

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:

- Code of Conduct – Article 11 (Compliance with the code of conduct) and means of implementation (1 meeting organized jointly with ICSID)
- Financing aspects of a multilateral 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 working papers and 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 meeting 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: Code of Conduct – Article 11 (Compliance with the code of conduct) and means of implementation

This meeting will be held jointly with ICSID

-1- Code of Conduct – Article 11

The discussion will be conducted on the basis of the note prepared by the Secretariat ([A/CN.9/WG.III/WP.209](#)) available [here](#). Delegations will be invited to consider draft article 11 (Compliance with the Code of Conduct), which reads: “1. Every Adjudicator and Candidate shall comply with the applicable provisions of this Code. 2. The disqualification and removal procedures in the applicable rules or treaties shall apply to this Code. 3. [Other options based on means of implementation of the Code.]”

Article 11 reflects the expectation that the primary method of implementing the Code will be through voluntary compliance. It may be noted that the availability of disqualification and removal procedures will depend on the rules or treaties applicable to the IID. Accordingly, article 11(2) does not create additional grounds for disqualification or removal under the applicable rules or treaties, including under mandatory domestic laws applicable in ad hoc arbitrations. For example, under the UNCITRAL Arbitration Rules (2013), an arbitrator could only be disqualified “if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence.” Similarly, in ICSID arbitration proceedings, an arbitrator could only be challenged for manifest lack of the qualities referred to in article 14(1) of the Convention or because the person was ineligible for appointment.

A related issue concerns a failure to disclose pursuant to article 10 of the Code. Article 10(5) provides that “the fact of disclosure or failure to disclose does not by itself establish a breach of this Code.” Various views were insofar expressed.

Questions for consideration include:

- Whether a failure to disclose under article 10 should or not be in itself a ground for disqualification (Article 10(5) provides that “the fact of disclosure or failure to disclose does not by itself establish a breach of this Code.”)

- Some comments noted that a failure to disclose is not in itself a ground for disqualification, but that it could be factually relevant to establishing a breach of the Code;
- Other comments suggested that a “serious,” “repeated” or “wilful disregard” of the disclosure obligation should be subject to article 11(2) or could give rise to doubts about an adjudicator's independence and impartiality;
- The importance of any omission to disclose matters giving rise to a conflict would depend on the circumstances of the case;
- What other possible sanctions could be provided for (Article 11(3) remains bracketed for further consideration of possible sanctions).

-2- Means of implementation of the code of conduct

The discussion will be conducted on the basis of the note prepared by the Secretariat ([A/CN.9/WG.III/WP.208](#)) available [here](#) and delegations will be invited to consider the various means suggested in the note.

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](#).

- [A/CN.9/WG.III/WP.208](#), Investor-State dispute settlement (ISDS) reform – Draft code of conduct: Means of implementation and enforcement
- [A/CN.9/WG.III/WP.209](#), Possible reform of investor-State dispute settlement (ISDS) – Draft Code of Conduct
- [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.ius.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/>