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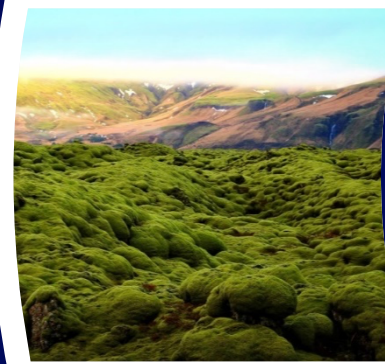
# UNCITRAL WORKING GROUP III ON ISDS REFORM

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## AN OVERVIEW

JESSE COLEMAN  
COLUMBIA CENTER ON SUSTAINABLE INVESTMENT

2022





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# UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW



# United Nations Commission on International Trade Law

- Established by the United Nations General Assembly in 1966
- Mandate to further the progressive harmonization and modernization of the law of international trade
- Work includes preparing and promoting the use and adoption of legislative and non-legislative instruments in a variety of substantive areas of commercial law



# United Nations Commission on International Trade Law

## **DOES:**

- Promote harmonization and unification of legal frameworks governing trade (including at the domestic level)
- Strengthen uniform application and interpretation of instruments adopted
- Coordinate its work with other UN bodies

## **DOES NOT:**

- Establish international rules on trade or investment
- Adjudicate disputes between private parties and states, or between states
- Provide legal advice



# United Nations Commission on International Trade Law

1. Micro, Small and Medium-sized enterprises
2. Dispute Settlement
3. Investor-State Dispute Settlement
4. Electronic Commerce
5. Insolvency Law
6. Judicial Sale of Ships



# UNCITRAL Membership

- 60 Member States; 6 year terms
- Regional breakdown in 2022:
  - 14 Africa
  - 10 Latin America and the Caribbean
  - 2 Northern America
  - 15 Asia
  - 18 Europe
  - 1 Oceania



## Methods of Work

- Commission gives mandates to Working Groups to advance certain initiatives
- Consensus
  - Decisions should be reached by consensus as much as possible
  - If a vote is necessary, 60 UNCITRAL Member States vote





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# WORKING GROUP III





## Mandate of WGIII

“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 benefitting 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**.”

# Three Phases of Mandate



## Phase 1

*Identify and consider concerns regarding ISDS*



## Phase 2

*Consider whether reform is desirable in light of identified concerns*



## Phase 3

*If the WG were to conclude that reform is desirable, develop any relevant solutions to be recommended to the Commission*

## Agreed parameters:

- Reform solutions will take into account ongoing work of other international organizations (e.g., OECD, UNCTAD, ICSID)
- Each state may determine whether and to what extent it will adopt the reform solution
- Working Group sessions will alternate between discussing “structural” and “non-structural” issues
  - E.g., structural issues are multilateral investment court and appellate mechanism
  - E.g., non-structural issues include multiple proceedings and counterclaims, frivolous claims, etc.



## Scope of concerns:

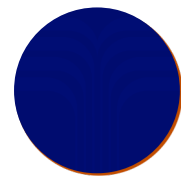
### Procedure vs. Substance

- The Working Group has interpreted its mandate to be limited to identifying and addressing procedural and not substantive concerns
  - E.g., independence of adjudicators is procedural
  - E.g., formulation of FET is substantive
- Several states have reiterated in sessions and written submissions that substance and procedure cannot be so easily divided, and true reform will require addressing certain substantive issues

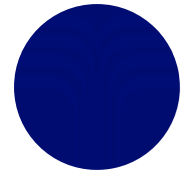




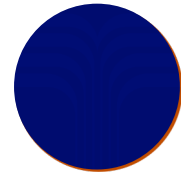
## **Identified concerns:**



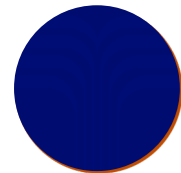
**Consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals**



**Arbitrators and decision makers**



**Cost and duration of ISDS cases**



**Third-Party Funding**

**Other  
issues that  
must be  
addressed:**



**Exhaustion of Local Remedies**



**Dispute Prevention and Alternative  
Dispute Resolution**



**Damages**



**Investor Obligations and  
Counterclaims**



**Third Parties and Third Party  
Participation**



**Regulatory Chill**

# Resources for delegates

[https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)



United Nations Commission On International Trade Law

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Home - Working Documents - Working Groups - Working Group III: Investor-State Dispute Settlement Reform

## Working Group III: Investor-State Dispute Settlement Reform

### 43<sup>rd</sup> session 5-16 September 2022, Vienna

- [A/CN.9/1124 - Report of Working Group III \(Investor-State Dispute Settlement Reform\) on the work of its forty-third session \(Vienna, 5-16 September 2022\) \(Advance copy\)](#)
- [A/CN.9/WG.III/WP.215 - Annotated provisional agenda](#)
- [A/CN.9/WG.III/WP.212 - Advisory Centre](#)
- [A/CN.9/WG.III/WP.212/Add.1 - Advisory Centre](#)
- [A/CN.9/WG.III/WP.213 - Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters](#)
  - [Cost and financing of a permanent multilateral body \(unofficial document, English only\)](#)
- [A/CN.9/WG.III/WP.216 - Possible reform of investor-State dispute settlement \(ISDS\): Draft Code of conduct](#)
- [A/CN.9/WG.III/WP.217 - Possible reform of investor-State dispute settlement \(ISDS\): Draft provisions on mediation](#)
- [A/CN.9/WG.III/WP.218 - Possible reform of investor-State dispute settlement \(ISDS\): Draft guidelines on investment mediation](#)
- [A/CN.9/WG.III/WP.219 - Possible reform of investor-State dispute settlement \(ISDS\): Draft provisions on procedural reform](#)
  - [Compilation of selected procedural provisions in recent IIAs \(unofficial document, English only\)](#)
- [A/CN.9/WG.III/WP.220 - Possible reform of investor-State dispute settlement \(ISDS\): Assessment of damages and compensation](#)
- [A/CN.9/WG.III/WP.221 - Possible reform of investor-State dispute settlement \(ISDS\): Multilateral instrument on ISDS reform](#)
  - [A/CN.9/WG.III/WP.194 - Multilateral instrument on ISDS reform](#)
  - [Comments from experts \(unofficial document, English only\)](#)
- [Submission from New York International Arbitration Center \(NYIAC\) on Article 4 of the Code of Conduct \(unofficial document,](#)

### Sessions

- 23–27 January 2023, Vienna
- 27–31 March 2023, New York
- 9–13 October 2023, Vienna (tentative)

### Initial Drafts on Reform Options

**New!** [Initial draft Commentary to the Code of Conduct](#)

[Click to see all initial drafts and comments](#)

### Reform options

## Resources for delegates

- CCSI and partner submissions and publications organized by topic of concern accessible [here](#)
- Materials from past CCSI WGIII prep sessions also accessible [here](#)
- Partners:
  - [South Centre](#)
  - [IIED](#)
  - [IISD](#)



### Workplan Submission

1 March 2021

Submission to UNCITRAL Working Group III on ISDS Reform, contributed by the Columbia Center on Sustainable Investment (CCSI), the International Institute for Sustainable Development (IISD), and the International Institute for Environment and Development (IIED)

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Pursuant to an invitation from the Chair of Working Group III in his letter dated 1 February 2021, CCSI, IISD, and IIED are pleased to submit the following comments on the draft work and resourcing plan (the Plan).

#### **I. Importance of Facilitating Participation of Developing States, Observers, and the General Public**

When giving Working Group III its mandate, delegations noted that they viewed UNCITRAL as an appropriate venue for ISDS reform negotiations given its nature as multilateral forum that enabled work in an “inclusive and transparent manner, where the interests not only of States but also of other stakeholders could be considered.” (Commission, 50th Session, para. 258) Accordingly, the Commission’s mandate directed WGIII to ensure the work would be based on input “from all Governments” and be “fully transparent.” (Commission, 50th Session, para. 258)

Many delegations, particularly developing States, face capacity constraints that limit their effective participation in the process. The proposed Plan envisions a significant increase in work and shifts in modes of working that seem likely to exacerbate those challenges. This raises questions about whether and how the Working Group can comply with the Commission’s mandate and how the work can be conducted consistently with the United Nations Sustainable Development Goals’ call for “responsive, inclusive, participatory and representative decision-making at all levels” (SDG target 16.7). We therefore suggest some steps that could help facilitate openness and engagement.





# THANK YOU

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