

UNCITRAL Working Group III - Reform of Investor-State Dispute Settlement
Informal online meeting on 6-10 December 2021, 1 - 3 pm (CET)

The UNCITRAL Secretariat is organizing five two-hour informal meetings on 6 to 10 December on the following topics:

- Mediation - Dispute prevention and mitigation (1 meeting)
- Financing aspects of a multilateral permanent investment tribunal (1 meeting)
- Shareholders claims for reflective loss (1 meeting organized jointly with the OECD)
- Multilateral instrument on ISDS reform (2 meetings)

The purpose of the meetings is to consider informally draft documents prepared by the Secretariat on these topics, which will be available in due course on the website of UNCITRAL [here](#). The purpose is also to explore topics in detail in order to support delegations in their preparation for the next Working Group meetings at which these topics will be considered and make such discussions more efficient. In addition, informal meetings can be helpful in providing technical support to the Secretariat tasked with the preparation of revised versions of the working papers to be formally presented to the Working Group. No decisions will be taken at these meetings.

The discussions will be guided by the Chair and the Rapporteur who will briefly introduce the topics. Interested delegations will be invited to make brief introductory remarks. Delegations will then be invited to informally raise any questions, share their views and make suggestions.

The meetings will not be recorded. The Chair and the Rapporteur will prepare a brief summary in English and French that will be posted on the website, the purpose being to provide information to those delegations which were not able to attend, and to highlight the proposals made. Comments will not be attributed to States or specific delegates.

The meetings are open for participation to all UNCITRAL Working Group III delegations. They will be held in English and French, with the interpretation being sponsored by the German Federal Ministry for Economic Cooperation and Development (BMZ).

The meeting will be held online. The meeting link will be circulated in due course.

Programme

6 December

Opening of the informal meetings week and introduction

Welcome remarks by Anna Joubin-Bret, Secretary, UNCITRAL.

Introduction into the topics scheduled to be addressed this day by Natalie Morris-Sharma, Rapporteur, Working Group III and Shane Spelliscy, Chair, Working Group III.

Interested delegations will also be invited to make brief introductory remarks.

Topics for consideration: Mediation - Dispute prevention and mitigation

-1- Mediation

The discussion will be conducted on the basis of the draft documents prepared by the Secretariat available [here](#) and delegations will be invited to consider:

- The draft model clauses for investment treaties
- The draft guidelines for the use of mediation in ISDS
- The means to foster the use of mediation in ISDS

Questions for consideration include:

- How to ensure States legal and policy framework sustain and encourage mediation and other forms of amicable dispute settlement?
- How could the reluctance/ resistance of mediation/ ADR be addressed and cured?
- To what extent would mandatory mediation be feasible and efficient?
- Is it necessary to clearly differentiate between mediation and other forms of ADR in dispute resolution clauses of investment treaties?
- How to reconcile between transparency and confidentiality as competing interests in context of mediation?

-2- Dispute prevention and mitigation

The discussion will be conducted on the basis of the draft documents prepared by the Secretariat available [here](#) and delegations will be invited to consider:

- The role of a lead agency
- Whether and when to establish a single agency, an inter-institutional commission or an ad hoc solution (depending on the concrete case)
- Which mechanism to establish to ensure awareness of the impact of new legislation and policy changes on investment obligations and to monitor identified issues

7 December

Introduction

Introduction into the topics of the day by Natalie Morris-Sharma, Rapporteur, Working Group III and Shane Spelliscy, Chair Working Group III.

Interested delegations will also be invited to make brief introductory remarks.

Topic for consideration: Cost of establishing a standing multilateral tribunal

A note, to be made available in due course on the website of UNCITRAL, presenting the cost of establishing permanent bodies generally, and the assumptions for determining the costs of establishing a standing multilateral tribunal will be presented by the Secretariat to delegations.

8 December

Introduction

Introduction into the topics of the day by Natalie Morris-Sharma, Rapporteur, Working Group III and Shane Spelliscy, Chair Working Group III.

Interested delegations will also be invited to make brief introductory remarks.

Topic for consideration: Shareholders claims for reflective loss

This meeting will be held jointly with the OECD

Delegations will be invited to consider the topic of shareholders claims for reflective loss on the basis of document [A/CN.9/WG.III/WP.170](#). A note presenting draft provisions on shareholders claims for reflective loss will also be made available in due course on the website of UNCITRAL.

9-10 December

Introduction

Introduction into the topics of the day by Natalie Morris-Sharma, Rapporteur, Working Group III and Shane Spelliscy, Chair Working Group III.

Interested delegations will also be invited to make brief introductory remarks.

Topic for consideration: Multilateral instrument on ISDS reform

Delegations will be invited to consider the topic of a multilateral instrument on ISDS reform on the basis of document [A/CN.9/WG.III/WP.194](#). A multilateral instrument would aim at providing the framework for the implementation of various reform options. The instrument could include specific provisions and annexes, addressing various reform options, it can also foresee the preparation of protocols for addressing possible developments. A further possibility would be for the instrument to also set-up a multilateral institution for investment dispute settlement that would allow States to

choose among different modes of dispute settlement administered by the institution (reformed investor-State arbitration, inter-State arbitration, use of a multilateral standing mechanism, domestic remedies).

Comments received on document [A/CN.9/WG.III/194](#) will be presented by the Secretariat. Delegations will be invited to consider:

- Whether there should be core provisions or minimum standards that should be adopted in the multilateral instrument and that all parties to that instrument must accept; if so, what should such core provisions or minimum standards address in order to result in an agreeable multilateral framework?
- How to organize the relation between the multilateral instrument and the underlying investment treaties? Whether the instrument should apply to both existing and future investment treaties?
- What guiding principles should apply to determine the reform options that should be included in a multilateral instrument? For instance, should it be the nature of the instrument to implement the specific reform option?
- Based on the assumption that the multilateral instrument would cover different reform options, should combinations of various options be provided for? How would the process of opting into or out of the reform options work? How to ensure the necessary level of flexibility, allowing each State to choose the reforms it wishes to implement, while ensuring consistency in the overall regime? Should the instrument include the flexibility to allow over time accession by States Parties to certain reform options?
- What form for a multilateral instrument would be the most appropriate to keep the ISDS reformed framework coherent and relatively easy to refer to and understand for users?

Background documents

The following documents contain information on the history and current status of the discussions in Working Group III and provide for a basis for the discussions. Further material can be found on the [UNCITRAL website](#).

- [Draft Working Paper](#) on mediation and other forms of alternative dispute resolution (ADR) (open for comments by delegation until 31 December 2021)
- [Draft Working Paper](#) on mediation and other forms of alternative dispute resolution (ADR) – Add. 1 (open for comments by delegation until 31 December 2021)
- [A/CN.9/WG.III/WP.190](#) - Note by the Secretariat on dispute prevention and mitigation - Means of alternative dispute resolution
- [A/CN.9/WG.III/WP.170](#) - Note by the Secretariat on shareholder claims and reflective loss
- [A/CN.9/WG.III/WP.194](#) - Note by the Secretariat on multilateral instrument on ISDS reform
- [A/CN.9/WG.III/WP.142](#) - Note by the Secretariat on possible reform of investor-State dispute settlement (ISDS)
- [A/CN.9/1044](#) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020)
- [A/CN.9/1004](#) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)
- [A/CN.9/970](#) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)
- [A/CN.9/964](#) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)
- [A/CN.9/935](#) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018)
- [A/CN.9/930/Rev.1](#) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) - Part I
- [A/CN.9/930/Add.1/Rev.1](#) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) - Part II
- Academic Forum on ISDS papers available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/>