

Invitation to Online Preparatory Sessions for UNCITRAL Working Group III, 45th Session

February 2023 – March 2023

Dear esteemed colleague,

At its 50th Session in July 2017, the United Nations Commission on International Trade Law (UNCITRAL) mandated its Working Group III (WGIII) to explore reform of investor-state dispute settlement (ISDS).¹ Since that Commission meeting, there have been thirteen formal week-long meetings of WGIII and additional “intersessional” meetings on this topic. Following the **23-27 January 2023** WGIII meetings in Vienna, the subsequent week-long meeting of WGIII is currently scheduled for **27-31 March 2023 in New York**.

The Columbia Center on Sustainable Investment was commissioned by the Deutsche Gesellschaft für Zusammenarbeit (GIZ) GmbH on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ) to organize **a series of online sessions** to provide a forum for governments of developing countries to prepare for future meetings and intersessional engagements. This series of workshops covers topics anticipated on the agendas of the January and March 2023 sessions: (i) code of conduct for adjudicators, including selection and appointment, (ii) multilateral permanent investment tribunal, including selection and appointment of adjudicators; (iii) appellate mechanism; (iv) multilateral instrument to implement reforms; (v) multilateral advisory centre; (vi) alternative dispute resolution (ADR) and dispute prevention; and (vii) cross-cutting issues. We will also devote time to discussing certain other priority issue areas for delegates from developing countries as well as how reforms will be implemented.

When issuing its mandate, the Commission emphasized that the work of WGIII is to be “Government-led, involving high-level input from all Governments.”² Because the issue of ISDS reform covers a wide range of complex topics and issues, it is crucial to ensure that there is adequate time and space to consider and discuss, in an informal setting, the relevant concerns and potential ways forward. One advantage of the online platform is that it offers an opportunity for governments to involve more representatives in the preparatory discussions, an important benefit given the range of issues and areas of expertise that ISDS and ISDS reform touch upon.

All input from participants is under the Chatham House Rule, meaning that the identity and governmental affiliation of all speakers must be kept confidential (although non-attributed statements may be used elsewhere). All statements shall be deemed to be in each participant’s personal capacity; no statement made will be attributed to any Government.

¹ [Report of the United Nations Commission on International Trade Law](#), 50th session, July 3-21, 2017, A/72/17, para. 264.

² Ibid n.1.

We would like to **formally invite you to the second set of online workshops**, detailed below. Each session will take place from 9:00 to 11:00 am ET. There will be simultaneous translation in French for each of the sessions.

Note the registration links under each of the bolded titles. You must register for each session individually. Speakers and readings are subject to change.

9 February 2023 – Proposed Multilateral Advisory Centre

At its 38th session, WGIII garnered general support to [consider the establishment of an advisory center](#), requesting preparatory work be undertaken. WGIII provided guidance on how to conduct the preparatory work, suggesting the Advisory Centre on WTO Law as a useful model. This session will allow government officials to consider the structure and scope of the proposed advisory centre, reflecting on how the centre should address the needs of the current international ISDS regime and respond to concerns including the cost of ISDS proceedings, correctness and consistency of decisions, and access to justice.

- Participants:
 - Karl Sauvant, CCSI
 - Lise Johnson, Curtis, Mallet-Prevost, Colt & Mosle LLP
 - Gbenga Oduntan, Kent Law School

Registration link:

<https://columbiauniversity.zoom.us/meeting/register/tJMkdumgpj4sEtLVT8iJb6KcQ0hBFQ3uUcrc>

14 February 2023 – Damages, Third-Party Funding, and Costs

The WGIII has acknowledged concerns regarding the award of damages in ISDS, Third-Party Funding (TPF) and Costs. In the context of damages, concerns have been raised in relation to the steep increase in the amount awarded to claimants, with an average reaching USD\$ 110.9 million. In their note published in September 2021, the WGIII has identified general issues crucial for determining damages that must be addressed in the reform process. These include the valuation methodology, including the controversial Discounted Cash Flow (DCF) method, causation, evidentiary requirements and interest. Additionally, the cost and duration of the proceedings have raised doubts as average costs exceed USD\$8 million per part and duration averaging three to four years (A/CN.9/930/Rev.1, para. 36).

Relatedly, the WGIII acknowledged concerns on the increased use of TPF and agreed to consider at future sessions whether or not it would be desirable to assess reform options on the subject. So far, reform options include (1) prohibiting the use of TPF in ISDS entirely and (2) regulating TPF through mechanisms that ensure transparency via disclosures, sanctions for failure to disclose, and the creation of rules.

- Participants:
 - Josef Ostránský, International Institute for Sustainable Development
 - Emma Aisbett, Australian National University
 - Mélida Hodgson, Arnold & Porter

Registration link:

<https://columbiauniversity.zoom.us/meeting/register/tJYlc-irqzgJG9Q1EcFHDV1ZwgvPVBtjrx5>

1 March 2023 – Cross-Cutting Issues

At its 36th session, concerns were raised "underlining the importance of improving the global investment environment in a way that encouraged fairness and promoted investment policies in line with the three pillars of sustainable development."³ Such discussions on the "concerns and possible reforms of ISDS are of central importance to developing States that adopted such regime."⁴ Accordingly, WGIII has identified a series of concerns relating to cross-cutting issues that should be addressed during the reform negotiations. Among these cross-cutting issues, our speakers will be talking about Reflective loss and multiple claims, third parties rights and regulatory chill and counter-claims and investors obligations.

- Participants:
 - David Guakrodger, OECD
 - Uche U. Ewelukwa, University of Arkansas
 - Lorenzo Cotula, International Institute for Environment and Development

Registration link:

<https://columbiauniversity.zoom.us/meeting/register/tJUkceCspz0uG9wJ-S4GAvLm6N281zcIXaSb>

16 March 2023 – Alternative Dispute Resolution (ADR) and Dispute Prevention

At its 38th session, WGIII agreed to undertake preparatory work on [dispute prevention and means of alternative dispute resolution \(ADR\)](#), supporting the need for mechanisms that prevent and reduce the frequency of investor-State disputes. This session will consider a number of dispute prevention and mitigation practices that are already in place in national and international mechanisms, their implications for the interests of developing countries, as well as whether and how forms of alternative dispute settlement could be promoted and more widely used.

- Participants:
 - Daniel Uribe, South Centre
 - Leidylin Contreras, Brio Group SRL
 - Mavluda Sattorova, University of Liverpool

Registration link:

https://columbiauniversity.zoom.us/meeting/register/tJcsdeygpz0qH90Bj5w-q_1PSQUUa8-JdOQH

³ UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (Vienna, 29 October – 2 November 2019), para. 22.

⁴ *Ibid.*, para. 22.