

## UNCITRAL's Work Plan on ISDS reform: The role of the Commission in stopping marginalisation of issues of concern to developing countries

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## **The Commission and its role overseeing the work of UNCITRAL's WGIII**

In 2017, the UN Commission on International Trade Law (hereafter referred to as the Commission) gave a broad mandate to UNCITRAL's Working Group III to conduct a government-led consensus-based process on the possible reform of investor-state dispute settlement (ISDS). The WGIII is now in the third and final stage of its work, to identify solutions to issues that have been identified as problems. It is seeking more resources (time and budget) to complete this work by 2026.

So far, the mandate given to WGIII has been narrowly interpreted and applied in a way that focuses on a limited set of procedural issues, which have been restricted to four issues: consistency, coherence, predictability and correctness of arbitral decisions; arbitrators and decision makers; cost and duration of cases; and third-party funding. The substantive concerns that underpin the crisis of legitimacy confronting the international investment regime, and ISDS more specifically, have not been addressed.

A number of developing countries have argued that the following issues should be addressed by WGIII, which came to be referred to as "other concerns" or "cross-cutting issues":

- Means other than arbitration to resolve investment disputes: these include the role of domestic courts, the role of State-to-State mechanisms;
- Domestic courts and role of exhaustion of local remedies;
- Participation by third parties and affected communities;
- Counterclaims and investor obligations;
- Calculation of damages;
- Regulatory chill.

In a meeting of WGIII held in New York during April 2019, there was agreement among participating Member States that these issues will be addressed as the Working Group develops tools to address various concerns. However, since then, they have rarely been addressed in a meaningful and integrated manner as discussions on reform options evolve.

The Commission decides the allocation of time and resources for WGIII, based on a submission prepared by the Secretariat and approved by the Working Group members. In its most recent 54<sup>th</sup> session, the Commission heard reports on the latest deliberations of WGIII, including a proposed Work Plan that provides a road map for the finalisation of the Working Group's deliberations. The Commission also considered a request from WGIII for more resources based on the proposed Work Plan to cover one additional week of meetings per year over the period between 2022 and 2026.

The Working Group's previous proposal to the Commission for more time and resources was not adopted in 2020, reflecting the lack of consensus among Member States on the way forward. Consideration of the future allocations was deferred to the Commission's meeting in 2021. This note gives an overview of the deliberations behind the proposed Work Plan of WGIII and the discussion of the request for additional resources that took place during the Commission's 54<sup>th</sup> session. It also provides recommendations for the way forward in order to enhance the possibilities that WGIII delivers genuine, significant and meaningful reforms to ISDS.

## **The proposed Work Plan and the deliberations behind it**

The Chair, Secretariat and Rapporteur for WGIII initially developed the draft of a Work Plan to justify more resources and an intensified schedule of meetings with inputs from just a small number of mainly developed countries. Delegations were not prepared to adopt the proposed draft during the Working Group's meeting in February 2021. A dedicated two-day online session was then scheduled for May 2021 to finalise the Work

Plan.<sup>1</sup> The draft was shared with all delegations for review and comment in the run-up to that meeting, although feedback received from delegations was not published by the Secretariat. Delegations' responses to the revised proposals at the May online session reflected the divergent positions presented in the Working Group over the previous three years and suggest that a consensus outcome that addresses all the principal issues, especially for developing countries, was increasingly unlikely.

The Chair described the Work Plan as "flexible". Yet the topics that were identified for consideration and allocation of time and resources to them, and modalities of formal and informal meetings and drafting groups to undertake the work, would inevitably circumscribe the possible outcomes. That reality shaped the lively debate at the May 2021 meeting. The disagreements among participating States centred on the selection of topics, sequencing of decisions, modalities and timelines.

During the second day of the meeting the Chair circulated a revised draft schedule of work for discussion, asking for any additional comments within a week. The Plan would then be revised and presented to the Commission to approve the allocation of time and resources. If there was no agreement among delegations, the document would be forwarded in the name of the Chair and Rapporteur. Participating States' comments are not publicly available.

**Table 1: Revised Proposed UNCITRAL WGIII Work Plan circulated by the UNCITRAL secretariat<sup>2</sup>**

	ADR Mechanisms and Dispute Prevention	Selection and Appointment of Arbitrators	Code of Conduct	ISDS Procedural Rules Reforms	Multilateral Advisory Centre	Appellate Mechanism	Multilateral Permanent Investment Court	Multilateral Instrument	Total
<b>Working Group days</b>	7	4	4	12	6	9	8	10	60
<b>Other Meetings days</b>	8	7	4	13	7	12	12	14	77
<b>Subtotal</b>	15	11	8	25	13	21	20	24	137

### *Developing countries' issues marginalised*

The revised Work Plan was divided into eight streams, each of which was allocated a proportion of the available WGIII time and resources, split into 60 formal working days and 77 other meetings days or informal work days to complete specific tasks, including drafting groups. The original aim was to conclude by 2025.<sup>3</sup> The revised draft proposed to extend that to 2026.

One of the eight categories was vaguely entitled "ISDS Procedural Rules Reforms". That was initially allocated around 18% of the overall meeting time, both formal and informal working days, or 20% of the formal working group time where decisions could be taken. The Chair explained that that umbrella term was expected to include consideration of new rules on frivolous claims, multiple proceedings, shareholder

<sup>1</sup> For a critique of the draft Work Plan, see: Lisa Sachs, Lise Johnson, Brooke Guven, Jesse Coleman, and Ladan Mehranvar (4 May 2021), "The UNCITRAL Working Group III Work Plan: Locking in a Broken System?", Columbia Center on Sustainable Investment, available at: <https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system>

<sup>2</sup> Available as an annex in the document Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session (Vienna, 4 and 5 May 2021), A/CN.9/1054, available at: <https://undocs.org/en/A/CN.9/1054>

<sup>3</sup> See: Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements, Note by UNCITRAL Secretariat, A/CN.9/WG.III/WP.206, [3] – [5], available at: <https://undocs.org/en/A/CN.9/WG.III/WP.206>

reflective loss claims, counterclaims, security for costs, third-party funding and treaty interpretation, with the possible addition of procedural rules with respect to regulatory chill, exhaustion of local remedies, denial of benefits, consolidation, allocation of costs “and so forth”.<sup>4</sup> In other words, the long list of “other concerns” or “cross-cutting issues” that developing countries had sought to get on the WGIII agenda were clustered together and not granted specific time for deliberations.

That approach contrasted starkly with the allocation of time and resources for reforms advocated by capital-exporting States. A Multilateral Investment Court (MIC) and/or appellate body together accounted for close to one-third of the formal Working Group days and total time. Very specific issues, such as Code of Conduct and the Advisory Centre, had their own allocations, in addition to time already spent on them so far.

Developing countries had to invest significant negotiating capital in order to reclaim and defend a space in the Work Plan for these “other concerns” or “cross-cutting issues” that they had been promised would form part of the ongoing deliberations. Several developing countries took the floor to request that those issues be explicitly reflected in the Work Plan and given enough time and resources for discussion. For example, South Africa reminded the Working Group that “while there was agreement in WGIII that these issues will be taken into account as the working group develops tools to address various concerns, they are rarely being addressed in an integrated manner as discussions on reform options evolve”.<sup>5</sup> South Africa added that they “do not consider general considerations of these issues to be adequate without dedicated time for such discussion, both in terms of time and resources”.

The Secretariat of the African Continental Free Trade Area pointed to the genuine and long-standing appetite for reform on these matters, which deserved dedicated, earmarked time for discussion. More broadly, Kenya stressed the need for concerns of developing countries to be considered seriously given that capital importers bear most of the challenging consequences of the ISDS regime, and repeated the call for reforms to address substantive as well as procedural concerns.

The Moroccan delegation, supported by Nigeria, raised concerns that the tight time frame dedicated to these cross-cutting issues and damages could mean sacrificing quality and the ability of officials to engage with their capitals. Morocco also questioned whether clustering these concerns with multiple other issues as “ISDS Procedural Rules Reforms” was adequate given the complexity of each issue.<sup>6</sup> They proposed that certain issues, such as exhaustion of remedies and assessment of damages, should be treated as separate issues with their own time allocation, just as the selection and appointment of arbitrators was. These practical suggestions were set aside by the Chair as something that could be considered by the Working Group later on.

The Chair defended the proposed approach, saying the Plan looked at the tools rather than the concerns themselves, and the category of “ISDS Procedural Rules Reforms” was broad enough to encompass the “cross-cutting issues”. There was no sign that the Chair would use the flexibility that he said was available in the Work Plan to accede to developing countries’ demands that equivalent time and resources be allocated to examining and finding effective solutions for these concerns. The revised version on day two allocated three days of intersessional work to explore the topic in detail, and one formal Working Group meeting at which delegations could give the Secretariat specific instructions on cross-cutting issues to consider. How this process would feed into deliberation on solutions remained unclear.

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<sup>4</sup> Ibid, WP.206 [9]

<sup>5</sup> Statement of South Africa during the first day of the May 2021 meeting of WGIII, is on file with the authors and can be listened to in the recording of UNCITRAL WGIII meeting available at the following link: <https://soundcloud.com/uncitral/wgiii-resumed-40th-session-5-may-floor/s-Se3VxSHflwe?in=uncitral/sets/wgiii-resumed-40th-session-5-may/s-0ZCvW0bAJqo>

<sup>6</sup> Statement of Morocco during the second day of the May 2021 meeting of WGIII.

### *Worries about modalities and pace of the work*

A second category of concerns involved the modalities for the future Work Plan, especially the 77 informal meetings proposed to further discussions on specific reform options for consideration, as shown in Table 1. These are supposed to be meetings where no decisions are taken, yet some may involve drafting groups or expert groups and are likely to be driven by proponents of particular positions. The informal meetings are to be hosted voluntarily by States, who will write the reports for other delegations. Which countries offer to organise these sessions, with what agenda, resources, interpretation and time zones will therefore influence whose voices are heard loudest, what is reported and what options would be on the table. The Chair also indicated that interpretation in these meetings will be decided case by case depending on the availability of funding.<sup>7</sup> There is no guarantee of funding support, making it even harder for developing countries to participate, let alone to ensure their concerns are prioritised. The Honduras delegation warned that developing countries' participation in these informal processes might be replaced by a greater role for the Secretariat and "academic forum".<sup>8</sup>

The intense pace of the meetings and overall work was another major concern, as it could jeopardise the effective participation of many delegations particularly developing countries. Many delegations said this intensity was unrealistic for several reasons, including the limitations on the officials' time and competing workloads, technical difficulties that undermine the right to be heard, availability of translation and interpretation, need to brief and seek instructions from the capital, and competing UNCITRAL priorities.<sup>9</sup> Honduras made the point that rushed and incomplete deliberations in which delegations were unable to effectively participate would be perceived as lacking in legitimacy and transparency.<sup>10</sup> The proposed timeline would mean sacrificing the quality of the discussion, the ability of officials to engage in this discussion, and eventually the ability to deliver relevant reforms pertaining to these issues.

### *Modalities for finalising reforms may disadvantage developing countries*

Capital-exporting countries were most concerned about sequencing of an outcome. The paper to the May 2021 meeting of WGIII suggested that reform options could be "approved in principle" as they were developed, then formally adopted as part of the proposed final text. The Chair said this would allow any necessary adjustments when the whole project is complete, but not the reopening of discussions on agreed solutions.<sup>11</sup> The phrase "approved in principle" was later replaced by the ambiguous notion of "consideration by the Commission".

The US, Australia, Japan, Israel and Chile objected that concrete solutions should be agreed to as soon as possible, with an "early harvest of low hanging fruit".<sup>12</sup> The Chair's approach was likened to a "single undertaking", a term in trade talks that means nothing is agreed until everything is agreed. Presumably, they anticipated that trade-offs would be demanded by supporters of the MIC in end-game bargaining. Conversely, the EU and Switzerland were clearly concerned that allowing piecemeal agreement on reforms would militate against agreement on a more comprehensive consensus outcome. Russia repeated its call to focus on matters where agreement was feasible. These disagreements among capital-exporting countries raise significant doubts that they will be able to agree on an outcome, even as a "menu" of options they can select from in a multilateral instrument.

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<sup>7</sup> In the report of WGIII on its 40th resumed session, which was raised to the Commission, reference was made to "support provided by the Government of France and the German Federal Ministry for Economic Cooperation and Development (BMZ) to increase the capacity of the Secretariat and to provide some interpretation support for virtual intersessional meetings". See: Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8-12 February 2021), A/CN.9/1050, available at: <https://undocs.org/en/A/CN.9/1050>

<sup>8</sup> This unofficial academic forum includes many academics who are active arbitrators and legal counsels in arbitrations and has significant influence in providing research to the Secretariat and on the margins of the WGIII deliberations.

<sup>9</sup> Sri Lanka, Honduras, Bahrain, South Africa, AfCFTA, India, Morocco, Argentina, Indonesia, Russia, Nigeria and Jamaica spoke to these issues.

<sup>10</sup> Recording of the meeting available at: <https://uncitral.un.org/en/audio#03>

<sup>11</sup> Recording of the meeting available at: <https://uncitral.un.org/en/audio#03>

<sup>12</sup> A phrase used by the Israeli representative



The “early harvest” approach is also problematic for developing countries, as it increases the risks that issues that have been allocated the most time will be closed. Remaining issues, especially those of concern to developing countries, which might be more complex in nature, have not been discussed so far and lack equivalent time and resources, will remain unresolved. Such an approach would also prevent a holistic assessment of the interlinkages between the different reform options, how they influence each other, and the meaningfulness of the final package of adopted reform, especially for developing countries as the main targets of ISDS disputes. It is worth noting that the sequencing of the outcomes, whereby some reform options are “approved in principle” or “considered by the Commission”, could become a *de facto* “early harvest”.

A Multilateral Legal Instrument is being promoted as the means to adopt the outcomes and is one of the eight topics in the Work Plan. Discussion suggests this instrument may allow capital-exporting States to pick and choose which reforms to adopt, allowing them to avoid reforms that are most important to developing countries.

In sum, unless there are significant changes to the current draft Work Plan the real time to be dedicated to the long list of “cross-cutting” issues will be minimal, on top of the lack of any dedicated time or resources to date. Despite promises of “flexibility”, the process over the remaining four years at present offers no real prospect of any significant reforms, even within the narrow ambit of ISDS “procedure”.

### **Deliberations of the Commission on the Work Plan and the request of additional resources**

On 15 July 2021, the Commission considered for the second time a request from WGIII for additional resources, which would allow it to meet for three instead of two weeks every year between 2022 and 2026. As recalled earlier, the first request raised to the Commission in 2020 was not agreed. The Chair of the Commission’s session, the head of the UNCITRAL Secretariat and the Chair of WGIII urged Member States to focus their attention on the resource requirements and the related request to the General Assembly and not to discuss the content of the draft Work Plan of WGIII. The head of the UNCITRAL Secretariat and the Chair of WGIII insisted that the Work Plan is a notional, flexible living document providing a road map and that adjustments to it could be adopted as and when needed. They both noted that without the additional resources, WGIII will need up to 2028 or possibly longer in order to finish its work. The Chair of WGIII also stated that the Work Plan is a document of WGIII and it is not the role of the Commission to approve or disapprove it.

Despite these attempts to minimise the debate, several countries raised concerns about the request of additional resources, particularly given the lack of consensus in WGIII on the proposed Work Plan. They pointed out that issues of concern to developing countries have not been allocated adequate time and resources for proper consideration. South Africa stressed that the resource request was based on the Work Plan. While giving its conditional support to the request of additional resources for WGIII, the delegation said those additional resources should be applied to give requisite attention to issues raised by developing countries. Chile, while supporting the request for additional resources, echoed South Africa’s demand that issues of concern to developing countries including “cross-cutting issues” be given proper attention.

Russia initially asked for more consideration of the request for additional resources due to the lack of consensus on the Work Plan. The delegation later suggested the Commission could allocate resources for one additional week in 2022, and could subsequently reassess whether more resources are needed and whether the concerns pertaining to the Work Plan have been addressed. Iran sounded its concern that the Work Plan currently does not allow for adequate time and resources for the list of “cross-cutting” issues of importance to developing countries, and so it did not support the request for additional resources. Iran later supported the proposal from Russia. Honduras considered that the Russian proposal was reasonable and

suggested that the Commission report to the General Assembly accordingly, with a view to undertaking a revision at the end of 2022 to decide whether there is a need for an extra session of the Working Group in the years to come.

Bahrain did not support the request for additional resources and urged the Commission to postpone the discussion about resources to a more opportune time. Bahrain was particularly concerned about the excessive number of informal meetings, pointing out that these meetings are taking on a semi-formal character and will pre-determine possible future decisions in WGIII. Bahrain stressed that such an approach to meetings will pose a lot of challenges for developing countries.

India was cautious about the request of additional resources and urged that Member States should not give preference to one Working Group of UNCITRAL over the others. Similarly, Brazil noted concerns over the request for additional resources, and agreed that more consideration was needed. Brazil also reminded other States that ISDS is not the only model to settle investment disputes, highlighting the model adopted by Brazil that reverts to the role of an ombudsman and State-to-State mechanisms.

Vietnam, while supporting the request for additional resources, called for the Work Plan to be adjusted to ensure that all reforms are properly addressed. Belarus stressed that the request of additional resources should be based on consensus over the Work Plan. Several countries also raised concerns about the pace of work and urged that the increase in number of meetings should not be to the detriment of participation by developing countries. These included Argentina, Thailand, Sri Lanka, Zimbabwe and Morocco.

The United States, while supporting the request for resources, would have preferred that WGIII finishes its work within the time originally allocated to it. The US said that such a request must remain extraordinary and not be normalised, especially given the scarcity of UN resources and the strain that additional meetings will put on delegations and their resources. The US underlined the importance of flexibility in order to adjust the Work Plan as needed. They also rejected the division of the work of WGIII into structural and procedural reforms, and asked that the Plan should clearly reflect the synergies that show how structural reform builds on procedural reforms.

Japan stressed inclusivity as a crucial element for the integrity of WGIII's work and that no country be left behind, otherwise consensus as a working method would be jeopardised. While supporting the resource request, Japan underscored the importance that the Work Plan remains flexible and adjustable depending on the evolution of its work and suggested an annual review of WGIII's progress to be followed by a review of the Work Plan as needed. Austria also highlighted the importance of inclusivity and transparency as well as flexibility in order to address the "cross-cutting" issues and to mitigate the challenges emerging from the burden of work.

Even though countries that did not support the request did not change their position, the Chair concluded, applying the "silence procedure",<sup>13</sup> that an overwhelming majority supported the request, while noting some delegations had reservations and concerns over the need to give greater visibility to cross-cutting issues, transparency, pace of work and impact on delegations, and needs to review the Work Plan. Consequently, a request for additional resources was to be drafted and raised by the Commission to the UN General Assembly with clear wording to "better accommodate" cross-cutting issues, revise and adjust the Work Plan "as needed", and ensure transparency and inclusivity in the process.

The vagueness of this wording has echoes of past unfulfilled promises of the "flexibility" of the Work Plan. Genuine and concrete changes to the Work Plan will require ongoing pressure on the WGIII Chair, the Secretariat, and capital-exporting countries that have so far dominated the WGIII agenda. The one real safeguard is the Commission's intention to evaluate the progress of the work in 2022 and to revisit this

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<sup>13</sup> Under this procedure for decision-making, a country is considered to agree if it is silent on a matter under consideration.

year's decision based on that review. The Chair of the Commission's meeting asked the UNCITRAL Secretariat to draft such a request and submit it to him, after considering inputs from participating States, which will then be submitted for consideration by the Members under the "silence procedure".

### **Recommendations for the way forward**

Having conferred the mandate on WGIII, the Commission has a crucial role to ensure the Working Group's process, agenda and proposals can deliver genuine, significant and meaningful reforms to ISDS. The Commission also has a major role in ensuring that work achieved in WGIII meets the commitments and obligations of United Nations Member States to the Sustainable Development Goals. These include respect for human rights, governance structures that ensure inclusive participatory processes and equal access to justice, and encouraging sustainable new investment for development purposes in States that need it.

Currently, the possibilities of WGIII meeting those obligations in a manner consistent with the sustainability and developmental mandates of bodies within the UN system, including UNCITRAL, seem remote unless major corrections in the direction of travel of WGIII are achieved.

### ***Amending the WGIII Work Plan***

Issues of concern to developing countries, including the "cross-cutting" issues, cannot continue to be rolled forward until they are never properly addressed. The Work Plan must give priority now to the concerns and reforms raised by developing countries, given they are the principal targets of ISDS disputes. An acceptable Work Plan must allocate time and resources equitably to the issues of concern to developing countries, recognising they have not been discussed to date in WGIII. The list of "cross-cutting issues" must also be disaggregated, so they can be considered as reform options on their own and allocated clear stand-alone time. Solutions to these issues must form part of the minimum standards for any agreed outcome in WGIII.

### ***Implementation of the revised Work Plan***

Establishing a transparent monitoring mechanism is essential to ensure that no State is left behind in the negotiations process due to lack of capacity or resources to participate in the extensive number of meetings. The measure of participation by developing countries in the WGIII process must be their ability to make effective contributions to the process, not the number of countries represented. Where the active participation of developing countries drops significantly, additional efforts must be made to ensure developing countries can participate effectively and equitably in all WGIII activities and deliberations.

All communications, meetings, and work – including involvement in intersessional projects – must be conducted on an opt-out, rather than opt-in, basis that ensures the widest possible access of States to the process.

All drafting and other work undertaken by WGIII must be conducted in an open and participatory manner, and provided to States on an accessible portal. States must be fully informed about the participation of experts in advising, reviewing and commenting on draft work products or working papers. All States must have access to any draft document provided by the Secretariat to any State.

Where informal meetings form part of the Work Plan:

- (a) they must meet the minimum requirements to allow effective participation of developing countries, including attendance, translation and interpretation;
- (b) all the States participating in WGIII must decide the agenda and issues for such meetings in a way that ensures progress towards solutions on issues of concern to developing countries;
- (c) reports must be provided to non-participating States that are full and accurate accounts of the discussion and their relationship to the formal discussions; and
- (d) they must not involve any drafting of text or formal or *de facto* decision-making.



### ***Decision-making procedures on reforms to be agreed in WGIII***

Modes of decision-making on the outcomes to be adopted by WGIII must not undermine the achievement of outcomes that address the issues of concern to developing countries. Moreover, the Commission must retain the ability to effectively assess, approve or reject the final outcome, taking into account the totality of the reforms and the balance of the final package, including effective solutions to issues of concern to developing countries. Furthermore, any instrument adopted for implementation of any agreed outcome must ensure that its mandatory provisions include reforms that address those matters of importance to developing countries.

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