# ISDS Reform: Working Group III Gets Down to Brass Tacks


Last week, multilateral efforts to reform investor-state dispute resolution (***ISDS***) entered a new phase, with substantive discussions of reform options beginning in earnest. As readers of this blog are aware, delegations from around a hundred States have been working multilaterally toward reforming ISDS in the United Nations Commission on International Trade Law (***UNCITRAL***), Working Group III (***WGIII***) over the last two years.

This work began in earnest in WGIII's 34th Session in Vienna (2017) and has continued through biannual Sessions in Vienna and New York. From 2017–2018, Delegations registered substantial concerns with ISDS, relating to fragmented arbitral outcomes; the arbitrators charged with adjudicating disputes; matters of duration and cost; the lack of a framework to address multiple proceedings; and third-party funding (Phase 1). In Vienna last year, WGIII decided to work multilaterally to reform such concerns within UNCITRAL (Phase 2) – discussed further here. Last week proved to be a key hinge in the process. WGIII has now moved firmly into working on concrete reform options (Phase 3).

WGIII's 37th Session in New York this past Spring 2019 appeared as something of a lull in the process, but it culminated in a key compromise on working methods that preserved consensus for the time being. WGIII spent much of that week debating working procedures, ultimately adopting a compromise plan to divide working time between developing "*structural reforms*" (*i.e.*, large scale institutional reform options like a standing investment court or a standalone appellate body), and "*functional reforms*" (*i.e.*, specific targeted reforms on problematic aspects of ISDS, like the lack of code of conduct, the lack of a mechanism to address multiple claims and shareholder claims more generally, third party funding, and security for costs). But it deferred actually developing a concrete project schedule until the fall.

WGIII's 38th Session in Vienna last week marked the fruition of that compromise, and a transition into detailed discussions on reform options. Even before the Session, over forty-five governments submitted concrete proposals for specific reforms to ISDS, across nineteen submissions (here). These proposals were complemented by several Secretariat papers, submissions by observer delegations and concept papers on particular reform options by the Academic Forum on ISDS Reform (here). By the end of the first day, WGIII had worked out a concrete project schedule for its next several sessions, pursuant to its earlier compromise on apportioning time between structural and functional reform. Over the remaining three days, Delegations began debating specific reform options, starting with (i) a multilateral advisory center for ISDS disputes; (ii) a multilateral code of conduct for arbitrators; and (iii) reforms to third-party funding.

***Project Schedule***

At the outset, the Chair indicated that he would not let discussions on priorities drag on indeterminately. After some preliminary debate it became clear that States had (not

unexpected) differences in where to start and how to prioritize. The main split was between those governments eager to start developing complex structural reforms, and those seeking to focus on targeted functional reforms (sometimes framed as an end-in-itself, and occasionally framed as potential "*early harvests*" on the way toward eventual structural reform). Ultimately the Chair brokered a consensus project schedule for the next three Sessions, hewing closely to the compromise reached in New York (requiring even time for structural and functional reform).

> – For the duration of the 38th Session, WGIII would consider high level questions about reform options relating to (i) a **multilateral advisory center**; (ii) a **code of conduct**; and (iii) **third party funding**;
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> – For its 39th Session (Vienna, January 2020), WGIII will turn to high level questions relating to the main structural reform options: (iv) a **multilateral investment court**; and (v) a standalone **appellate mechanism**. Thereafter WGIII will turn to the cross cutting question of (vi) **arbitrator and adjudicator appointment**; and
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> – In its 40th Session (NYC, April 2020), WGIII will turn to reform options relating to (vii) **dispute prevention**, including mediation and alternative dispute resolution; (viii) State control over **treaty interpretation**; (ix) **security for costs**; (x) **frivolous claims**; (xi) **multiple proceedings** and **shareholder claims for reflective loss**; and (xii) **counter claims**. These important matters serve not only as standalone functional reforms, which might be incorporated into an omnibus multilateral convention on procedural reforms, but also as potential building blocks which might be incorporated into broader structural reforms. Moreover, these matters should not be seen as trivial. For example, as I and others have argued in our Academic Forum paper on Reforming Shareholder Claims in

ISDS, reforming shareholder claims for reflective loss would have wide-ranging, positive systemic effects that go far toward addressing many of the Delegations' concerns with ISDS.

The Chair largely sought to prioritize discussing the merits, structure, and trade-offs of these various reform options over these three Sessions. Though questions of form would certainly come up, the idea  to mostly defer discussing the form of reform down the line (*i.e.*, whether the goal should be soft law, model treaty clauses, a multilateral convention on targeted procedural reforms, opt-in/opt-out mechanisms, and/or the development of full adjudicative institutions).

For the remainder of the session, WGIII at last turned to developing particular reform options. In doing so, it held to the above schedule, allocating a day each to the advisory center, code of conduct, and third party funding. In each case, the goal was to discuss objectives, concerns, and trade-offs at a high level, to give the Secretariat information about Delegations' preferences as it turns to developing concrete reform options.

***Multilateral Advisory Center***

After a day's discussion it was clear that most Delegations supported designing a multilateral advisory center as a reform option. The center would be modeled on the Advisory Center on WTO Law, with a view to providing capacity building services and legal advice to least developed and developing countries in relation to ISDS. WGIII requested that the Secretariat begin work on a spectrum of institutional design options relating to:

– **Potential beneficiaries** – as to which States should have access (least developed and developing States only, or also developed States who might pay for such services), and whether small and medium enterprises might

have access for certain services;

– **Services** the Center might provide – including capacity building (*g.*, legal advice on treaty interpretation, dispute prevention, risk assessment, and training in skills related to dispute settlement) and/or defense assistance for particular cases;

– **Funding options**; and

– Options relating to **structural design and core principles**.

***Code of Conduct***

Here too there was substantial agreement about the desirability of developing a code of conduct, ideally in coordination with ICSID. As with the advisory center, the goal of these initial discussions was to provide the Secretariat with information and guidance toward developing a draft. WGIII requested that the Secretariat begin to develop a draft code with options relating to:

– **Scope and application** – the code should be binding and universal for all States that choose to adopt it, detailed but flexible, and applicable not only to arbitrators but also secretariats and staff;

– **Content** – drawing largely on the Secretariat paper 167 (here) but with special emphasis on independence, including rules on double-hatting and issue conflict, integrity, efficiency, confidentiality, competence, and disclosure; and

– **Enforcement** – requesting options for rules that are binding and enforceable, exploring possibilities for imposing material sanctions on violators (but without being overly draconian in ways that might, perversely, lead to underenforcement).

***Third Party Funding***

While a few Delegations suggested that banning third party funding might be appropriate, many were in favor of simply regulating the practice – largely through a disclosure regime. Several others resisted the notion of regulating third party funding at all. WGIII requested that the Secretariat work on options along a spectrum, from a simple ban to a range of regulatory regimes. In particular, WGIII requested options relating to:

– The **definition** of third party funding – which can be relatively narrow (direct funding of claims for impecunious clients) or quite capacious (potentially ranging from complex claims financing arrangements to, in the extreme, even contingency fee arrangements);

– The **types of required disclosures** – the existence of third party funding, the identity of the funder, and/or aspects of the funding agreement;

– The tribunal's **general discretion** to order disclosures;

– The **nature of disclosures** – *g.*, total transparency or in camera review; and

– **Enforcement**, which might intersect with the code of conduct (noting, here too, that sanctions may be desirable but overly draconian sanctions might be counter-productive).

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Going forward, the goal seems to be to engage in similar high level discussions of each reform option on the project schedule over the next two Sessions, and to circle back to more concrete discussions on each topic seriatim. These things

take time. But the process is now in full swing. The 38th Session in Vienna should be remembered as a key pivot in the reform of ISDS. WGIII is now fully down to brass tacks – engaged in the business of institutional design, cost-benefit analysis, and prioritization.

[**Editorial note:** This post first appeared on the *International Economic Law and Policy Blog.*]

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