delicate issue,' explaining that while resources were available, they were being allocated to ongoing arbitration and other international cases rather than to the WGIII reform process.

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135 Allee and Peinhardt (n 8) 82; Alschner and Skougarevskiy (n 8).

136 The data on the ISDS cases has been gathered from UNCTAD (n 9).

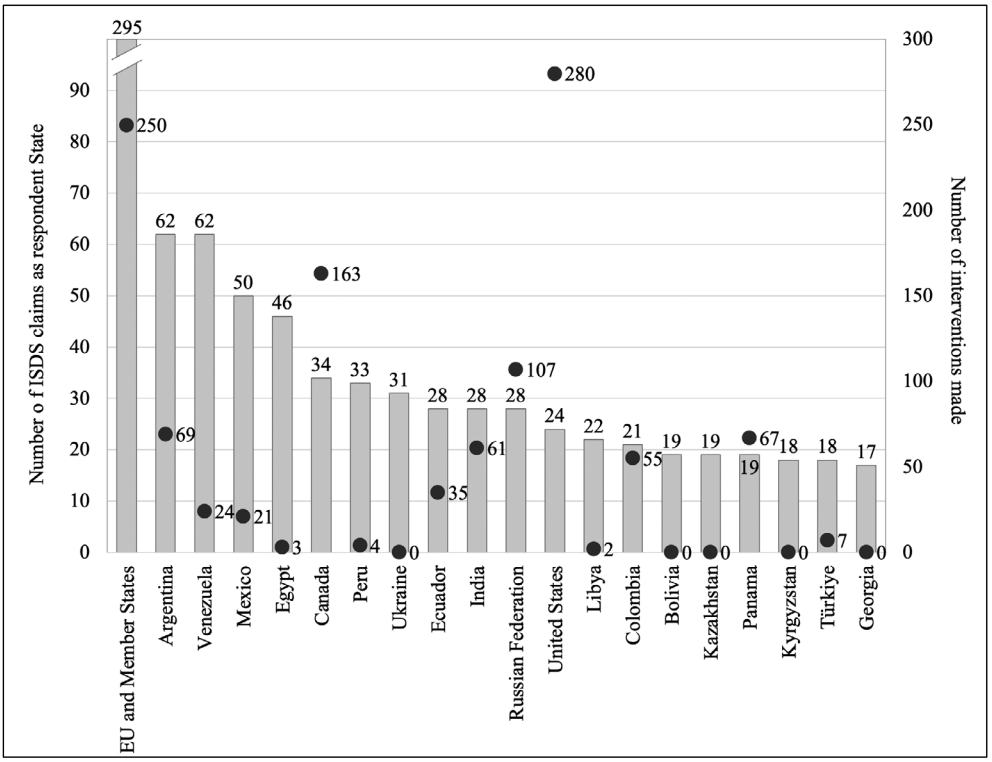


Figure 1 Number of ISDS claims against the top 20 respondent States ( ) and total number of interventions (●) made during the 43rd–47th WGIII Sessions

Ukraine and Georgia had also participated in earlier WGIII sessions but have been largely inactive in recent ones. According to official records, Ukraine attended four of the five sessions under review (though one was remote), while Georgia attended only one. Neither delegation made any interventions despite facing a significant number of ISDS claims. In Georgia's case, its sole session was attended by a representative from its Permanent Mission, which may explain the lack of engagement. Ukraine's delegation appeared to include both Permanent Mission staff and representatives from other ministries, though it is unclear whether any of them were actually present, as we did not witness their attendance first-hand.

Egypt, one of the most frequently sued countries in ISDS, provides another example of minimal engagement despite having a significant stake in the reform process. A lower middle-income country, Egypt has faced at least 46 known ISDS cases and has been ordered to pay about USD 2.2 billion to

foreign investors in concluded cases.137 According to official records, Egypt has attended all but one session from the 34th to the 47th WGIII Session. Yet, despite this consistent presence, its delegation remained largely silent throughout the five in-person sessions under review. The only session where Egypt made three interventions was attended by at least one representative from its Ministry of Justice. In all other cases, the delegation consisted solely of personnel from the Permanent Mission, who either did not engage or did not attend.

Similarly, Libya, Peru, and Türkiye, each of which has been the subject of numerous ISDS claims, have made relatively few interventions, with totals of four, two, and seven interventions, respectively. Libya had a delegation present at four of the five sessions but was represented by its Permanent Mission staff, according to official reports. One of Libya's two interventions during the 46th Session highlights this challenge: the delegate introduced himself as a new member of the Libyan Embassy, thanked the Working Group for the paper under discussion, and acknowledged he had not yet reviewed it, promising to send it to the capital for further analysis, especially in light to Libya's many disputes involving frozen assets. Peru has been on the attendance list for every WGIII session up to the 47th Session, yet in all five sessions under consideration, its delegation consistently came from its Permanent Mission. Türkiye, by contrast, has been present at all sessions with a more diverse delegation, yet it has engaged only minimally, with a limited number of substantive interventions.

While it is possible that such limited participation reflects deliberate strategic choices – such as prioritising other forums or adopting a low-profile role – these patterns are also consistent with structural constraints such as financial limitations, reliance on generalist diplomats, and competing policy demands that limit capacity for sustained engagement. The aim here is not to assert a single causal explanation, but rather to highlight how such barriers may systematically disadvantage certain States. This analysis does not claim that weaker engagement leads to worse outcomes for these States; instead, it raises questions about the perceived fairness and procedural inclusivity of the process. When States most affected by the regime are underrepresented or unable to engage meaningfully, the legitimacy of the reform process – regardless of its formal openness – may be undermined.

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137 This amount is likely much higher, as it only includes publicly disclosed awards and settlements and does not account for accrued interest. In addition, in most cases, respondent States must also cover for their own legal fees and tribunal costs.

The cases of Mexico and Venezuela further illustrate this complexity. Both countries have faced a high number of ISDS claims, at least 62 and 50 ISDS, respectively, yet they each made fewer than 25 interventions in total over the five sessions. Both States appeared on the official attendance lists for nearly every session, but Mexico was physically present in only three of the five, which may partly explain its more limited engagement. Interestingly, Mexico's delegate in two of those sessions was from its Permanent Mission to International Organisations in Vienna and also serves as Deputy Representative to UNCITRAL. Although not a capital-based official, she is an international lawyer with apparent expertise in UNCITRAL matters, which may explain her comparatively active participation despite not being a subject-matter specialist in ISDS.

Venezuela, on the other hand, attended four of the five sessions and participated actively in three, with its delegation led by the Attorney General – suggesting high-level political commitment. Venezuela's interventions focused sharply on issues of particular concern, including double-hatting, third-party funding, and damages, areas in which the country has significant experience. Its approach appears to reflect a strategic deployment of limited speaking opportunities to prioritise issues closely aligned with national interests, rather than engaging broadly across the agenda. These examples underscore that low or selective engagement may also reflect strategic calculus or institutional preferences, not just structural constraints, though the latter remain a critical part of the explanation.

Argentina, Colombia, Ecuador, India, Panama, and the Russian Federation have all faced a significant burden from ISDS claims, often with severe financial and policy implications. All six countries attended each of the WGIII sessions under review and actively contributed to discussions, though the frequency and consistency of their interventions varied. Importantly, all these countries sent delegates from their capitals, ensuring that their teams included experts with specialised knowledge of investment law and ISDS reform, an important enabling factor for substantive engagement.

In Argentina's case, while its delegation has been consistently engaged across all five sessions, one representative in particular made a strong impression in the three sessions he attended. His vocal and consistent positions, especially on double-hatting, made Argentina's interventions particularly firm and unwavering during those sessions. Similarly, Colombia's participation spiked dramatically during the 43rd Session, where it was among the top ten most active delegations. This heightened engagement may be attributable to the presence of a specific delegate with deep expertise in treaty negotiations and experience across both public and private sectors. In contrast, Colombia's

participation in the other four sessions, while still present, was noticeably less pronounced. These patterns suggest that delegation composition, especially the presence of specialised individuals, may significantly shape the extent of engagement, though this is not the only possible explanation.

Canada, the US, and several EU Member States – particularly Spain, Czechia, Poland, and Romania, which are the four most-sued EU countries under the ISDS mechanism – have also been frequent respondents in investor-State arbitration. Unlike many of the States discussed above, these countries are high- or upper middle-income, with the exception of Bulgaria, which remains classified as a middle-income country despite its EU membership. Notably, the majority of ISDS claims against these countries – approximately 90% – have been brought by investors from other high- and upper middle-income countries.

Furthermore, around 77% of cases against EU Member States have been intra-EU disputes, primarily brought under the Energy Charter Treaty (ECT) or an intra-EU BIT.138 The prevalence of intra-EU litigation, coupled with the primacy of EU law and growing concerns about conflicts between investment treaties and climate commitments, contributed to the EU's collective decision to withdraw from the ECT and terminate all intra-EU BITs, thereby, reducing their exposure to ISDS claims. Similarly, 33 of the 34 ISDS cases against Canada and 19 of the 24 against the US were brought by investors from the US and Canada, respectively, under NAFTA or as legacy claims under the United States-Mexico-Canada Agreement (USMCA). To mitigate this risk, Canada and the United States removed ISDS provisions in their bilateral relationship under the USMCA to limit future exposure.

These three sets of investment treaties – the ECT, intra-EU BITs, and NAFTA – are distinct in that they primarily govern investment relationships between economically powerful States with highly reciprocal cross-border investments. Given the volume of claims and the financial burdens associated with ISDS litigation, these States have increasingly opted to exit these treaties or eliminate ISDS mechanisms when renegotiating their investment frameworks. As such, the active participation of these States in WGIII may be shaped less by direct vulnerability to foreign investor claims than by other strategic or normative concerns, such as preserving regulatory autonomy or shaping future global rules. Again, the point is not to infer a direct causal link

138 If we were to add the number of ISDS cases brought by investors from Norway, Switzerland, and the United Kingdom against EU Member States, the total number would be 235 out of the 250 cases, which is 94%. About 60% of the treaties between Norway and EU Member States and between the UK and EU Member States have also been terminated by consent, again, eliminating the risk of future ISDS cases.

between exposure and participation levels, but to highlight how different structural, legal, and strategic contexts inform how and why States engage – or choose not to engage – at various moments in the reform process. These dynamics matter not only for understanding influence, but also for assessing whether the process is procedurally inclusive and perceived as fair by the full range of affected stakeholders, including the public.

### 5.2 *Participation of Top Home States in WGIII Sessions*

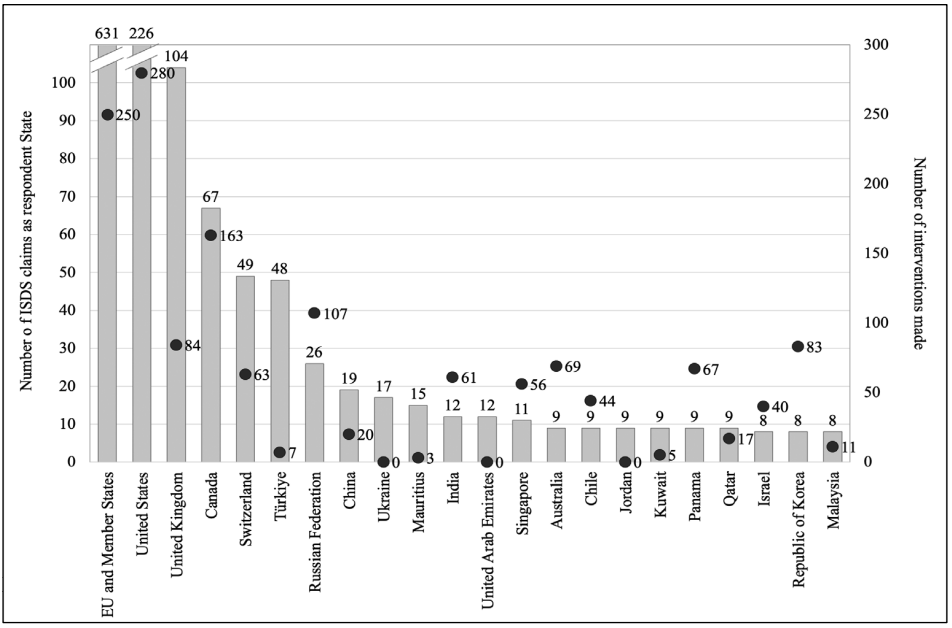
The WGIII sessions have seen a marked predominance of investor home States – particularly net capital-exporting countries – actively participating in the reform negotiations. These countries, together with their investors and legal professionals, have derived substantial benefits from the current asymmetrical ISDS regime, which they were instrumental in designing.139 While their position as frequent home States largely insulates them from the most severe financial and policy costs of the system, they continue to wield significant influence over the formulation and reform of the rules.

As illustrated in Figure 2, the number of interventions made by delegates from the most frequent home States of investors tend to be considerably higher than those made by many frequent respondent States.

A subset of countries appears in both Figure 1 (frequent respondents) and 2 (frequent home States): Canada, the EU and EU Member States, India, Panama, the Russian Federation, Türkiye, Ukraine, and the United States. Of these eight, Türkiye and Ukraine have made no or very few interventions across the sessions, effectively limiting their participation in the negotiations. In contrast, the Russian Federation, and to a lesser extent, India and Panama, have been particularly active in the negotiations. However, Canada, the EU and its Member States, and the US stand out as the most consistently vocal participants in the Working Group discussions. Not coincidentally, these same States are also home to a large share of investors bringing ISDS claims.

Although Canada, EU Member States, and the US have themselves faced a fairly large number of ISDS claims, they are still predominantly in the position of a home State to investors initiating ISDS claims. This is especially true moving forward since they have withdrawn from ISDS treaties among themselves. Alongside the United Kingdom and Switzerland, both of which have only been respondents in a single treaty-based ISDS claim, these five States or regional groups are home to the largest share of investors that initiate ISDS claims. Investors from at least one of these jurisdictions have initiated about 76% of

139 Nicolás M Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (OUP 2021) 51–81, 96–121.




the 1303 publicly known ISDS cases. These same countries are also home to a significant portion of the international legal profession involved in investment arbitration, including arbitrators, counsel, and legal experts.

Importantly, their predominance in both ISDS claim initiation and WGIII deliberations does not automatically imply that their participation is disproportionate or illegitimate. Rather, the correlation raises questions about how structural advantages may enable greater engagement by certain delegations. The concern, then, is not about the outcomes these States promote *per se* – though those outcomes are highly consequential and warrant further study – but about whether the deliberative process remains procedurally inclusive and responsive to the perspectives of States with fewer resources or different institutional positions in the ISDS regime.

### 5.3 *Participation of States Grouped into the Five Economic Categories*

When examining the total number of concluded ISDS cases to date, it is evident that high-income countries have appeared relatively infrequently as respondents States, especially when compared to the far greater number

of cases in which they have acted as the home State of the claimant investor. This is not unexpected, given that high-income countries are typically net capital-exporters and thus home to a larger share of investors with the capacity to initiate ISDS claims. What is noteworthy, however, is that this structural asymmetry – between who designs and who is most often subjected to the ISDS system – persists in the UNCITRAL WGIII negotiations.

Table 4 presents comparative data across the five economic categories, showing the percentage and total number of ISDS claims where countries from each group have appeared as respondent States; the percentage and total number of ISDS claims where countries from each group have appeared as home States; and the percentage and total number of interventions made by each group in the five WGIII sessions under review.

As shown, high-income countries have been respondent States in only 8.8% of all known ISDS cases, a proportion roughly one-third that of upper middle-income countries. Yet in WGIII, they have accounted for approximately 40% of all interventions, far outweighing their experience as respondent States.

In contrast, upper middle-income countries, which have been respondents in a significantly larger share of cases, made only 12% of total interventions across the five sessions. Notably, middle-income countries as a group have been respondents in 37.5% of ISDS claims, more than any other income category,

Table 4 Total share of claims, usage of ISDS regime, and the number of interventions made at the 43rd–47th WGIII Sessions per economic classification

| **Economic classification** | **Percentage (and #) of claims as respondent States** | **Percentage (and #) of claims as home States** | **Percentage (and #) of interventions made in the five WGIII sessions** |
|---|---|---|---|
| High-income | 8.8% (115) | 68.7% (974) | 39.4% (1074) |
| Upper middle-income | 24.1% (314) | 15.5% (220) | 11.9% (324) |
| Middle-income | 37.5% (488) | 11.2% (159) | 20.4% (557) |
| Lower middle-income | 27.2% (355) | 4.5% (64) | 21.8% (594) |
| Low-income | 2.4% (31) | 0% (0) | 6.6% (180) |

yet their participation in the reform process is also disproportionately low, constituting just 20% of the recorded interventions.

This discrepancy does not necessarily imply causation between a State's experience as a respondent and its degree of engagement. From the perspective of procedural inclusivity, however, the underrepresentation of middle- and upper middle-income States, despite their heightened exposure to ISDS litigation, raises important concerns about whether the WGIII process equitably accommodates the voices of those most affected by the regime.

### 5.4 *Most Active States in the WGIII Negotiations*

While factors such as national wealth, continuity in delegation composition, and institutional memory shape overall patterns of participation, the influence of individual delegates – their negotiation skills, legal expertise, personal networks, and ability to navigate informal processes – can be equally consequential. Attending to these individual-level dynamics offers a more nuanced understanding of how participation in WGIII reflects not only systemic inequalities but also the agency and strategic engagement of those representing their States.

Notably, several countries that have borne the brunt of ISDS claims, and might therefore have the greatest interest in reform, have not been especially active in the WGIII negotiation process. By contrast, a smaller group of delegations has had an outsized impact in the number of interventions they have made. Table 5 identifies the 12 most vocal delegations across the five WGIII sessions examined, noting each country's economic classification, its involvement in ISDS as a home or respondent State, and its number of interventions in the negotiations.

Some of these delegations, such as Canada, the EU and its Member States, the Republic of Korea, the Russian Federation, and the United States, may be active because they have both defensive and offensive interests in the regime. However, because of recent treaty terminations and ISDS elimination among EU Member States and between Canada and the US, their defensive exposure has largely dissipated, weakening the argument that defensive concerns drive their engagement. Instead, their high level of participation may be better understood in terms of their offensive interests: the implications of reforms for their business industries and legal professionals, rather than concerns about the systemic implications for the legitimacy or asymmetry of the ISDS mechanism. From this perspective, incrementalism or the preservation of the status quo through a UN-led multilateral process may align more closely with their interests. This may also help explain the frequency of interventions from other net capital-exporters like the United Kingdom and Japan.

Table 5 Country delegations with the highest number of interventions made during the 43rd–47th WGIII Sessions

| Country delegation | Economic Category | # of claims as respondent States | # of claims as home States | # of interventions made |
|---|---|---|---|---|
| United States | High-income | 24 | 226 | 280 |
| EU and Member States | High-income | 295 | 629 | 250 |
| Canada | High-income | 34 | 67 | 163 |
| Sierra Leone | Low-income | 1 | 0 | 126 |
| Russian Federation | Middle-income | 28 | 26 | 107 |
| United Kingdom | High-income | 1 | 104 | 84 |
| Republic of Korea | High-income | 10 | 8 | 83 |
| Viet Nam | Lower middle-income | 13 | 0 | 77 |
| Morocco | Lower middle-income | 8 | 0 | 74 |
| Japan | High-income | 1 | 6 | 73 |
| Armenia | Middle-income | 5 | 0 | 72 |
| Bahrain | Upper middle-income | 4 | 1 | 72 |

On the other hand, several States that have primarily been on the receiving end of ISDS claims, such as Viet Nam, Morocco, and Armenia, may be more motivated to advocate for meaningful reform. Their relatively high level of engagement could reflect efforts to reshape a system that has proven more costly than beneficial.

It is particularly striking that some of the most active delegations in WGIII have had only limited involvement in ISDS litigation, at least under their treaties. For instance, Sierra Leone, which has only been sued in one treaty-based ISDS case, was the fourth most vocal participant in the negotiations under review. Other examples include Armenia, Bahrain, Japan, and Viet Nam, though to varying degrees. These countries may be engaged in investor-State disputes under domestic laws, investment contracts, or undisclosed arbitration proceedings not covered in this study. Yet a shared feature among these delegations is the presence of highly qualified and consistent individual

representatives, many of whom embody the normative attributes discussed earlier, such as legal and technical expertise, English proficiency, and regular attendance, enabling them to take a leading role in the discussions.

Sierra Leone, for example, has been represented by Ambassador Michael Imran Kanu, a seasoned legal practitioner and scholar with specialisations in commercial law and dispute settlement, international business law, and public international law. He holds a doctorate and an LL.M. in International Business Law from the Central European University.140 Kanu is widely respected for his substantive contributions in WGIII, traits that set him apart from typical diplomatic appointees, and is also known for his ability to elevate collective action, often taking a leadership role in steering negotiations forward.

Similarly, Armenia's delegation has been led by Arman Sarvarian, an academic with a doctorate in public international law from University College London and an LL.M. from the University of Cambridge. His qualifications and experience in international law are extensive and diverse. Since 2012, he has been a faculty member at the University of Surrey, where he teaches international law and conducts research focused on the codification of fundamental rules and the progressive development of international dispute settlement mechanisms.141 Like Kanu, his expertise and technical knowledge, as well as his command of English, equips him with the tools to navigate and shape complex technical discussions.

In Bahrain's case, while the key figure – Jan Paulsson – has not been physically present during the sessions under review, he has reportedly followed the negotiations remotely and contributed through a proxy. Paulsson has served as counsel, arbitrator, and president in numerous high-profile arbitration cases,142 significantly influencing the practice and jurisprudence of international arbitration, particularly in investor-State disputes. He is a Judge in Bahrain's Court of Cassation and the Chamber for Dispute Resolution Court.143 He co-founded the arbitration practice at the law firm Freshfields Bruckhaus Deringer, one

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140 'Dr. Michael Imran Kanu' (Kanu & Associates Solicitors 2024) <https://kandasl.com/dr-michael-imran-kanu/> accessed 12 September 2024.

141 'Arman Sarvarian' (University of Surrey 2024) <https://www.surrey.ac.uk/people/arman-sarvarian#teaching> accessed 12 September 2024.

142 'Curriculum Vitae of Jan Paulsson' (Court of Arbitration for Sport, January 2021) <https://www.tas-cas.org/uploads/tx_tascas/CV_Jan_Paulsson_Jan2021_01.pdf> accessed 12 September 2024.

143 Bahrain Chamber for Dispute Resolution (BCDR), 'Judge Paulsson Speaks at the 8th ICC European Conference on International Arbitration' (22 March 2024) <https://bcdr.org/judge-paulsson-speaks-at-the-8th-icc-european-conference-on-international-arbitration/> accessed 12 March 2025.

of the leading firms representing investors in ISDS cases. Given that he has built his career and reputation on the existing ISDS framework and has largely benefited from it, reforms aimed at democratising or altering the asymmetry within ISDS could diminish his influence over the arbitration process. His vested interest in maintaining the current regime may inform Bahrain's position in the reform process.144

Japan has also consistently supported the existing ISDS framework, as evident during the ECT modernisation process where it opposed substantial revisions.145 Its delegation typically includes a large team of over ten individuals, though only a few attend in person. Those present include a diverse group of experts who take turns contributing to the discussions. Lead negotiator Yudai Ueno, Director of Investment Policy in the Ministry of Foreign Affairs, is often accompanied by experts such as Shotaro Hamamoto and Shimpei Ishido. Hamamoto, a Professor of Law at Kyoto University with a doctorate from Paris II, writes prolifically on international law and organisations, including on topics related to ISDS and investment treaties.146 Ishido, a partner at Nishimura & Ashai and former legal counsel to Japan's Ministry of Foreign Affairs, holds an LL.M. from University College London. He has extensive experience in international trade and investment, including advising and representing both governments and major corporations in ISDS cases, as well as negotiating Japan's investment treaties.147

Viet Nam's delegation has been led by Lai Thi Van Anh, a senior official with 25 years of experience in various capacities within the Ministry of Justice. She has played a direct role in drafting and scrutinising numerous legal texts governing investment, trade, and commerce, and has negotiated multiple treaties related to investment, economics, and trade with various partners. In addition, Van Anh has extensive experience in establishing foreign investment projects,

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144 Anthea Roberts and Taylor St John, 'The Originality of Outsiders: Innovation in the Investment Treaty System' (2023) 33(4) EJIL 1153, 1174–79.

145 Chloé Farand, 'Japan Blocks Green Reform of Major Energy Investment Treaty' (*Climate Change News*, 8 September 2020) <https://www.climatechangenews.com/2020/09/08/japan-blocks-green-reform-major-energy-investment-treaty/> accessed 12 September 2024; Energy Charter Secretariat, 'Decision of the Energy Charter Conference' (6 October 2019) <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf> accessed 12 September 2024.

146 'Professor Shotaro Hamamoto' (Max Planck Institute Luxembourg for Procedural Law 2016) <https://www.mpi.lu/the-institute/external-scientific-fellows/2016/professor-shotaro-hamamoto/> accessed 12 September 2024.

147 'Shimpei Ishido' (Nishimura & Asahi 2024) <https://www.nishimura.com/en/people/shimpei-ishido> accessed 12 September 2024.

handling disputes with foreign investors, and negotiating investment contracts. She leads a specialised team within the Ministry of Justice that represents the Vietnamese government in ISDS cases.148 Her practical knowledge of investment governance and dispute resolution likely explains both her frequent interventions and the quality of her contributions.

Finally, it is important to underscore that a high number of interventions does not necessarily translate into greater influence over negotiation outcomes. Some delegates may intervene frequently to voice disapproval of procedural matters, like the order of topics to be discussed, without substantively engaging the reform proposals. Nevertheless, beyond this small subset, the broader trend suggests persistent information and preparation asymmetries across delegations. Those with legal and technical fluency in ISDS, as well as a deep understanding of its distributive and systemic implications, tend to make more impactful and persuasive interventions. And given that WGIII operates on a consensus basis rather than majority vote, the frequency, clarity, and substance of interventions do matter for shaping the negotiation trajectory.

## 6 Conclusion

The analysis presented in this paper demonstrates that, while UNCITRAL's Working Group III has taken steps toward greater transparency and procedural inclusivity compared to other multilateral negotiations, significant structural barriers continue to limit the meaningfully participation of many developing countries. Although the ISDS reform mandate initially aimed to address systemic flaws in the regime, the process has remained focused on procedural fine-tuning rather than confronting the deeper substantive issues that perpetuate inequities between treaty partners. These structural imbalances, entrenched since the system's inception, continue to generate disproportionate burdens for lower-income countries, both in terms of exposure to ISDS claims and the economic consequences that follow.

The data on ISDS claims and case outcomes underscore the asymmetries at the heart of the investment treaty regime. Lower-income countries face a disproportionately high number of claims, endure greater risks of adverse rulings, and bear financial burdens that can severely strain national budgets,

148 'Curriculum Vitae of Lai Thi Van Anh' (Viet Nam International Arbitration Center, 24 May 2014) <https://www.viac.vn/images/Arbitration/Administered-of-Arbitration/Listed-Arbitrators/TTV-Viet-Nam/TTV-Lai-Thi-Van-Anh/TTV.VN_LTVAnh_EN_240514.pdf> accessed 12 September 2024.

diverting critical resources away from essential public services like healthcare. These costs are not abstract. In several cases, ISDS claims have equaled or exceeded a country's annual healthcare budget. Yet, despite being among the most affected, many of these countries remain underrepresented or disengaged in WGIII deliberations. Some States – such as Egypt, Peru, and Ukraine – have participated in sessions with little visible engagement, while others, including Kazakhstan and Kyrgyzstan, were entirely absent from the sessions under review. Whether due to budgetary constraints, limited legal expertise, competing national priorities, or other factors, this lack of sustained engagement has further skewed the reform process in favour of countries with the resources, political will, and institutional stability to assert influence.

Meaningful reform requires more than open invitations to attend meetings; it demands dedicated support for capacity-building, technical assistance, and preparatory access for those States historically excluded from shaping investment law. It also requires building solidarity and coordination among like-minded delegations. Lower-income countries need not only resources, but also stronger regional and issue-based coalitions to advocate effectively for reforms aligned with their shared interests.

That said, the engagement of developing countries in the WGIII negotiations has not been without impact. While still constrained by financial and institutional limitations, some delegations have succeeded in influencing outcomes – especially when operating through coalitions. The leadership of Sierra Leone in the Code of Conduct negotiations, for instance, demonstrates how strategic collaboration and individual expertise can partially offset broader structural disadvantages. Also, based on our ongoing observations of the WGIII process, our impression is that both attendance and meaningful engagement by developing countries have increased in more recent sessions. This may reflect growing familiarity with the process, expanding technical expertise, and the slow emergence of more organised blocs with shared priorities.

Still, the overall structure of the negotiations continues to favour wealthier States. Their larger, specialised delegations, supported by external legal advisors and extensive preparatory resources, enable them to dominate both formal negotiations and informal discussions. These States have shaped the reform agenda in ways that reflect their economic interests and legal cultures, often steering discussions away from deeper structural change and toward adjustments that preserve the foundations of the existing system. As a result, the negotiations have increasingly trended toward reinforcing the legitimacy of the current regime rather than fundamentally reimagining it. As some critics have warned, by prioritising "softer options for superficial ISDS reform," and ignoring the "historic and structural inequalities" embedded in the

international investment law regime, WGIII risks reinforcing rather than rectifying the system's most pressing flaws.149

Unless more ambitious steps are taken to address these asymmetries, the process risks delivering symbolic reforms that reinforce, rather than challenge, the deeper structural inequalities of the investment treaty regime. A more inclusive and equitable system will require not just greater efficiency or predictability, but a rebalancing of participation, voice, and influence within international investment lawmaking. Without this, the reform effort may ultimately entrench the very disparities it was convened to redress.

## Annex 1

| **Low-income country** | **Lower middle-income country** | **Middle-income country** | **Upper middle-income country** | **High-income country** |
|---|---|---|---|---|
| | | **GNI per capita (2022) in USD** | | |
| **< 1,135** | **1,136–4,465** | **4,466–13,845** | **13,846–36,190** | **> 36,191** |
| Afghanistan | Algeria | Albania | Antigua and Barbuda | Andorra |
| Burkina Faso | Angola | Argentina | Bahamas, The | Australia |
| Burundi | Bangladesh | Armenia | Bahrain | Austria |
| Central African Republic | Benin | Azerbaijan | Barbados | Belgium |
| Chad | Bhutan | Belarus | Brunei Darussalam | Canada |
| Congo, Dem. Rep. | Bolivia | Belize | Chile | Denmark |
| Eritrea | Cabo Verde | Bosnia and Herzegovina | Croatia | Finland |
| Ethiopia | Cambodia | Botswana | Cyprus | France |

149 Jean Ho, 'Hegemony 101 in International Investment Law' (*Afronomicslaw Blog*, 9 September 2020) <https://www.afronomicslaw.org/2020/09/09/hegemony-101-in-international-investment-law/> accessed 12 September 2024.

(*cont.*)

| Low-income country | Lower middle-income country | Middle-income country | Upper middle-income country | High-income country |
|---|---|---|---|---|
| | | **GNI per capita (2022) in USD** | | |
| **< 1,135** | **1,136–4,465** | **4,466–13,845** | **13,846–36,190** | **> 36,191** |
| Gambia, The | Cameroon | Brazil | Czechia | Germany |
| Guinea-Bissau | Comoros | Bulgaria | Estonia | Iceland |
| Korea, Dem. People's Rep. | Congo, Rep. | China | Greece | Ireland |
| Liberia | Côte d'Ivoire | Colombia | Guyana | Israel |
| Madagascar | Djibouti | Costa Rica | Hungary | Italy |
| Malawi | Egypt | Cuba | Korea, Rep. | Japan |
| Mali | Eswatini | Dominica | Latvia | Kuwait |
| Mozambique | Ghana | Dominican Republic | Lithuania | Liechtenstein |
| Niger | Guinea | Ecuador | Malta | Luxembourg |
| Rwanda | Haiti | El Salvador | Nauru | Monaco |
| Sierra Leone | Honduras | Equatorial Guinea | Oman | Netherlands |
| Somalia | India | Fiji | Panama | New Zealand |
| South Sudan | Iran | Gabon | Poland | Norway |
| Sudan | Jordan | Georgia | Portugal | Qatar |
| Syrian Arab Republic | Kenya | Grenada | Romania | San Marino |
| Togo | Kiribati | Guatemala | Saudi Arabia | Singapore |
| Uganda | Kyrgyzstan | Indonesia | Slovak Republic | Sweden |
| Yemen, Rep. | Lao PDR | Iraq | Slovenia | Switzerland |
| | Lebanon | Jamaica | Spain | United Arab Emirates |
| | Lesotho | Kazakhstan | St. Kitts and Nevis | United Kingdom |
| | Mauritania | Kosovo | Trinidad and Tobago | United States |
| | Micronesia | Libya | Uruguay | |
| | Mongolia | Malaysia | | |
| | Morocco | Maldives | | |

(*cont.*)

| Low-income country | Lower middle-income country | Middle-income country | Upper middle-income country | High-income country |
|---|---|---|---|---|
| | | **GNI per capita (2022) in USD** | | |
| **< 1,135** | **1,136–4,465** | **4,466–13,845** | **13,846–36,190** | **> 36,191** |
| | Myanmar | Marshall Islands | | |
| | Nepal | Mauritius | | |
| | Nicaragua | Mexico | | |
| | Nigeria | Moldova | | |
| | Pakistan | Montenegro | | |
| | Papua New Guinea | Namibia | | |
| | Philippines | North Macedonia | | |
| | Samoa | Palau | | |
| | Sao Tome and Principe | Paraguay | | |
| | Senegal | Peru | | |
| | Solomon Islands | Russian Federation | | |
| | Sri Lanka | Serbia | | |
| | Tajikistan | Seychelles | | |
| | Tanzania | South Africa | | |
| | Timor-Leste | St. Lucia | | |
| | Tunisia | St. Vincent and the Grenadines | | |
| | Ukraine | Suriname | | |
| | Uzbekistan | Thailand | | |
| | Vanuatu | Tonga | | |
| | Viet Nam | Türkiye | | |
| | Zambia | Turkmenistan | | |
| | Zimbabwe | Tuvalu | | |
| | Venezuela | | | |

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