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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session (Vienna, 4 and 5 May 2021)

Contents

	<i>Page</i>
I. Introduction	2
II. Organization of the session	2
III. Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements	4
A. General remarks	4
B. Revised workplan	6
C. Summary	8
Annex	
Revised workplan	9



I. Introduction

1. At its fiftieth session, in 2017, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s).¹
2. At its thirty-seventh session, in April 2019, the Working Group considered a number of proposals for a workplan and agreed to discuss, elaborate, and develop multiple potential reform solutions simultaneously. The Working Group further agreed that a project schedule should be prepared to move the proposed solutions forward in parallel, to the maximum extent of the Working Group's capacity and in light of the tools available (A/CN.9/970, para. 81). Accordingly, a project schedule was agreed by the Working Group at its thirty-eighth session, in October 2019 (A/CN.9/1004*, paras. 25 and 27).
3. At its fifty-third session, in 2020, the Commission considered the resource requirements for the implementation of the work programme of the Working Group based on a note by the Secretariat (A/CN.9/1011).² Due to the limited time available at that session and divergence in views, the Commission was not able to come to a consensus on a proposed way forward and agreed that the topic would be considered at its next session, in 2021. In the meantime, the Commission encouraged the Working Group to continue to make progress on its mandate.³
4. Accordingly, at its thirty-ninth session in October 2020, the Working Group agreed on the process to develop a work and resourcing plan to support its work (A/CN.9/1044, para. 113).

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its resumed fortieth session in Vienna on 4 and 5 May 2021 in accordance with the decision on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease (COVID-19), adopted on 19 August 2020 by the States members of UNCITRAL (contained in document A/CN.9/1038), and extended by a decision dated 9 December 2020 (see document A/CN.9/LIII/CRP.14). Arrangements were made to allow delegations to participate in person at the Vienna International Centre and remotely.
6. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Ecuador, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Libya, Malaysia, Mali, Mauritius, Mexico, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.
7. The session was attended by observers from the following States: Angola, Armenia, Bahrain, Bolivia (Plurinational State of), Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cyprus, Egypt, El Salvador, Guatemala, Jamaica, Kuwait,

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

² *Ibid.*, *Seventy-fifth Session, Supplement No. 17 (A/75/17)*, part two, paras. 102–118.

³ *Ibid.*, para. 119.

Lithuania, Madagascar, Morocco, Myanmar, Panama, Portugal, Slovakia, Sweden, Timor-Leste, Tunisia and Uruguay.

8. The session was also attended by observers from the European Union and the Holy See.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: African Union (AU), Economic Community of West African States (ECOWAS), Gulf Cooperation Council (GCC), Hague Conference On Private International Law (HCCH), Organisation for Economic Co-operation and Development (OECD), Organisation of African, Caribbean and Pacific States (ACP), Organization for Petrol Exporting Countries (OPEC), South Centre and World Trade Organization (WTO);

(c) *Invited non-governmental organizations*: African Academy of International Law Practice (AAILP), African Association of International Law (AAIL), American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR), American Society of International Law (ASIL), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian Academy of International Law (AAIL), Asian International Arbitration Centre (AIAC), Asociación Americana de Derecho Internacional Privado (ASADIP), Association of Swiss Arbitrators (ASA), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Center for International Legal Studies (CILS), Centre for International Law (CIL), Centre of Excellence for International Courts iCourts, Centro de Estudios de Derecho, Economía y Política (CEDEP), China International Economic And Trade Arbitration Commission (CIETAC), Columbia Centre on Sustainable Investment (CCSI), Corporate Counsels' International Arbitration Group (CCIAG), Cyberjustice Laboratory (CRDP), European Federation for Investment Law and Arbitration (EFILA), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Geneva Centre for International Dispute Settlement (CIDS), Georgian International Arbitration Centre (GIAC), Institute for Transnational Arbitration (ITA), Inter-American Bar Association (IPBA), International and Comparative Law Research Center (ICLRC), International Association of Judicial Officers (UIHJ), International Association of Legal Science (IALS), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Dispute Resolution Institute (IDRI), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), Inter-Pacific Bar Association (IPBA), Kozolchyk National Law Center, Milan Chamber of Arbitration, Moot Alumni Association (MAA), Queen Mary University of London School of International Arbitration (QMUL), Singapore International Arbitration Centre (SIAC), New York International Arbitration Council (NYIAC), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

10. According to the decision made by the States members of the Commission (see para. 4 above), the following persons continued their offices:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

11. The Working Group had before it the following documents: (a) annotated provisional agenda ([A/CN.9/WG.III/WP.205](#)); and (b) note by the Secretariat on a

workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements ([A/CN.9/WG.III/WP.206](#)).

12. The Working Group adopted the following agenda:
 1. Opening of the session.
 2. Adoption of the agenda.
 3. Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements.

III. Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements

13. The Working Group considered the workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements as contained in document [A/CN.9/WG.III/WP.206](#). The Working Group expressed its appreciation to the Chair and the Rapporteur as well as the Secretariat for preparing the workplan, which provided a useful basis for considering the question of resource requirements.

A. General remarks

14. It was noted that the main objective of the workplan in document [A/CN.9/WG.III/WP.206](#) was to assist the Working Group in determining whether additional resources were needed to support the ISDS reform project. It was also noted that the workplan included an illustration of the additional conference time and other resources that would be required if work were to proceed on the basis of the schedule suggested in the workplan.

15. It was emphasized that the workplan was only notional, and adjustments would need to be made as the work progressed, for example, to incorporate any additional concerns or reform options identified by the Working Group or to adjust the sequencing of the work, depending on progress made. In that regard, reference was made to the question of damages and their assessment, on which the Secretariat was preparing a document for consideration by the Working Group. Reference was also made to the column in the work plan on ISDS procedural rules, under which some of the cross-cutting issues that had not been expressly identified in the workplan could be considered (for example, regulatory chill, exhaustion of local remedies and enforcement thereof, costs and allocations thereof, and immunity of respondent States against enforcement).

16. It was suggested that the workplan could be periodically reviewed and updated to reflect the progress made and the evolving circumstances. On the other hand, a view was expressed that, for the purpose of requesting additional resources, the workplan should be fixed and not be subject to further changes.

17. It was said that the workplan took into consideration the need to develop multiple reform options simultaneously and aimed at maintaining a balance between structural reforms and non-structural reforms, including the time allocated to each stream. Contrary views were expressed that the workplan appeared to prioritize a certain stream over another and that efforts should be made to ensure a balanced approach. Additional views were expressed that the workplan should consider that time requirements would vary by individual reform option and that that difference should not be equated with prioritization of options. Differing views were expressed on whether the work on a multilateral instrument on ISDS reform should begin at an earlier stage than reflected in the workplan or later following the development of the other reform options.

18. It was clarified that the categories of reform options in the workplan should be understood broadly, as they had been construed to allow for the consideration of a

number of issues that had been raised in the previous discussions of the Working Group.

Suggested increase in Working Group sessions and informal meetings

19. It was noted that the workplan was prepared on the basis of holding four one-week sessions per year from 2022 to 2024, which would entail two additional sessions per year compared to the current pattern. It was further noted that the workplan proposed the increased use of informal meetings during the intersessional periods (intersessional meetings, drafting groups, joint work with other organizations as well as supporting webinars). It was explained that such informal meetings were aimed at reducing the overall time required at formal Working Group meetings by facilitating a better understanding of the different positions of the delegations and keeping them informed of, and engaged in, the ongoing deliberations. It was clarified that no decisions would be made during such informal meetings.

20. A wide range of views were expressed in that regard. As to the proposed increase in the number of informal meetings, concerns were expressed about the constraints faced by some delegations, including technical difficulties to access online meetings. It was mentioned that attending all of the proposed meetings would be a significant burden, possibly exceeding the financial and human resource capacity of certain delegations, despite their willingness to devote their efforts to ISDS reform. In addition, it was mentioned that sufficient preparation time should be provided in-between the various meetings. It was emphasized that the increase in informal meetings should not result in reduced participation, which could harm the inclusive nature of the ISDS reform process.

21. Calls were made for increased capacity building and travel support for delegations from developing countries. It was also pointed out that interpretation should be provided for in such informal meetings.

22. On the need for financial assistance for travel and interpretation, States were reminded of the possibility to provide contributions to the UNCITRAL trust fund, and it was noted that the European Union, France, the German Federal Ministry for Economic Cooperation and Development (BMZ) and the Swiss Agency for Development and Cooperation (SDC) had made contributions to allow for the increased participation of developing States in the deliberations of the Working Group and to cover the interpretation costs of informal meetings.

23. The Working Group also took note of, and welcomed, the proposals by States to host intersessional meetings (in Seoul, Republic of Korea on 2 and 3 September 2021 on the topic of ISDS procedural rule reform and in Hong Kong, China on 20 and 21 October 2021 on the topic of investment mediation).

Approval in principle

24. The Working Group discussed a proposal in the workplan that reform options could be subject to “approval in principle” by the Commission in a staggered manner beginning in 2022. It was explained that the practice of “approval in principle” was generally used when the substance of a text was mature enough to be finalized by Commission but might need to be considered at a later stage as adjustments might be needed. It was explained that this meant that the Commission would approve the broad policy considerations reflected in the text presented for approval as well as its key objectives, general features, and structure. It was further explained that such an approach would ease the workload of the Commission and allow for a formal adoption of all of the reform options in 2025. It was said that “approval in principle” would provide the flexibility to return to any reform option in order to guarantee consistency and coherence with the other reform options. It was further said that many of the reform options were intertwined and could not be implemented on their own, particularly if a multilateral instrument were to be prepared to implement the reforms in a holistic fashion.

25. On the other hand, questions were raised as to why the results of the Working Group could not be formally adopted by the Commission once the work on each of the reform option was complete. It was said that some of the reform options could be developed in a rather short time frame, particularly those that could be prepared on the basis of recent developments in investment treaties. In that light, support was expressed for adoption of reform options on a rolling basis, which would make it possible to achieve tangible results sooner than later. However, concerns were expressed that such an approach might disrupt the balance between structural and non-structural reform options. It was further mentioned that the approval in principle by the Commission should only be of a preliminary nature and the entire package of reform options, including structural and non-structural reform options, would need to be adopted at the same time.

26. With respect to the adoption of a package of reform options, concerns were expressed that such a notion was contrary to the fundamental principle, inherent in the mandate of the Working Group, of allowing each State the choice of whether and to what extent it wished to adopt particular reform options. It was mentioned that, while the Working Group would negotiate all of the reform options for consideration by the Commission, consistent with the Working Group's mandate, there was no expectation that States would have to adopt all of the reform options, but each State would retain the flexibility to choose whether and to what extent to adopt any reform options the Working Group developed. It was also mentioned that, given the fact that not all reform options were suitable to be treated as a package, the comparison between ISDS reform and negotiations of a free trade agreement, where a single undertaking approach was frequently taken, was not an adequate analogy.

Modalities of the adoption of the report and other measures to enhance efficiency

27. The Working Group considered its practice of dedicating one day per one-week session for adopting its report. Support was expressed for utilizing that day for substantive deliberations and for adopting the report after the session through a procedure similar to that applied since the thirty-ninth session in October 2020. It was suggested that this would provide additional time to progress the work, thereby increasing efficiency. However, it was said that the change in practice was due to the restrictions in place for the holding of sessions during the COVID-19 pandemic and, therefore, should be considered temporary in nature.

Suggested date for conclusion of the reform project

28. In light of the estimated amount of work on the project remaining, and the increased in the number of both intersessional meetings and working group meetings proposed in the work plan, the Working Group noted that the target date for conclusion of the project would be 2025. The Working Group considered whether this target date was adequate. Some concerns were expressed that the envisaged conclusion in 2025 was unrealistic, and overly ambitious and would disproportionately disadvantage developing countries. It was also mentioned that there was no need to already fix a target date. Concerns were also expressed that the coronavirus disease 2019 (COVID-19) pandemic, which posed further obstacles, needed to be taken into account. On the other hand, it was argued that a more ambitious end date should have been envisaged considering the urgency and importance of ISDS reform and that, in any event, the end date should not be set later than 2025.

B. Revised workplan

29. In light of the discussions reflected above, a revised workplan was presented to the Working Group for its consideration on the final day of the session (see annex). The key elements of the revised workplan were as follows:

- Inclusion in the workplan of what was referred to as cross-cutting issues as well as the question of damages and their assessment, with specific allocation of time for the Working Group to give instructions on those topics at its forty-third session;
- The deletion of reference to “approval in principle” by the Commission and its replacement with the understanding that the Commission would consider the reform options on a rolling basis and decide on the appropriate action to be taken for each reform option;
- One (instead of two) additional working group session per year from 2022 to 2025 (four one-week sessions in total); and
- Extension of the workplan into 2026, with the scheduling of two sessions of the Working Group prior to the Commission session in 2026.

30. A number of delegations reserved their final position on the workplan and stated that they would give it further consideration. Among the delegations in a position to share views on the revised plan, support was expressed for the revised workplan as adequately addressing a number of concerns expressed about the workplan in document [A/CN.9/WG.III/WP.206](#) (referred to from hereon as the “original workplan”). It was felt that the revised workplan provided a balance between the view that work should be accelerated with additional resources and the other view that the workplan should reflect the possible limitations of some delegations to fully participate in the deliberations. It was also said that the flexibility of the workplan regarding sequencing and potential additional issues had been preserved, while ensuring that the momentum for reforms was not lost. It was said that requesting one additional working group session per year was suitable in light of the current budget situation in the United Nations.

31. With regard to damages and other cross-cutting issues, which were currently placed under the general category “ISDS Procedural Rules Reforms” in the revised workplan, it was mentioned that depending on the instruction to be given by the Working Group, some of those issues might deserve a separate workstream so as to be able to develop relevant reform options. In that context, it was suggested that, given the importance in the ISDS reform process of issues relating to damages and the exhaustion of local remedies, a separate stream should be devoted to these topics in the workplan and that the development of rules to be followed by arbitrators on assessment of damages and of a mechanism for the recognition and enforcement of final judgments rendered by domestic courts should be considered. In addition, it was suggested that, given the number of cross-cutting issues which had not been expressly mentioned in the workplan under the point “ISDS Procedural Rules Reform”, a footnote should be added to the workplan in which all the cross-cutting issues to be examined under the workplan would be included, to ensure more transparency and avoid any ambiguity on that matter. A view was expressed that considering the vast amount of issues to be considered within that category, additional time should be allocated to their consideration than that proposed in the revised workplan. Similarly, a view was expressed that more time should be allocated to the appellate mechanism and the multilateral permanent investment court in the revised workplan.

32. Support was expressed for the consideration and appropriate action by the Commission of the reform options on a rolling basis, which would make it possible for States to adopt such reform options in their investment treaty practice rather quickly than having to wait for the completion of the work on all the reform options. In that context, it was, however, suggested that a multilateral instrument on ISDS reform could only be finalized in the final stages of the workplan once the reform options themselves had been finalized. A question was raised on the meaning of “consideration and appropriate action”, in light of the view that deadlines should not be set for approval of reform options.

33. Concerns were focused particularly on the number of informal meetings, which remained the same in the revised workplan, although they would be spread over a

longer period of time than in the original workplan. It was reiterated that efforts should be made to ensure adequate participation in the informal meetings of all involved in the reform process, particularly those from developing countries, including by providing interpretation. It was suggested that the practice of holding hybrid meetings should continue even after the pandemic to accommodate delegations that have limited travel budgets, and in that context, it was suggested that the technical difficulties faced by some in accessing online platforms should be addressed. Views were expressed that the meetings, both informal and formal, should be adequately distributed throughout the calendar year (possibly every two months) so as to allow delegations to prepare for the meetings and to coordinate internally with their different stakeholders. It was suggested that the workplan should be reviewed periodically to ensure continued participation in the reform process which would be essential for consensus building.

34. It was also suggested that effort should be intensified to increase the efficiency of the work at the Working Group sessions by making use of the existing resources.

C. Summary

35. It was generally accepted that the revised workplan provided a workable roadmap for progress to be made by the Working Group, while emphasis was also put on the flexibility of any plan, so that the details could be adapted as progress was made. It was recalled that the workplan was, in this regard, only a guide for the Working Group, and that instead, the focus should be on the resource request and the factors that were driving it. Accordingly, while some reservations were expressed about certain aspects of the revised workplan, it was generally felt that working on the basis of a resource request for one additional one-week session per year from 2022 to 2025, was a workable compromise reflecting the divergence in views.

36. Accordingly, it was noted that the resource implications in document [A/CN.9/WG.III/WP.206](#) would need to be updated, in close consultation with the Department for General Assembly and Conference Management (DGACM) so as to provide an estimate of the required additional conference and supporting resources from 2022 to 2025, and to assist the Commission in making an informed decision on whether to request such resources from the General Assembly.

Annex

Revised workplan

		ADR Mechanisms and Dispute Prevention	Selection and Appointment of Arbitrators	Code of Conduct	ISDS Procedural Rules Reforms	Multilateral Advisory Centre	Appellate Mechanism	Multilateral Permanent Investment Court	Multilateral Instrument to Implement Reforms
2021	Inter-Sessional #40	Inter-Sessional Meeting - HK China (2 days)		Other Meetings w ICSID (2 day) / Drafting Group (2 days)	Other Meetings (2 days)/ Inter-Sessional Meeting – Republic of Korea (2 days)	Other Meetings (3 days)		Other Meetings (2 days)	
	Commission #54 - Decision on Resource Request								
	Working Group #41			First Reading (4 days)					
	Inter-Sessional #41	Other Meetings (2 days)			Other Meetings on Cross-Cutting Issues and Damages (3 days)			Drafting Group (2 days)	Other Meetings (2 days)
2022	Working Group #42					Instructions (1 day)		First Reading (3 days)	
			Other Meetings (1 day)				Inter-Sessional Meeting (2 days)	Inter-Sessional Meeting (2 days)	Other Meetings (1 day)
	Commission #55 – Consideration of the Code of Conduct								
	Working Group #43	Instructions (1 day)			Instructions on Cross-Cutting Issues and Damages (3 days)				
	Inter-Sessional #43						Drafting Group (2 days)	Drafting Group (2 days)	
	Working Group #44						First Reading (3 days)		Instructions (1 day)

	Inter-Sessional #44	Drafting Group (2 days)				Drafting Group (2 day)	Other Meetings (2 days)		
2023	Working Group #45	First Reading (4 days)							
	Inter-Sessional #45	Drafting Group (2 days)	Other Meetings (1 day)				Drafting Group (2 days)		Inter-Sessional Meeting (2 days)
	Working Group #46	Second Reading (2 days)				First Reading (2 days)			
	Inter-Sessional #46				Drafting Group (2 days)				
	Commission #56 – Consideration of ADR Mechanisms and Dispute Prevention Reforms								
	Working Group #47				First Reading (4 days)				
Inter-Sessional #47						Drafting Group (2 days)	Drafting Group (2 days)		
2024	Working Group #48						Procedural Rules (2 days)	Procedural Rules (2 days)	
	Inter-Sessional #48		Inter-Sessional Meeting (2 days)			Drafting Group (2 days)			
	Working Group #49					Second Reading (3 days)			Instructions (1 days)
	Inter-Sessional #49		Drafting Group (1 day)		Drafting Group (2 days)				
	Commission #57 – Consideration of a Multilateral Advisory Centre								
	Working Group #50		First Reading (2 days)			First Reading (resumed) (2 days)			
Inter-Sessional #50							Drafting Group (2 days)	Drafting Group (3 days)	
2025	Working Group #51							Second Reading (3 days)	First Reading (1 day)

	Inter-Sessional #51		Drafting Group (2 days)		Drafting Group (2 days)				Drafting Group (1 day)	
	Working Group #52				Second Reading (3 days)				First Reading (resumed) (1 day)	
	Inter-Sessional #52	Commission #58 - Consideration of ISDS Procedural Rules Reforms and a Multilateral Permanent Investment Court								
		Working Group #53						Second Reading (4 days)		
	Inter-Sessional #53									Drafting Group (3 days)
	2026	Working Group #54		Second Reading (2 days)						Second Reading (2 days)
Inter-Sessional #54									Drafting Group (2 day)	
Working Group #55									Second Reading (resumed) (4 days)	
Inter-Sessional #56		Commission #59 – Consideration of the Selection and Appointment of Arbitrators, Appellate Mechanism, and the Multilateral Instrument to Implement Reforms								
									Total	
Working Group days	7	4	4	12	6	9	8	10	60	
Other Meetings days	8	7	4	13	7	12	12	14	77	
Subtotal	15	11	8	25	13	21	20	24	137	

Year	Working Group days	Other Meeting days
2021	4	24
2022	12	16
2023	12	13
2024	12	12
2025	12	10
2026	8	2