

## Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Issues

Submission to UNCITRAL Working Group III on ISDS Reform, contributed by International Institute for Environment and Development (IIED), Columbia Center on Sustainable Investment (CCSI), and International Institute for Sustainable Development (IISD)<sup>1</sup>

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1. At its 36<sup>th</sup> session (Vienna, 29 October – 2 November 2018), the Working Group identified three broad categories of concerns for which ISDS reform was deemed desirable:
  - Concerns relating to the lack of consistency, coherence, predictability and ‘correctness’ of arbitral decisions;<sup>2</sup>
  - Concerns relating to arbitrators and decision makers;<sup>3</sup> and
  - Concerns relating to costs and duration of ISDS cases.<sup>4</sup>
  
2. In addition, at its 37<sup>th</sup> session (New York, 1 – 5 April 2019) the Working Group concluded that reform was desirable in order to address concerns related to the definition and to the use or regulation of third-party funding in ISDS.<sup>5</sup> At its 37<sup>th</sup> session, the Working Group also engaged in a discussion to identify possible additional concerns not already addressed in its deliberations. The Working Group discussed the following issues:
  - Means other than arbitration to resolve investment disputes as well as dispute prevention methods;<sup>6</sup>
  - Exhaustion of local remedies;<sup>7</sup>
  - Implications for third parties, and the role of third-party participation, including participation both by the general public and by local communities affected by the investment or the dispute at hand;<sup>8</sup>

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<sup>1</sup>This submission was prepared by Lorenzo Cotula (IIED), Thierry Berger (IIED), Lise Johnson (CCSI), Brooke Güven (CCSI) and Jesse Coleman (CCSI).

<sup>2</sup>United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (Vienna, 29 October–2 November 2018)* (hereinafter “36<sup>th</sup> Session Report”). Concerns include: 1) divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency (36<sup>th</sup> Session Report, para. 39); 2) lack of a framework to address multiple proceedings (*ibid.*, para. 53); and 3) limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions (*ibid.*, para. 63).

<sup>3</sup>Including: 1) lack or apparent lack of independence and impartiality (36<sup>th</sup> Session Report, para. 83); 2) limitations in existing challenge mechanisms (*ibid.*, para. 90); 3) lack of diversity of decision makers (*ibid.*, para. 98); and 4) qualifications of decision makers (*ibid.*, para. 106).

<sup>4</sup>Including: 1) lengthy and costly ISDS proceedings and the lack of a mechanism to address frivolous or unmeritorious cases (36<sup>th</sup> Session Report, paras. 122 and 123); 2) allocation of costs in ISDS (*ibid.*, para. 127); and 3) concerns regarding the availability of security for cost in ISDS (*ibid.*, para. 133).

<sup>5</sup>UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1–5 April 2019)* (hereinafter “37<sup>th</sup> Session Report”), para. 25.

<sup>6</sup>*Ibid.*, para. 29.

<sup>7</sup>*Ibid.*, para. 30.

<sup>8</sup>*Ibid.*, paras. 31-33.

- Investor obligations and counterclaims;<sup>9</sup>
  - Regulatory chill;<sup>10</sup> and
  - Damages.<sup>11</sup>
3. The Working Group noted that these issues related to:<sup>12</sup>
    - Concerns that had already been identified (e.g. third-party participation, which the Working Group partly linked to concerns about the consistency and correctness of arbitral decisions;<sup>13</sup> and damages, which the Working Group linked, “for example”, to concerns about correctness of arbitral decisions<sup>14</sup>);
    - Tools to be considered by the Working Group in Phase 3 of its mandate (e.g. means other than arbitration to resolve investment disputes as well as dispute prevention methods;<sup>15</sup> exhaustion of local remedies<sup>16</sup>); and
    - “Guiding principles for developing reforms” (e.g. addressing regulatory chill, including with regards to the “inherent asymmetric nature of the ISDS system, costs associated with the ISDS proceedings, and high amount of damages awarded by tribunals”;<sup>17</sup> not foreclosing “consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so”<sup>18</sup>).
  4. Based on these observations, the Working Group resolved to consider the issues listed in paragraph 2 above as part of its exploration of possible reforms to address the concerns that have been identified (rather than as additional concerns at the current stage).<sup>19</sup> In effect, the Working Group framed these aspects as ***cross-cutting issues*** to be considered in Phase 3 of the Working Group’s mandate.
  5. The Working Group reiterated that this conclusion “did not preclude other concerns to be identified and dealt with at a later stage of the deliberations”.<sup>20</sup> It also noted that any work by the Working Group would need to take into account developments in investment treaties, so that the solutions developed by the Working Group are flexible enough to adapt to a rapidly changing international policy context.<sup>21</sup>
  6. To support the Working Group in the implementation of this approach, Table 1 illustrates how consideration of the cross-cutting issues affects the contours of the concerns the Working Group has identified, and of possible options for reform. Separate submissions to the Working Group discuss in greater detail: implications for third parties and issues concerning third-party participation;<sup>22</sup> regulation of third-party funding (and draft text to

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<sup>9</sup> *Ibid.*, paras. 34-35.

<sup>10</sup> *Ibid.*, paras. 36-37.

<sup>11</sup> *Ibid.*, para. 38.

<sup>12</sup> *Ibid.*, para. 39.

<sup>13</sup> *Ibid.*, para. 33; see also 36<sup>th</sup> Session Report, paras 59, 61.

<sup>14</sup> 37<sup>th</sup> Session Report, para. 38.

<sup>15</sup> *Ibid.*, para. 29.

<sup>16</sup> *Ibid.*, para. 30.

<sup>17</sup> *Ibid.*, paras. 36-37.

<sup>18</sup> *Ibid.*, para. 35.

<sup>19</sup> *Ibid.*, para. 39.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, para. 40.

<sup>22</sup> CCSI, IIED and IISD, Third Party Rights in Investor-State Dispute Settlement: Options for Reform (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019).

accomplish this objective);<sup>23</sup> and a multilateral framework on termination and withdrawal of consent, which illustrates how the UNCITRAL process could be used to provide space for other means of dispute settlement.<sup>24</sup>

7. The issues identified in Table 1 are relevant to the Working Group's discussion of reform options, including those identified as more structural in nature, those that can be applied to the current ad hoc ISDS system, or those that straddle these lines. As illustrated in the Table, considering the cross-cutting issues will help ensure that, as the Working Group proceeds to the next phase of its reform discussions, it broadly surveys the range of potential options and takes a holistic view of their implications. In practice, it would mean that:
  - The cross-cutting issues are fully integrated in the Working Group's work and reflected in its project schedule(s);
  - Working Group sessions devoted to reform options for the concerns identified further consider how the cross-cutting issues affect the concern at stake and related reform options;
  - The Working Group periodically revisits whether developments in its deliberations warrant additional concerns to be specifically identified and addressed;
  - The cross-cutting issues are duly considered in any activities organised in connection with the work of the Working Group, such as seminars, colloquia or online discussions that are formally or informally linked to the Working Group;
  - The Working Group and the UNCITRAL Secretariat are endowed with adequate resources to consider the cross-cutting issues and their implications for reform options, including development of any technical analysis necessary to support the Working Group's deliberations.

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<sup>23</sup> CCSI, IISD and IIED, Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019).

<sup>24</sup> CCSI, IIED and IISD, Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019).

**Table 1. Cross-cutting issues: illustrative implications for Phase 3 of the Working Group’s mandate**

Concerns identified →  Cross-cutting issues ↓	Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions	Concerns pertaining to arbitrators and decision makers	Concerns pertaining to cost and duration of ISDS cases	Concerns pertaining to third-party funding
<b>Means other than arbitration to resolve investment disputes as well as dispute prevention methods</b>	Consider alternatives to ISDS, such as domestic courts, ombudsmen, ADR and state-to-state dispute settlement Consider limits on the causes of action that can be pursued through ISDS (e.g. to denial of justice) Consider rules on referral to other courts and/or expert bodies and on staying ISDS disputes while related proceedings are pending that might narrow or resolve issues relevant to the ISDS claim or defence			
<b>Exhaustion of domestic remedies</b>	Consider requiring exhaustion as a means of clarifying and crystallising the scope of legal and factual issues for resolution at the international level, potentially reducing scope for inconsistent or incorrect decisions	Consider requiring exhaustion for all or some causes of action so as to more clearly allocate primary responsibility for deciding different issues of law and fact between different domestic and international adjudicators, each with different sociocultural backgrounds, areas of expertise and powers of review	Consider effect on duration of ISDS proceeding and duration of overall proceeding from initiation of claim through post-award challenges	Consider the effect of exhaustion on the nature and availability of third-party funding of claims
<b>Implications for third parties<sup>25</sup></b>	Consider participation by actors specifically affected by the investment or the dispute, beyond <i>amicus curiae</i>	Consider ways to ensure decision makers have expertise in key relevant areas of law, including outside of	Consider arrangements to ensure that enhanced third-party participation does not	Consider whether/how disclosure or other rules regarding third-party funding

<sup>25</sup> Further discussion of implications for the rights of third parties is in the separate submission “Third Party Rights in Investor-State Dispute Settlement: Options for Reform”, supra note 23.

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	<p>submissions, in order to promote correct interpretation and application of all relevant norms</p> <p>Consider dismissal or reframing of claims where affected third parties cannot be joined, so as to prevent inconsistent and incorrect interpretations of their rights</p>	<p>investment law, and in issues raised by community-investor disputes</p> <p>Consider processes for referral to other courts and/or expert bodies and stays of proceedings pending resolution of third parties' rights</p>	<p>unduly increase cost or duration<sup>26</sup></p> <p>Consider rules on dismissal where impacts on affected third parties give rise to risks of multiple proceedings</p> <p>Consider how addressing issues relating to third parties may affect overall cost and duration, including by avoiding or consolidating claims</p>	<p>would govern participation by and/or funding of third parties</p>
<b>Counterclaims</b>	<p>Consider providing greater clarity regarding issues on which arbitral jurisprudence is divided (e.g. nature of the required connection between claim and counterclaim)</p> <p>Consider how use of counterclaims can address issues of inconsistency across</p>	<p>Consider ways to ensure decision makers have expertise in key relevant areas of law, including investor legal compliance issues</p> <p>Consider processes for referral to other courts and/or expert bodies and stays of proceedings for resolution of counterclaims</p>	<p>Consider arrangements to ensure that counterclaims do not unduly increase cost or duration<sup>27</sup></p> <p>Weigh costs and benefits of permitting counterclaims with costs and benefits of requiring those claims to be pursued in different fora</p>	<p>Consider whether/how disclosure or other rules regarding third-party funding would govern state receipt of funding in the context of counterclaims</p>

<sup>26</sup> This may involve, for example, case management rules including strict deadlines and limiting size of party and third-party submissions. However, the Working Group emphasised that “ensuring due and fair process as well as guaranteeing the quality and correctness of the outcomes should not be sacrificed for the sake of speedy resolution of ISDS” (36<sup>th</sup> Session Report, para. 117).

<sup>27</sup> Commentary in the previous footnote applies *mutatis mutandis*.

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	<p>otherwise separate proceedings</p> <p>Consider how to ensure consistency and coherence across legal regimes, including by allocating decision making authority across those regimes</p>			
<b>Regulatory chill</b>	<p>Consider removing or restricting access to ISDS through, e.g.:</p> <ul style="list-style-type: none"> <li>- Requiring exhaustion of local remedies</li> <li>- Limiting some or all causes of action or issues to state-to-state dispute resolution<sup>28</sup></li> <li>- Including state-to-state filters that claims must pass through before going to ISDS</li> </ul>			
	<p>Consider arrangements to increase consistency and predictability (e.g. an appeal mechanism), in order to mitigate regulatory chill concerns</p> <p>Consider providing greater clarity regarding rules for</p>	<p>Consider clarifying rules on deference to factual and legal determinations and policy preferences of domestic (or other) government bodies or adjudicators</p>	<p>Consider issues concerning calculation of damages, as well as legal and arbitration costs, in order to reduce the incentive to sue for monetary damages, reduce the overall financial cost of ISDS and mitigate its impact on public decision making</p>	<p>Consider transparency of third-party funding and funding arrangements in order to understand the role of third-party funding in ISDS and its impact on certain categories of claims</p> <p>Consider whether to prohibit funding or otherwise limit the</p>

<sup>28</sup> This could draw on the approach used in the renegotiated North American Free Trade Agreement. A convention could be used whereby states could substitute state-to-state dispute settlement for ISDS for some or all causes of action, for some or all treaties. A discussion of how this could be done is in the separate submission “Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements”, supra note 25.

Concerns identified →  Cross-cutting issues ↓	Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions	Concerns pertaining to arbitrators and decision makers	Concerns pertaining to cost and duration of ISDS cases	Concerns pertaining to third-party funding
	dismissing frivolous claims and related costs		Consider making “costs follow the event” the default rule  Consider requiring security for costs  Consider sanctions against counsel for frivolous or abusive claims  Consider strengthened pleading standards	types of claims that can be funded <sup>29</sup>
<b>Calculation of damages</b>	Consider arrangements to increase consistency and predictability as regards the burdens of proof and the legal standards for assessing damages  Consider increasing consistency with norms regarding damages assessments in other relevant areas of law and policy	Expand availability of review for errors of fact and law in damages assessments	Consider clarifying the evidence required and the methods used for the calculation of damages, so as to reduce the overall financial cost of ISDS  Consider rules on early disclosure of nature of damages claims and support for those claims  Consider clarifying rules on cost shifting, interest, and recoverability	Consider clarifying the evidence required and the methods used for the calculation of damages, as well as legal and arbitration costs  Consider caps on the amount or percent of damages and/or interest a third-party funder may recover (to the extent such funding is permitted)

<sup>29</sup> See separate submission “Draft Text Providing for Transparency and Prohibiting Certain Forms of Third-Party Funding in Investor-State Dispute Settlement”, supra note 24.