UNCITRAL Working Group III: An Update on Certain Key Issues in ISDS Reform

From 5-16 September 2022, UNCITRAL Working Group III (WGIII) met in Vienna to advance its work on ISDS reform.

On the agenda for the two-week session, the 43rd session of Working Group III, was a long list of topics: selection and appointment of ISDS tribunal members in a standing mechanism (part of day 1); the advisory centre (day 2); a multilateral instrument to implement ISDS reform options (day 3); "procedural rules reform" and "cross-cutting issues" (days 4 and 5); draft provisions on mediation and draft guidelines on the use of mediation in ISDS (days 6 and 7); and the code of conduct for arbitrators and judges in a standing mechanism (days 8-10).[1]

This meeting was the first in-person WGIII meeting since the start of the COVID-19 pandemic. Although delegates could listen to the session remotely, they could only intervene with comments if they were attending the session in person.

This update highlights four key issues discussed during the session – damages, third-party funding, the broad category of "cross-cutting" issues, and multiple-hatting of arbitrators. It also outlines next steps and important dates.

WGIII Agrees to Move Forward with Work on Damages in ISDS

From among the first meetings of WGIII, delegates have flagged the issue of damages in ISDS as being important and one they wanted to address.[2] During the 38th session of WGIII in January 2020, particularly strong interventions by a number of delegations on the issue of damages led to WGIII directing the UNCITRAL Secretariat to consider how possible work on the topic could be advanced. The Secretariat circulated its note on the issue in July 2022, which served as a basis for discussions in this WGIII meeting.

Delegates' input during this recent 43rd session revealed a relatively clear north-south divide between those who wanted WGIII to do more in this area, and those who did not. For those who did not, they argued, for instance, that issues of damages were policy issues best left to individual states to negotiate and address on a treaty-by-treaty level.

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[1] Audio recordings are typically available on the UNCITRAL website. The days identified here can be used to identify the relevant topic should there be interest in listening to the delegates' interventions.

[2] *See, e.g.*, A/CN.9/930/Add.1/Rev.1, para. 30; A/CN.9/970, paras. 36–38. Issues related to damages were also raised in written submissions by states, including Indonesia (A/CN.9/WG.III/WP.156), paras. 8-9; Colombia (A/CN.9/WG.III/WP.173), p. 8; South Africa (A/CN.9/WG.III/WP.176), paras. 63, 71-73; Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182), p. 3; and Burkina Faso (A/CN.9/WG.III/WP.199).

Several delegations also stated that WGIII's mandate was to work on "procedural" reform of ISDS, and that work on damages was work on substance falling outside of that specific mandate. Some delegations similarly noted that WGIII had too much on its agenda already and could not add more.

For those states advocating that work on damages be undertaken, they highlighted that the mandate of WGIII, as given by the UNCITRAL Commission in 2017, was actually a "broad mandate" to work on ISDS reform (para. 264), that the line between "procedure" and "substance" was not always clear, and that the mandate did not need to be strictly interpreted by WGIII as being limited to a narrow set of procedural issues. It was further noted that, just as procedural reforms (like a court) were being explored in order to address concerns about substantive issues (like correctness of and inconsistency in interpretation of investment protection standards), WGIII could explore how procedural tools and approaches might be used to address at least some of the concerns around damages. These might include options such as facilitating appropriate use of tribunal-appointed experts and clarifying rules on the proof required for successful damage claims. A delegation also noted that while some states may have addressed the issue of damages to their satisfaction in their own treaties, not all states had the capacity or negotiating power to reach similar outcomes in their agreements, meaning that work on the issue in WGIII was particularly important for them to be able to address their concerns.

Among the specific concerns noted by delegates regarding damages, tribunals' use of the discounted cash flow (DCF) methodology to value assets was frequently cited. Delegates also noted that the use of DCF was particularly problematic for early-phase projects, and that it related to other issues, such as burdens of proof and evidentiary requirements for establishing damages claims.

Decision/Instruction

Likely due to the force and number of the interventions in support of further work on damages, WGIII decided to keep it on the agenda. The agreed way forward is for the Secretariat to draft text that will include provisions, guidelines, and explanatory notes on such issues as:

- speculative evidence, the burden of proof, and other evidentiary matters;
- allocation of costs if, for instance, damages claims were excessive;
- the conduct of parties and role of experts;
- causation requirements;

- valuation methods, such as the use of DCF;
- the proper valuation date; and
- pre- and post-award interest rates.

The form and content of the draft text is, however, without prejudice to any decision by WGIII on these issues.[3]

Next Steps

Due to other priorities between now and the next Commission session in July 2023, WGIII will likely not return to these issues in any formal session until October 2023. However, over the next year, the Secretariat will likely be working on the outputs requested by WGIII, and may therefore organize meetings and consultations, or solicit comments on drafts, to support it in its work.

It would be timely for delegations to consider possible draft provisions, guidelines, and explanatory texts, and to also consider providing input on the same to the Secretariat.

Disagreements Remain Regarding the Proper Approach to Third-Party Funding

The decision by WGIII to place third-party funding on its agenda was uncontroversial; yet delegations have not yet been able to agree on the nature of the reforms they would like to see. In this meeting, delegations explored various possible models and approaches to regulation of third-party funding outlined in text that had been drafted by the Secretariat. Some delegations supported approaches that would largely prohibit commercial third-party funding of claimants; others preferred approaches that simply imposed disclosure requirements (though the disclosure requirements contemplated within UNCITRAL seem to be more robust than the disclosure requirements recently adopted by ICSID in its Arbitration Rules).[4]

Decision/Instruction

WGIII did not reach consensus on a way forward on third-party funding. Nevertheless, the Chair proposed that WGIII instruct the Secretariat to prepare draft text reflecting what he saw as a compromise solution. The substance of the compromise was not

[3] This summary is from the author's notes of the discussions. A final report of the session, which will set forth the exact text of the agreed way forward, should be available on the UNCITRAL website later this fall after delegations have had time to review the draft and provide comments, and the Secretariat has finalized the text.

[4] *Compare* Rule 14 of the 2022 ICSID Arbitration Rules, *with* UNCITRAL Draft Provision E-2 (Disclosures) set forth on page 17 of the Secretariat's Draft Provisions on Procedural Reform.

discussed during the meeting, so it is unclear whether and to what extent there is support for it in WGIII. However, no delegation objected to the idea of instructing the Secretariat to work on drafting relevant language, with the understanding that the language would be discussed in a future meeting (again, not likely before October 2023). The instruction to the Secretariat is to prepare provisions that do the following:[5]

1. Provide a broad definition of third-party funding to ensure adequate disclosure, which would allow for the identification of any conflict of interests;

2. Include a permissive rule whereby third-party funding would generally be allowed, including third-party funding provided in return for remuneration dependent on the outcome of the proceeding, but would impose conditions on the specific terms of that funding, which might include the following:

   (a) Where security for costs had not been provided, the third-party funder would be required to have agreed to cover any costs awarded against the funded party;

   (b) The third-party funder or its representative must not (i) have control or influence over the management of the claim or the proceedings; (ii) be able to terminate the funding arrangement without prior notice to the arbitral tribunal and other disputing parties; or (iii) have control or influence over the decision of the funded party to terminate, settle or otherwise resolve the dispute; and

   (c) The funded party must retain the right to choose and be represented by its own legal representative;

3. Identify other specific terms, if any, which would be necessary to address what were seen as the most problematic consequences of third-party funding;

4. Provide rules mandating disclosure of the terms of the funding agreement necessary to establish that the above-mentioned conditions were met, while providing for the arbitral tribunal to have the discretion to order the disclosure of additional terms of the funding agreement; and

[5] This text was set forth in a draft of WGIII's final report. The final report is not yet published, but will be available on WGIII's website after delegations have had an opportunity to comment and the Secretariat has integrated those comments in an agreed text. A report may change from the draft to the final version. However, given that the text quoted above simply reflects the content of the Chair's proposal, rather than points made by different delegations in the discussions, it is unlikely to be contested or edited.

5. Include rules on sanctions to address the situation in which the funded party deliberately falsified the terms of the funding arrangement or intentionally concealed the fact that the above-mentioned conditions were not met.[6]

Next Steps

Delegates will want to analyse the acceptability of this proposed compromise position, whether and how they might want to modify it, and whether there are any elements they consider to be essential.

UNCITRAL Secretariat to Compile Options on "Cross-Cutting" Issues

In previous meetings and through their written submissions, delegations have identified a series of so-called "cross-cutting issues" warranting attention, and have agreed (paras. 29-40) that WGIII is to consider them when developing reform solutions. These include alternatives to arbitration (such as recourse to domestic courts), damages, regulatory chill, exhaustion of local remedies, and the rights of non-parties. While work has been done on some of those topics, several have not yet been given dedicated space or attention in WGIII's formal meetings.[7]

Nevertheless, those issues are not off the agenda. WGIII has now tasked the Secretariat with compiling relevant provisions on various "cross-cutting" and related issues from recent treaties, models, and other sources. It is not clear what will happen with this compilation once it has been produced.

Decision/Instruction

WGIII instructed the Secretariat to prepare draft provisions on the following set of "cross-cutting" issues:[8]

- binding joint interpretations by the state parties to the treaty, and other issues relating to the involvement of non-disputing treaty parties in the ISDS dispute;

[6] This text was set forth in a section of the draft report of the 43rd session (ACN.9/WG.III/XLIII/CRP.1/Add.7) and, as noted in the footnote above, should be reflected in the final report when that is published on UNCITRAL's website here.

[7] There was an inter-sessional meeting that addressed some of these topics. It was hosted by the Republic of Korea and held virtually 2-3 September 2021. A summary is available here.

[8] As noted above, the final report is not yet published. This content is taken from the author's notes and the draft report. The draft report is subject to comments from delegations and may be revised.

- participation by third parties such as those affected by the claim or investment;
- transparency of the proceedings;
- waivers of claims in other fora and by other actors within the corporate chain;
- limitations on treaty shopping;
- means to address the relationship between domestic and international claims, such as "fork-in-the-road" clauses and requirements for exhaustion of local remedies; provisions addressing determinations of domestic courts, such as limitations on ISDS claims challenging domestic courts' decisions, and rules governing the role and significance tribunals are to accord domestic courts' decisions on issues of domestic law;
- limitations on the nature or scope of claims that can be brought by certain investors and in certain circumstances;
- limitation periods;
- consolidation of proceedings;
- discontinuance of abandoned claims;
- rules on the taking, production, or evaluation of evidence (including rules dealing with fabrication of evidence);
- regulatory chill; and
- use of state-to-state dispute settlement.

Next Steps

These issues are wide-ranging. It thus seems the Secretariat would benefit from delegations' input when collecting potentially useful provisions. It would also be useful to elaborate how those provisions have been applied in practice, to the extent they have been invoked in ISDS cases.

In terms of timing, WGIII had envisioned potentially touching on some of these issues (i.e., alternatives to arbitration) in March 2023. However, given that work on the Code of Conduct has been slow, and there is a strong push to finish that work so that it can be adopted by the UNCITRAL Commission in July 2023, it is unlikely that any formal

meeting time will touch on these "cross-cutting" issues in any depth, if at all, until at least October 2023. Nevertheless, delegations could presumably provide input to the Secretariat at any point.

In addition to supporting work on compiling provisions, delegations will likely want to develop proposals regarding what they consider should be done with those provisions (e.g., do they form part of a multilateral reform instrument? or are they just listed as possible options for individual states to consider adopting in their treaties?).

WGIII Stalls When Considering Multiple-Hatting

WGIII is preparing a Code of Conduct for arbitrators (and judges in any future standing mechanism) that addresses, among other things, the important question of whether arbitrators in ISDS cases should also be able to play other roles as counsel or expert.

Some delegations have taken a strong stance against such multiple-hatting and have argued that this Code should generally prohibit it. Others, however, want a more permissive approach, advocating for disclosure as a solution. After previous discussions, the Secretariat had been instructed to prepare text that could reflect a possible compromise position. The Secretariat's text, which was discussed for the first time in this recent 43rd session, read:

> Article 4 – Limit on multiple roles
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> *[Paragraphs applicable to arbitrators only]*
>
> 1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:
>
>   a. The same measure(s);
>
>   b. The same or related party(parties); or
>
>   c. The same provision(s) of the same treaty.
>
> 2. [Unless the disputing parties agree otherwise,] an Arbitrator shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving

> legal issues which are substantially so similar that accepting such a role would be in breach of article 3.[9]

There remained, however, considerable disagreement among delegations on the suitability of this text. Key issues included (1) whether to include the cooling-off period and, if so, whether three years (which was based on the previous discussions) was appropriate; (2) whether to keep or adjust 1(c);[10] and (3) whether to delete subparagraph 2 and, if so, whether to move it to the Commentary that is being prepared to accompany the Code of Conduct.

For some delegations that had wanted to ban double-hatting, proposals to move further away from a meaningful restriction on the practice by deleting subparagraph 2 seemed particularly problematic. However, at least some delegations stated that if the subparagraph were deleted from the text of the Code itself and moved to the Commentary to Article 3 (which deals with the requirements of independence and impartiality), the change would only be a difference in form, not in substance.

Decision/Instruction

No decisions were adopted or instructions given on this topic of multiple-hatting.

Next Steps

Given the differences in opinion on this issue, significant time was spent on it, but agreement was not reached. Thus, the Chair decided to park discussions and move on to the other provisions and issues. Article 4 will be revisited in the January 2023 meeting in Vienna and/or the March 2023 meeting in New York. The Chair indicated that he wanted to reflect on the developments from the 43rd session before providing further communications about what specifically will be discussed in those two upcoming sessions. He also indicated that he would likely be scheduling informal consultations on this issue in order to try to find a solution.

Upcoming Dates and Opportunities

WGIII's work is covering a wide range of topics, and spans both questions of policy (i.e., what the delegations want to achieve) and technical legal drafting (i.e., how the text can best achieve desired objectives). The work can involve engagement during the formal

[9] Possible Reform of Investor-State Dispute Settlement: Draft Code of Conduct, Note by the Secretariat, A/CN.9/WG.III/WP.216, 5 July 2022, at 6.

[10] Some delegations supported keeping this provision as is. Others suggested: adjusting it to make clear that it did not apply to the ICSID Convention; making clear that it did not apply to multilateral treaties such as the ECT; and adjusting it so that it did not apply to "procedural" issues, only substantive provisions.

sessions and tasks in between those meetings, such as providing comments on the Secretariat's drafts.

Among relevant dates and deadlines are the following:

- 27 September 2022: Comments are due from delegates on Add.6-Add.10 of the Report of the 43rd WGIII session. Delegates can use this opportunity to ensure that their inputs during that session are appropriately reflected and discussions during the session adequately recorded.

- 14 October 2022: Comments are due from delegates on the Commentary to the Code of Conduct. If the comments are not received by that date, they will likely not be reflected in the draft of that Commentary, which is scheduled to be discussed in Vienna in January. Note: there was significant discussion during the 43rd session of what could and should go in the Commentary; and there are many open questions about what belongs in the Commentary as opposed to what belongs in the Code. Input on the Commentary should therefore recognize those issues.

- 23–27 January 2023, Vienna: WGIII meeting

- 27–31 March 2023, New York: WGIII meeting

- 3–21 July 2023, Vienna: UNCITRAL Commission Session (at which WGIII currently aims to present the Code of Conduct, Commentary to the Code of Conduct, and rules on mediation[11])

- 9–13 October 2023, Vienna (tentative): WGIII meeting

About Curtis

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[11] This update does not focus on mediation or certain other issues discussed during the 43rd session such as the possible establishment of an advisory centre.

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Lise Johnson is an experienced lawyer with a broad depth of knowledge in international law as well as investment law and policy. Coming from a background in domestic litigation, she has spent over a decade working in the field of investment law. She has supported governments from around the world engaged in formulating domestic and international investment policy, evaluating risks of investor-state dispute settlement (ISDS), developing strategies and options for minimizing those risks, and defending ISDS claims.

Ms. Johnson's work has concentrated on the intersection of investment law and complex regulatory spheres such as climate policy, governance of extractive industries and infrastructure, and development of industrial policy.

She has participated as a delegate in ISDS reform negotiations at the United Nations Commission on International Trade Law (UNCITRAL), both during development of the UNCITRAL Rules on Transparency, and in ongoing efforts to address concerns with ISDS.

Please feel free to contact Ms. Johnson if you have any questions on this important development:

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