UNCITRAL WORKING GROUP III ON ISDS REFORM

AN OVERVIEW

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2022
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

Working Groups
- 6 working groups
- Technical bodies
- Report to Commission

Secretariat
- Organizes and supports work
- Prepares Studies

Commission
- 60 member states
- Reports to UNGA
- Oversees working groups
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
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://unctital.un.org/en/working_groups/3/investor-state
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
THANK YOU

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