

# UNCITRAL WGIII: Where the working group is at now

Presented by:  
Columbia Center on Sustainable Investment

UNCITRAL Working Group III 38<sup>th</sup> Session Preparatory Meeting

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Columbia Center  
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY



# Outline

- ◆ Sessions and intersessionals
- ◆ Concerns identified
- ◆ Potential solutions identified
- ◆ Workplan

# Sessions and Intersessionals

The Commission entrusted Working Group III with a **broad mandate** to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available **expertise from all stakeholders**, would be **government-led** with **high-level input from all governments**, **consensus-based** and be **fully transparent**.\*

\*UNCITRAL Commission Report, 50<sup>th</sup> Session, para 264

# Sessions and Intersessionals

- ◆ Three phase mandate:
  - ◆ **Phase I: Identify and consider concerns regarding ISDS**
  - ◆ **Phase II: Consider whether reform was desirable in light of any identified concerns**
  - ◆ **Phase III: If the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission**

# Sessions and Intersessionals

- ◆ **34<sup>th</sup> Session, 27 Nov – 1 Dec 2017 (Vienna)**
  - ◆ Phase I
- ◆ **35<sup>th</sup> Session 23-27 April 2018 (New York)**
  - ◆ Phase I
- ◆ **Intersessional, 10-12 Sept 2018 (Republic of Korea)**
- ◆ **36<sup>th</sup> Session 29 Oct – 2 Nov 2018 (Vienna)**
  - ◆ Phase II
- ◆ **Intersessional, 13-14 Feb 2019 (Dominican Republic)**
- ◆ **37<sup>th</sup> Session 1-5 April 2019 (New York)**
  - ◆ Phase I – II (Third-Party Funding) – Phase III
- ◆ **Intersessional, 25-26 Sept 2019 (Guinea)**
- ◆ **38<sup>th</sup> Session 14-18 October 2019 (Vienna)**
  - ◆ **Phase III**
- ◆ **39<sup>th</sup> Session 20-24 January 2020 (Vienna)**

# Sessions and intersessionals

- ◆ On the UNCITRAL WGIII website ([https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)):
  - ◆ Agendas and materials prepared by the Secretariat for each session
  - ◆ All submissions made by states and observer organizations
  - ◆ Reports of all sessions
  - ◆ Audio recordings of all sessions (in all UN languages)
  - ◆ Other materials related to the WGIII process (e.g. academic forum materials)

# Outline

- ◆ Sessions and intersessionals
- ◆ **Concerns identified**
- ◆ Potential solutions identified
- ◆ Workplan


# Concerns identified

Scope of concerns that have been interpreted to be within the WGIII's mandate:

- ◆ **Fact vs. Perception:** It is important to distinguish whether concern is rooted in fact or perception, but both kinds of concerns are deserving of attention
- ◆ **Procedure vs. Substance:** The Working Group's mandate has been interpreted to limit its work to procedural aspects of ISDS rather than substantive provisions, e.g.,
  - ◆ Note: process can be used to determine and inform substance
  - ◆ Some countries continue to push for work on substance
  - ◆ The breadth of the mandate can be used to support a broad view of “procedure”



# Concerns identified

- 
- Consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

- 
- Cost and duration of ISDS cases

- 
- Arbitrators and decision makers

- 
- Third-party funding

# Concerns identified

- ◆ Each of these four “buckets” of concerns need to be unpacked and articulated in a way that permits the working group to identify specific concerns and formulate solutions to address the concern
- ◆ For instance:
  - ◆ Is your concern about inconsistency that the treaty is being inconsistently with your understanding of it? If so, you may want a mechanism to correct “incorrect” or “inconsistent” interpretations.
  - ◆ Or is your concern about inconsistency that investment law is being interpreted inconsistently across treaties? If so, you may want a mechanism to harmonize the law.

# Concern 1: Consistency, coherence, predictability and correctness

- ◆ Sub concern: Concerns related to **unjustifiably inconsistent interpretations** of investment treaty provisions and other relevant principles of international law by ISDS tribunals. (WGIII Report, 36<sup>th</sup> Session, para 40)
- ◆ Sub-concern: Concerns related to the **lack of a framework for multiple proceedings** brought pursuant to treaties, laws, instruments and agreements (WGIII Report, 36<sup>th</sup> Session, para 53)
- ◆ Sub-concern: Concerns that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions (WGIII Report, 36<sup>th</sup> Session, para 53)

# Concern 1: Consistency, coherence, predictability and correctness

## But questions remain:

- ◆ What is meant by “correct/incorrect”?
  - ◆ Failure to correctly interpret or apply applicable law?
  - ◆ Failure to correctly interpret or apply domestic law?
- ◆ What is meant by “inconsistent”?
  - ◆ Interpretations under the same treaty?
  - ◆ Interpretations across treaties (which may be justifiable)?
  - ◆ Interpretations inconsistent with state intent?
  - ◆ Interpretations inconsistent with domestic law and policy?
  - ◆ Interpretations inconsistent with other areas of international law (e.g. climate change, human rights, subsidies rules)?

**The nature of the concern will inform the appropriate solution**

# Concern 1: Consistency, coherence, predictability and correctness

## **Lack of a framework to address multiple proceedings**

- ◆ There are a variety of ways that this could be considered
  - ◆ Should claimants have relatively open access to bring claims, and then multiple proceedings are dealt with afterwards?
    - ◆ E.g. improved ability to consolidate claims
  - ◆ Should claimants access to ISDS be restricted in a way that ex ante avoids multiple proceedings?
    - ◆ E.g. limitations on shareholder reflective loss claims

# Concern 1: Consistency, coherence, predictability and correctness

## **Limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions**

- ◆ What issues are you concerned about?
- ◆ How does this impact solutions?
  - ◆ E.g. harmonize treaty interpretation
  - ◆ E.g. permit broader grounds for review

# Concern 2: Cost and Duration

- ◆ Sub concern:
  - ◆ lengthy and costly ISDS proceedings
  - ◆ lack of a(n effective) mechanism to address frivolous or unmeritorious claims
- ◆ Sub/related concern: Allocation of costs
- ◆ Sub/related concern: Availability of security for costs
- ◆ Sub/related concern: Appropriate timing – when are speedy processes and tight timelines desirable/not desirable?
- ◆ Interacts with third-party funding (addressed later)

## Concern 2: Cost and Duration

- ◆ **Who faces impacts?** System, while reciprocal in form, is not necessarily so in practice
- ◆ “Respondents in investment treaty arbitration are overwhelmingly middle-income states ... Of the 991 cases, low-income states are respondents in 3%, lower middle-income 25%, upper-middle income 40% and high-income states 28%. The litigation is also unidirectional across development status. For example, there is no decided case in which a claimant-investor from a middle or low-income state has sued a high-income state.” (Langford, et al., 2019: 3-4).



# Concerns 3 & 4

- ◆ Arbitrators and decision makers
- ◆ Third-party funding

(More attention devoted to these later)

# “Issues”

- ◆ Several “issues” in addition to “Concerns” were identified by the working group
- ◆ The WGIII noted that these issues related to:
  - ◆ Identified concerns
  - ◆ Tools that will be discussed in Phase III
  - ◆ “Guiding principles for developing reforms”
- ◆ These issues will be considered as part of the exploration of possible reforms to address the concerns that have been identified (rather than additional concerns at this stage)

\*WGIII 37<sup>th</sup> Session Report paras 29-40.

# “Issues”

- ◆ Means other than arbitration to resolve investment disputes as well as dispute prevention methods;
- ◆ Exhaustion of local remedies;
- ◆ Implications for third parties, and the role of third-party participation, including participation by both the general public and by local communities and individuals affected by the investment or the dispute at hand;
- ◆ Investor obligations and counterclaims;
- ◆ Regulatory chill;
- ◆ Damages

# Integrating “Issues” in Reform Discussions

<p>Concerns identified →</p> <p>Cross-cutting issues ↓</p>	<p>Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions</p>	<p>Concerns pertaining to arbitrators and decision makers</p>	<p>Concerns pertaining to cost and duration of ISDS cases</p>	<p>Concerns pertaining to third-party funding</p>
<p>Means other than arbitration to resolve investment disputes as well as dispute prevention methods</p>	<p>Consider alternatives to ISDS, such as domestic courts, ombudsmen, ADR and state-to-state dispute settlement</p> <p>Consider limits on the causes of action that can be pursued through ISDS (e.g. to denial of justice)</p> <p>Consider rules on referral to other courts and/or expert bodies and on staying ISDS disputes while related proceedings are pending that might narrow or resolve issues relevant to the ISDS claim or defence</p>			
<p>Exhaustion of domestic remedies</p>	<p>Consider requiring exhaustion as a means of clarifying and crystallising the scope of legal and factual issues for resolution at the international level, potentially reducing scope for inconsistent or incorrect decisions</p>	<p>Consider requiring exhaustion for all or some causes of action so as to more clearly allocate primary responsibility for deciding different issues of law and fact between different domestic and international adjudicators, each with different sociocultural backgrounds, areas of expertise and powers of review</p>	<p>Consider effect on duration of ISDS proceeding and duration of overall proceeding from initiation of claim through post-award challenges</p>	<p>Consider the effect of exhaustion on the nature and availability of third-party funding of claims</p>

# Potential Solutions

- 🟢 WP 166 and Annex
- 🟢 Your preferences
- 🟢 Broader context



Source: ©UNCTAD.

# Workplans: Implementing Solutions

- ◆ How will states convert objectives to concrete solutions?
- ◆ How to identify particular reform options?
- ◆ How to
  - ◆ prioritize,
  - ◆ sequence, and
  - ◆ organize work,taking into account your objectives, resources, political feasibility, attributes of UNCITRAL process, etc.

# Workplan Illustrations (principle of equal time)

	M	T	W	T	F
Week 1	Structural	Structural	Other	Other	Implementation Next steps Report
Week 2	Structural	Structural	Other	Other	Implementation Next steps Report
Week 3	Structural	Structural	Other	Other	Implementation Next steps Report

# Workplan Illustrations (principle of equal time)

	M	T	W	T	F
Week 1	Structural	Structural	Structural	Structural	Implementation Next steps Report
Week 2	Other	Other	Other	Other	Implementation Next steps Report
Week 3	Structural	Structural	Other	Other	Implementation Next steps Report



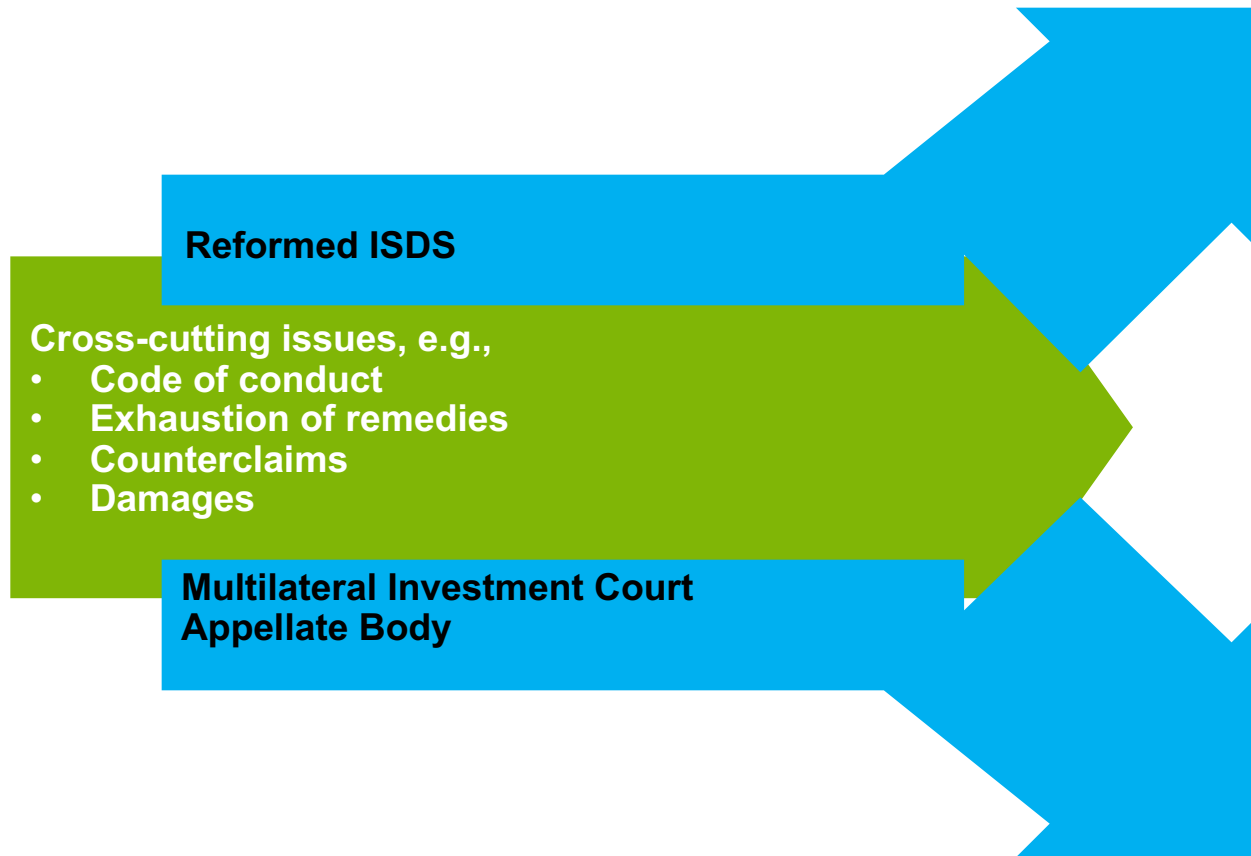
# Workplan Illustrations

	M	T	W	T	F
<b>Week 1</b>	Structural	Structural	Structural	Structural	Implementation Next steps Report
<b>Intersessional work – by whom? how? with what institutional engagement</b>					
<b>Week 2</b>	Other	Other	Other	Other	Implementation Next steps Report
<b>Intersessional work – by whom? how? with what institutional engagement</b>					
<b>Week 3</b>	Structural	Structural	Other	Other	Implementation Next steps Report

# Workplan Illustrations

	M	T	W	T	F
Week 1	Third-party funding	State control mechanisms	Adjudicator appointment and challenges (including roster and court)	Exhaustion  Implementation	Next steps/ Report
Week 2	Third-party funding (finishes)	State control mechanisms (finishes)	Adjudicator appointment and challenges (including roster and court)	Exhaustion  Implementation	Next steps/ Report
Week 3	Code of conduct	Appellate Mechanisms	Adjudicator appointment and challenges (including roster and court)	Implementation	Next steps/ Report

# Workplan Illustrations



**Q: How to deal with any cross-cutting solutions in terms of allocation of time?**

# Thank you

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