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On the Forty-eighth Session of UNCITRAL Working Group III

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The forty-eighth session of UNCITRAL Working Group III (WGIII) on Investor-State Dispute Settlement (ISDS) reform was held in New York from April 1-5, 2024. The WGIII made significant progress in various reform areas. The European Union's proposal for a permanent Multilateral Investment Court is advancing, albeit with mixed support. A Code of Conduct, developed with ICSID and adopted in 2023, remains contentious. Likewise, discussions focused on the draft statute for an Advisory Centre on International Investment Dispute Settlement, revised guidelines for dispute prevention, and a draft statute for a Permanent Mechanism for ISDS. Despite progress, core criticisms of the ISDS system—transparency, balance of rights, and rule clarity—remain inadequately addressed. This document considers some of the progress made and the need to provide more time for discussions on procedural and cross-cutting issues, which are crucial for developing countries to achieve balanced and inclusive outcomes.

La quarante-huitième session du Groupe de Travail III (GTIII) de la CNUDCI sur la réforme du Mécanisme de règlement des différends entre investisseurs et États (ISDS) s'est tenue à New York du 1er au 5 avril 2024. Le GTIII a réalisé des progrès significatifs dans divers domaines de réforme. La proposition de l'Union européenne relative à une Cour multilatérale d'investissement permanente progresse, bien qu'avec un soutien mitigé. Un Code de conduite, élaboré avec le CIRDI et adopté en 2023, reste controversé. De même, les discussions se sont concentrées sur le projet de statut d'un Centre consultatif sur le règlement des différends en matière d'investissement international, sur des lignes directrices révisées pour la prévention des différends et sur un projet de statut d'un Mécanisme permanent pour l'ISDS. Malgré les progrès, les principales critiques du système ISDS - transparence, équilibre des droits et clarté des règles - restent insuffisamment traitées. Ce document examine certains des progrès réalisés et la nécessité de consacrer plus de temps aux discussions sur les questions procédurales et transversales, qui sont cruciales pour que les pays en développement puissent obtenir des résultats équilibrés et inclusifs.

La cuadragésima octava sesión del Grupo de Trabajo III (GTIII) de la CNUDMI sobre la reforma del Sistema de Solución de Controversias entre Inversores y Estados (ISDS) se celebró en Nueva York del 1 al 5 de abril de 2024. El GTIII logró avances significativos en varias áreas de reforma. La propuesta de la Unión Europea de crear un Tribunal Permanente Multilateral de Inversiones avanza, aunque con un apoyo desigual. El Código de Conducta, desarrollado con el CIADI y adoptado en 2023, sigue siendo polémico. Asimismo, los debates se centraron en el proyecto de estatuto de un Centro de Asesoramiento sobre Solución de Controversias relativas a Inversiones Internacionales, en las directrices revisadas para la prevención de controversias y en un proyecto de estatuto para un Mecanismo Permanente de ISDS. A pesar de los avances, las principales críticas al sistema ISDS -transparencia, equilibrio de derechos y claridad de las normas- siguen sin abordarse adecuadamente. En este documento se examinan algunos de los progresos realizados y la necesidad de dedicar más tiempo a los debates sobre cuestiones procedimentales y transversales, que son cruciales para que los países en desarrollo logren resultados equilibrados e inclusivos.

General issues

The forty-eighth session of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (hereinafter "WGIII") on Investor-State Dispute Settlement (ISDS) reform was held in New York from April 1 to 5, 2024. The WGIII was tasked "with a broad mandate to work on the possible reform of investor-state dispute settlement [...] while drawing on the widest possible range of available expertise from all stakeholders, would be government-led, with high-level input from all governments, consensus-based and fully transparent" [1]. According to the Report of Working Group III on its Forty-Eighth Session (here in after the "Report"), the session was attended by 54 Member States, 19 non-Member States, three intergovernmental organizations including the South Centre, and 30 non-governmental organizations [2].

After almost seven years of work and meetings, the progress of the ISDS reform negotiations clearly shows that the European Union's proposal for the establishment of a permanent Multilateral Investment Court (MIC) is moving forward step by step, despite doubts on its need and effectiveness by most members of the WGIII. In addition to this element, a Code of Conduct developed in collaboration with the International Centre for Settlement of Investment Disputes (ICSID) was adopted by the UNCITRAL Commission in July 2023 [3], despite the fact that it did not satisfy all Member States. There are ongoing discussions on the mediation and prevention of investment disputes, a Multilateral Advisory Center, the Appellate Mechanism and on the reform of procedural rules and cross-cutting issues.

It is important to bear in mind that the discussion of procedural rules and cross-cutting issues relates to some of the issues that have most affected States in the context of arbitral awards. However, little improvement has been made on these matters. These issues would require to be addressed if any real progress is to be made in solving the problems of consistency, predictability and correctness of arbitral awards. It is therefore to be hoped that these matters will be seriously considered and resolved before negotiations on the other formal issues of WGIII are advanced or finalized.

During the five days of the WGIII meeting in New York, a draft Statute of an Advisory Centre on International Investment Dispute Settlement [4] was discussed and adopted, with instructions from WGIII to the Secretariat to adjust the language provided for in various articles of the Statute. Also discussed were a revised draft set of Guidelines for the Prevention and Mitigation of International Investment Disputes [5], and an informal draft budget and the financing of the Advisory Centre [6]. Finally, WGIII discussed part of the draft statute of a Permanent Mechanism for the Settlement of International Investment Disputes and its annexes [7].

[1] Official Records of the United Nations General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), para. 264.

[2] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-eighth session (New York, 1-5 April 2024) (Advance copy), UN Doc. A/CN.9/1167. Available from https://uncitral.un.org/en/working_groups/3/investor-state.

[3] See: UNCITRAL, Code of Conduct for Arbitrators in International Investment Dispute Resolution, adopted by the United Nations General Assembly on 7 December 2023. Available from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf.

[4] UNCITRAL, Draft statute of an advisory centre on international investment dispute resolution (Note by the Secretariat), UN Doc. A/CN.9/WG.III/WP.238. Available from https://undocs.org/Home/Mobile?FinalSymbol=A%2FCN.9%2FWG.III%2FWP.238&Language=E&DeviceType=Desktop&LangRegu_ested=False.

[5] UNCITRAL, Draft guidelines on prevention and mitigation of international investment disputes (Note by the Secretariat). Available from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_235_rev_clean.pdf.

[6] UNCITRAL Working Group III, Budget and financing of an advisory centre – A sample. Available from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/budget_and_financing_of_an_advisory_centre_1.pdf.

[7] UNCITRAL, Annotations to the draft statute of a standing mechanism for the resolution of international investment disputes, UN Doc. A/CN.9/WG.III/WP.240 (Note by the Secretariat). Available from https://uncitral.un.org/en/working_groups/3/investor-state.

From its forty-sixth session in Vienna in October 2023, to April 2024, the WGIII has made remarkable progress in the discussions on the Advisory Centre on Investment Dispute Settlement. In only three and a half days, it managed to complete the second reading of the outstanding issues of Articles 1 to 8, the discussion and reading up to Article 16 and four annexes [8], reaching agreement on the entire document with some modifications agreed upon during the session, which the Secretariat will prepare -in accordance with the decisions and deliberations of the WGIII- for adoption at the 57th session of the Commission later in 2024 [9].

It was recognized that preparatory work is needed for the operation of the Centre, which can be carried out through an informal process involving interested United Nations (UN) Member States, as well as intergovernmental organizations and non-governmental organizations (NGOs), to address, *inter alia*, criteria for determining the location of the headquarters and regional offices, budget, collection of contributions, etc. For the implementation of the Centre, an intersessional meeting would be held in December 2024. Additional informal meetings would be held on the margins of the WGIII sessions in 2024 and 2025 to complete the work (see Report, para. 78).

The review of the revised draft Guidelines on the Prevention and Mitigation of International Investment Disputes [10] did not make progress due to differing views on whether the text was ready for adoption or not. Concerns were raised about the prescriptive language of legal standards and the imposition of new obligations on States. Therefore, the Secretariat was tasked to remove prescriptive language and instead refer to a non-binding set of tools and practices, creating no obligations or expectations to mandatorily adhere to the practices (Report, para. 83).

With the discussion of the Guidelines on the Prevention and Mitigation of International Investment Disputes set aside, the remaining time of the Forty-Eighth Session was devoted to the discussion of the draft Statute of the Permanent Mechanism for the Settlement of Investment Disputes [11], which the Secretariat considered to be a text consolidating the common elements in the form of a Protocol for the Mechanism (Report, para. 84).

Two different views were considered as to whether the reform elements of a standing mechanism and an appellate mechanism should be addressed in one protocol or in separate protocols (Report, para. 86). Thus, in view of different views and the need to make progress, the WGIII considered the draft provisions "in the context of a first-tier standing mechanism, without prejudice to the decision on how to proceed with the two elements of reform" (Report, para. 90). Thus, Articles 2 to 6 and 14 to 17 were read and discussed, with members making suggestions on the texts.

It is expected that five important meetings (see the table below) will be scheduled between the end of September 2024 and the beginning of April 2025, where substantial progress is expected, given that discussions on a number of reform elements to be presented to the Commission in 2025 need to progress (Report, paras. 115-116).

September 2024 – April 2025 Meetings

September 23-27 of 2024	Forty-ninth session	Vienna – Standing Mechanism, appellate mechanism, and procedural and cross-cutting issues as well as the MIIR.
October 24-25 of 2024	Intersessional meeting	Chengdu
January 20-24 of 2025	Fiftieth session	Vienna
March (early) 2025	Intersessional meeting	Seoul
April 7-11 of 2025	Fifty-first session	New York

[8] UN Doc. [A/CN.9/WG.III/WP.238](https://www.un.org/doc/undocpub/2023/09/23230901.pdf?OpenElement)

[9] See: UNCITRAL, Provisional agenda, annotations thereto and scheduling of meetings of the fifty-seventh session, UN Doc. A/CN.9/1157, para. 16. Available from <https://uncitral.un.org/en/commission>.

[10] See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp.235_rev_clean.pdf.

[11] See, UNCITRAL, Draft statute of a standing mechanism for the resolution of international investment disputes, UN Doc. A/CN.9/WG.III/WP.239 (Note by the Secretariat). Available from https://uncitral.un.org/en/working_groups/3/investor-state.

Despite concerns expressed by some developing countries about the increased number of informal meetings and the use of informal documents to make progress, two of such informal meetings will be held in South Korea and China. The commitment to hold the meetings in a hybrid format and, if resources permit, to provide interpretation in at least two official languages of the United Nations is not sufficient to ensure a wide participation of developing countries in these meetings, nor are efforts to provide travel support for some of these countries' delegations to attend them. As noted in the Report, the topics for discussion "would need to be adjusted to reflect the progress and agenda of the Working Group and the Commission" (Report, para. 117).

In light of the developments at the WGIII, the risk remains that the potential reforms will fall short and the most ambitious or controversial proposals that could benefit developing countries will be left at the back of the queue, raising serious concerns about when (and if) they will finally be discussed and adopted.

The way forward

At the Forty-Eighth Session, the WGIII made important progress on the reading and agreement on the Advisory Centre for International Investment Dispute Settlement, advanced the reading of the Permanent Mechanism for the Settlement of International Investment Disputes, and discussed informal documents on the budget and financing of an Advisory Centre and draft Guidelines on the Prevention and Mitigation of International Investment Disputes. None of these instruments and documents, however, address the core criticisms of the current ISDS system. These are the perceived lack of transparency, the imbalance of rights and obligations between state and investor, and the vagueness of its substantive rules, often shaped by the expansive interpretation of tribunals.

The time and resources devoted by the Secretariat and the WGIII to the discussion of the above-mentioned issues since 2020 [12] have been very high compared to the time and resources devoted to the procedural and cross-cutting issues, which can contribute to addressing key interests of developing countries in respect of the ISDS system.

Taking into account the number of sessions from the end of September 2024 to the first week of April 2025, there is a risk that the WGIII would not have enough time to discuss the procedural and cross-cutting issues to achieve a satisfactory result for the Global South, as the consideration of the issues of interest to the developed countries tends to dominate in most of the sessions.

The countries of the Global South today face a situation with a slow and a fast track of discussion. A slow track for the procedural and cross-cutting issues and a fast track for the Standing Mechanism and its supporting elements. This contradicts the consensus reached at the thirty-seventh session, where delegates agreed to work on two tracks simultaneously: "structural reforms" and "other potential solutions", and to allocate time to both in a balanced manner [13].

Developing countries should reiterate the need to have more time to address the procedural and cross-cutting issues and thereby avoid an agreement being reached on the other issues before the former are settled.

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[12] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, UN Doc. A/CN.9/1004/Add.1. Available from https://uncitral.un.org/en/working_groups/3/investor-state.

[13] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session, UN Doc. A/CN.9/970, paras. 82 and 83. Available from https://uncitral.un.org/en/working_groups/3/investor-state.

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