

## UNCITRAL Working Group III: Moving forward towards consensus or losing balance?

By Daniel Uribe\* and Danish\*\*

### 1. Introduction

Since 2017, the United Nations Commission on International Trade Law (UNCITRAL) has entrusted its Working Group III (WG-III) with “a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS).”<sup>1</sup> At that time, it was clearly noted that the discussions on the possible reform of ISDS should consider States’ “different experiences and expectations”<sup>2</sup> with regards to their international investment agreements (IIAs) and the ISDS mechanism. According to the Commission, the WG-III would be “Government-led, with high-level input from all Governments, consensus-based and fully transparent,” and that it should:

- (a) identify and consider concerns regarding investor-State dispute settlement;
- (b) consider whether reform was desirable in the light of any identified concerns; and,
- (c) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.<sup>3</sup>

During its thirty-seventh session (2019), the WG-III decided to move to phase 3 of its mandate to “discuss, elaborate and develop multiple potential reform solutions simultaneously” and agreed to prepare a schedule 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.”<sup>4</sup> The WG-III identified issues related with the duration and costs of ISDS, and other issues such as security for costs, predictability and consistency, appointment of arbitrators, and conflicts arising from third-party funding as main elements for further discus-

### Abstract

This policy brief considers some concerns arising from the ongoing discussions on procedural reform of investor-State Dispute Settlement (ISDS) in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. It highlights the need to allocate sufficient time to deliberate upon the important issues being raised by developing countries. It further discusses some structural reform options that have been identified by the Working Group and reflects on some concerns arising from a possible ‘single undertaking’ approach being implemented through a future possible multilateral agreement on ISDS.

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*Le présent rapport sur les politiques examine certaines préoccupations apparues lors des discussions en cours sur la réforme du mécanisme de règlement des différends entre investisseurs et États au sein du IIIe groupe de travail de la Commission des Nations Unies pour le droit commercial international (CNUDCI). Il souligne la nécessité d'allouer le temps nécessaire pour débattre des questions importantes soulevées par les pays en développement. Il analyse en outre certaines des options recensées par le groupe de travail en matière de réforme structurelle et aborde les inquiétudes liées à la possible adoption, dans le cadre d'un futur accord multilatéral de règlement des différends entre investisseurs et États, du principe de « l'engagement unique ».*

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*En este informe sobre políticas se consideran algunas preocupaciones que han surgido a partir de los debates en curso sobre la reforma procesal del sistema de solución de controversias entre inversionistas y Estados (SCIE) del Grupo de Trabajo III de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI). En el documento se pone de relieve la necesidad de dedicar tiempo suficiente a deliberar sobre cuestiones importantes que han planteado los países en desarrollo. Además, en el informe se abordan algunas opciones de reforma estructural identificadas por el Grupo de Trabajo y se reflexiona sobre ciertas preocupaciones que plantea la adopción de un posible enfoque de “todo único” a través de un acuerdo multilateral sobre el SCIE que pudiera celebrarse en el futuro.*

\* Daniel Uribe is Lead Programme Officer of the Sustainable Development and Climate Change (SDCC) Programme, South Centre.

\*\* Danish is Programme Officer of the Sustainable Development and Climate Change (SDCC) Programme, South Centre.

sions by the group. The WG-III also emphasized that other additional procedural issues might be raised and considered in its future deliberations.<sup>5</sup>

After further discussions at its 39<sup>th</sup> session in October 2020, the WG-III decided to develop a work and resourcing plan considering all possible reform options.<sup>6</sup> In February 2021, the Chairperson and the Rapporteur of WG-III presented the initial draft of the work and resource plan (Plan), and requested delegations to submit written comments on it until 1<sup>st</sup> March 2021.<sup>7</sup> This Plan was further discussed during the resumed 40<sup>th</sup> session of the WG-III in May 2021 and a revised Plan was subsequently published.<sup>8</sup>

According to the WG-III, discussions must follow the principles of transparency, inclusiveness and flexibility.<sup>9</sup> Following previous experiences of UNCITRAL's working groups, the Secretariat has an active role in preparing working documents and drafts in consultation with experts, institutions and stakeholders, as well as in organizing informal meetings with the objective of advancing the preparation of formal sessions of the WG-III.<sup>10</sup>

Despite facing several limitations due to the COVID-19 pandemic, the WG-III has continued its work through hybrid meetings, with both in-person and remote participation. Although the flexibility shown by the WG-III demonstrates the potential of conducting international meetings through virtual means, participants from both developed and developing countries, as well as civil society have faced several technical obstacles, including limited connection and capacity to attend and effectively engage in all the meetings, webinars, and related online events being organized in the context of this process, which has been a significant barrier for participatory and open engagement.

This policy brief will first consider some concerns arising from the ongoing discussion on procedural reform of ISDS and the need to allocate sufficient time to respond to some of the issues brought to the attention of the WG-III by developing countries. Then, it will consider some options discussed by the Working Group about structural reform of ISDS, including the establishment of a multilateral investment court, an appellate body, and an advisory centre. Finally, it will discuss some issues arising from a possible 'single undertaking' approach implemented through a multilateral agreement.

## 2. Concerns emerging from discussions on procedural reform of ISDS

The need to modernize and reform international investment agreements has been clearly recognized by governments in WG-III.<sup>11</sup> Developing countries have been at the forefront of different bilateral and regional reform efforts, particularly looking at the need to safeguard the right of countries to adopt policies designed to achieve equitable, fair and sustainable development.<sup>12</sup> Nevertheless, the extent of such reform efforts

differs significantly among States at the bilateral, regional and multilateral levels revealing that reform approaches vary substantially among countries.

In terms of approaches to such reform, some countries have terminated their bilateral investment treaties, either consensually with their treaty partners or by withdrawing unilaterally<sup>13</sup>. Some developing countries have created alternatives to IIAs and the ISDS mechanism<sup>14</sup>; others have taken a wait-and-see approach, or have continued expanding their web of IIAs. Within this context, multiple questions have emerged regarding the extent to which IIAs incorporating ISDS facilitate or hinder successful linkages between foreign direct investment (FDI) and national development objectives and priorities, particularly considering long-term sustainable growth.

Mitigating ISDS risks, for example by promoting investment mediation and ombudsman offices for investors, is part of the modernization effort,<sup>15</sup> but strengthening the role of domestic jurisdictions to deal with investment disputes should also be a priority. ISDS has allowed domestic courts to be largely bypassed as it substitutes the use of domestic legal institutions by foreign investors.<sup>16</sup> International law should support governments to strengthen public institutions, including their administrative and judicial bodies. Nevertheless, ISDS allows international ad-hoc arbitral tribunals to "interpret and apply issues of domestic law from a commercial rather than public policy perspective."<sup>17</sup>

Another element that deserves attention is the effectiveness of the current language of the right to regulate incorporated in bilateral investment treaties (BITs). In the view of some countries, current BITs might preserve sufficient space for States to take public policy decisions, yet many developing countries have emphasized the limitations that current IIAs impose at different levels of public policy making. In the different sessions of the WG-III, delegations have expressed major concerns about limiting the reform of IIAs to only procedural matters, and how reform options should not be cosmetic and residual,<sup>18</sup> but consider systemic failures of ISDS, ranging from how substantive provisions are interpreted to how damages are assessed.<sup>19</sup>

In this context, it is also worth considering that IIAs may create costs and risks that outweigh the benefits deriving from FDI.<sup>20</sup> As ISDS involves human rights and public interest concerns, the discussion on the reform of "ISDS has to be located in a wider context and reform dialogue - to include reform of the terms of the underlying treaties, because reforming ISDS is in itself not sufficient to solve the current problems the regime faces."<sup>21</sup>

While the WG-III has scheduled discussions on reform of ISDS procedural rules,<sup>22</sup> the current allocation for discussion on this category is composed of more than seven different sub-categories, including frivolous claims, multiple proceedings, reflective loss, counterclaims, security for costs, third party funding and treaty interpretation, among others. Given that all reform options are intertwined and that solutions encountered on 'ISDS Procedur-

al Rules Reform' are cross-cutting to any structural reform options, majority of the discussions should be devoted to resolve these concerns effectively. This will allow the WG-III to respond to its mandate to identify, consider and develop any relevant solutions to be recommended to the Commission by 2026.<sup>23</sup>

### 3. The substantive effects of structural reform discussions

Discussions by the WG-III have considered 'structural reform' of ISDS, including the lack or apparent lack of independence and impartiality of decision makers in ISDS; the establishment of a permanent body for dispute resolution, and the establishment of an appellate mechanism. It has also considered the selection and appointment of ISDS tribunal members, in particular the lack of diversity and lack of transparency in the appointment process, and the need to guarantee independence, impartiality, and accountability of adjudicators.<sup>24</sup>

The draft Code of Conduct for adjudicators in international investment disputes, developed by the International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL<sup>25</sup>, is expected to address the lack of impartiality and independence of adjudicators. Although the draft Code of Conduct is a welcomed outcome, there are still several contentious issues pending for further discussions. General duties of adjudicators have now been removed, and now sets out a related obligation to "take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias."<sup>26</sup> Article 3.2 of the draft Code of Conduct includes an exemplary list of conducts that are forbidden, but the commentary to the draft article recognizes that "determination of whether there is a breach of the Code is highly fact dependent." The effects of disclosure are also not clear as Article 10.5 considers that disclosure is not in itself a breach of the code but will require disqualification and removal procedures will apply only to breaches included in Article 3 to 8 of the code.

A fundamental issue included in the draft Code is that of 'double hatting' for appointed arbitrators, which is directly linked to procedures aimed at regulating third party funding, preventing conflict of interests, and avoiding arbitrators being overburdened with simultaneous claims. While Article 4 considers the limitation of multiple roles for adjudicators as counsel or expert witness, it incorporates a caveat allowing disputing parties to agree on such multiple roles. This caveat could be translated into the possibility of arbitrators acting concurrently in several cases in different capacities. This seems to be in line with the removal of a provision on limitations of number of cases, which was previously included in Article 8 of the first draft, and was mostly opposed by acting arbitrators.<sup>27</sup>

Similarly, the need to differentiate between commercial and investment arbitration, including its impact on the appointment of arbitrators, has been a subject of

concern for different stakeholders. Determining qualifications for arbitrators that address some of the most common, yet significant matters brought to ISDS tribunals, including issues related to public international law, environmental law and human rights could serve to identify necessary expertise beyond investment and commercial law.

The WG-III has also considered the possible establishment of an appellate mechanism. The Working Group should consider whether having this mechanism is desirable and if so, what potential benefits and drawbacks it might offer. If an appellate mechanism is established, then it is important that any ISDS award rendered by an arbitration tribunal, whether *ad-hoc* or as part of a permanent court, should be subject to appeal for correcting errors of fact and errors of law.<sup>28</sup> Such scope should both encompass and be broader than those currently provided as grounds for annulment or setting aside of arbitral awards as included in existing legal instruments, such as national laws, the ICSID Convention, the New York Convention and others. It should also extend to the application or interpretation of so-called "standards" in international investment law, such as expropriation or fair and equitable treatment<sup>29</sup>, since these standards are themselves vague and ill-defined in existing investment treaties<sup>30</sup>.

Likewise, an appellate mechanism would also have to address the currently open questions regarding its applicable law and procedural rules. In case of a permanent standing body, the Working Group should also consider issues such as the possibility of it hearing appeals from *ad-hoc* tribunals, the participation of non-Member States, interactions with ICSID proceedings and the possibility for other stakeholders to submit appeals.

Regarding the standard of review to be used for appeals, the Working Group should consider the different legal traditions of its Members and accordingly allow for a wide range of deference to be provided. For instance, it must allow for *de novo* review when questions of human rights, public health and environmental protection are involved. These elements have become ever more relevant today as the international community is currently considering policies oriented to combat crises that threaten the whole of humanity, such as global pandemics<sup>31</sup> and climate change<sup>32</sup>. Any standard of review must therefore give due deference to the right to regulate and preserve policy space for taking these necessary actions.

However, the awards (or decisions) rendered by such appellate mechanism must themselves be subject to annulment proceedings. The World Trade Organization (WTO) rules for instance, provide that decisions of its Appellate Body are subject to scrutiny and adoption by the Dispute Settlement Body<sup>33</sup>, which could decide not to adopt the Appellate Body report. Without a similar process to keep in check any excess or overreach from any future appellate mechanism, their decisions and subsequent enforcement must remain subject to annulment proceedings.

The role of domestic judicial courts is also important for

the effective enforcement of arbitral awards, since they have a supervisory role and can annul or refuse to recognize and enforce the award under specific grounds within their jurisdiction<sup>34</sup>. This function can be leveraged and strengthened to provide further checks to any future appellate mechanism.

As UNCITRAL Working Paper 202<sup>35</sup> notes, the nature, scope and effect of an appeal would be dependent on the architecture of any future appellate mechanism. Members might consider whether at this point it is premature to be allocating significant effort in discussions and elaboration of options without clear guidance of the ultimate objective being sought to be achieved in this process. Given the discussions held in former Sessions of the Working Group, particularly the views expressed by developing countries, there is a need to allocate sufficient time to discuss structural reform options aimed towards promoting a holistic discussion of ISDS reform and guaranteeing regulatory space for States to achieve their development objectives.

#### 4. Use of a ‘single undertaking’ and ‘approval in principle’ for reform options in WG-III

A significant aspect of the discussions has been the focus on the ‘single undertaking’ approach for the implementation of the different reform options. A ‘single undertaking’ has been described as a negotiation ‘principle’ where “[v]irtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. [In other words] ‘Nothing is agreed until everything is agreed’”<sup>36</sup>.

This ‘principle’ has been extensively used in international negotiations for free trade agreements (FTAs) and at the WTO. For instance, it was expressly included as part of the 1986 Punta Del Este Ministerial Declaration, which states that, “The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking”<sup>37</sup>. It adds that “agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations...”<sup>38</sup> Similar language was also included in the Doha Ministerial Declaration of 2001<sup>39</sup>, wherein “the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis”<sup>40</sup>.

It is worth noting that the relevance of the single undertaking principle in the context of discussions at WG-III has been questioned by some delegations, who emphasized that the WG is not negotiating a FTA or an economic agreement, but considering options for ISDS reform. A take it or leave it approach will [therefore] not work.<sup>41</sup>

Similar concerns were also raised at the time when the ‘single undertaking’ was sought to be introduced

into the global trade regime. As has been noted, “The old GATT was not a single undertaking agreement. Contracting parties were free to be signatories of the various codes on an *a la carte* basis, in accordance to their needs and levels of development. In the course of the Uruguay Round, the developed countries made a concerted effort to push for the inclusion of new issues into the GATT - services, intellectual property and investment - and for these to be treated as parts of a ‘global accord’. That is, members had to accept all parts of the multilateral trading system or chose to opt out entirely.”<sup>42</sup>

There was an expectation that countries would be able to opt-in to the different agreements, including the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) which formed part of the Uruguay Round, but that did not materialize. For instance, reflecting India’s position in this context, it is considered that “India expected that the decision on the international implementation of the results would be taken by consensus, so that it would be free to decide whether to join the TRIPS Agreement or not. Once (...) USTR had come up with the ingenious device of creating a new treaty of which both a copied-and-pasted GATT and the TRIPS were an “integral part”, a refusal to join the TRIPS Agreement suddenly meant staying entirely outside of the multilateral trade regime; as a result, India’s leverage and ability to protect its own interests dissolved into thin air”<sup>43</sup>.

The experience of the single undertaking at the WTO has been mixed at best for developing countries. It has not prevented a fragmentation of the international trade regime through the recent proliferation of plurilateral and joint statement initiatives. In an already fragmented international investment regime, all countries do not have the same level of risks stemming from their existing IIAs. Many developing countries are already undertaking the reform and modernization of their investment treaties, and these processes continue apace with the discussions in WG-III. Given that scope of the WG-III reform outcomes is limited to procedural issues, it is extremely important to ensure that a ‘single undertaking’ approach for the proposed multilateral instrument does not limit any other possible substantive reforms or modernization of IIAs in the future.

Another element which requires close attention is the modality of ‘approval in principle’ at UNCITRAL. The draft Plan originally considered that “certain reform options would be subject to approval in principle by the Commission in a staggered manner beginning in 2022,” (para. 9) which seems to imply a referral of the draft text of certain reform options to the Commission as ‘provisional texts,’ which would be introduced as a ‘single undertaking’ for adopting any reform options as part of a ‘Multilateral Instrument to Implement Reforms’. However, at its resumed 40<sup>th</sup> session the WG-III decided to delete the 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”<sup>44</sup>. This could therefore include the

Commission giving ‘approval in principle’ or ‘recommending’ or ‘endorsing’ any reform option for States to voluntarily adopt and implement.

However, such draft texts will not have the legal status of a UNCITRAL outcome until it is formally adopted by the United Nations General Assembly, presently aimed to be completed and be ready for signature in 2026 as a ‘Multilateral Instrument’ adopted by UNCITRAL and the General Assembly.<sup>45</sup> Nevertheless, further clarity is still required on what such ‘approval in principle’ could imply at the Commission, with the WG-III Chairperson suggesting that it could mean different things in different contexts, particularly if it is ‘treaty text’ or as recommendations to States.<sup>46</sup>

There are concerns that any such ‘approval in principle’ might become analogous to the ‘early harvest’ scheme used in FTAs and at the WTO. For instance, while the Doha Round is considered as a single undertaking, some issues were taken out of the package in December 2011 for ‘early harvest’<sup>47</sup>. This ultimately resulted in the Trade Facilitation Agreement in 2013, while other issues (particularly those of developing country interest) of the Doha Round are still languishing.

It is also worth considering whether the drafts submitted by the WG-III to the Commission should be sent in a staggered manner, as the methods of work of UNCITRAL do not consider the adoption of ‘provisional texts’ but a *final draft text* comprised of all reform options. Similarly, submission of draft text in a staggered manner could clash with the intertwined and cross-cutting issues highlighted by the WG-III.<sup>48</sup> Finally, according to the methods of work of UNCITRAL, the consideration of texts by the Commission is deemed to be a “final round of negotiations of **the text that had been agreed upon in the working group**”<sup>49</sup>, which should be open to and circulated for comment by all States as well as relevant organizations.<sup>50</sup> Therefore, all options should remain open for final negotiation until the WG-III submits them to the Commission in 2026.

Similarly, considering the cross-cutting nature of structural and procedural reform options, the WG-III agreed to “discuss, elaborate and develop multiple potential reform solutions simultaneously” and “move the proposed solutions forward in parallel”.<sup>51</sup> Indeed, reform options cannot be considered in isolation and overlook the possible linkages among them. Negotiations in the WG-III will require flexibility and the possibility of reopening discussions on any reform option in order to guarantee consistency and the proper articulation among all the reform options. The opposite could risk even greater fragmentation in the international investment law regime.

## 5. Conclusion

The limitations imposed by the COVID-19 pandemic and the shift to virtual negotiations in WG-III has resulted in a very high number of webinars and related

online events throughout the year. Many developing countries and civil society participants have highlighted the fact that not all delegations can follow all these meetings owing to limited connectivity, technical obstacles and capacity constraints. This can create a misleading perception of ‘approval’ or ‘agreement’ among stakeholders on the diverse matters being discussed in these online meetings.

While the WG-III may come out with useful reform options, given the prior experiences outlined above, it is extremely important that developing countries preserve their ability to **opt-in** to only those reform options which would be suitable to and in line with their own national requirements, rather than having to adopt the whole suite of reform options which might be decided by WG-III. This will require ensuring that all reform options currently being discussed at WG-III are given equal consideration and weight, and that any ‘approval in principle’ or ‘recommendation’ of a particular reform option does not limit the discussions on other options, particularly those of high concern to developing countries.

Finally, the Working Group could consider all intertwined matters affecting the whole system, and therefore structural reform options should not be considered in isolation from other systemic failures of ISDS, ranging from how substantive provisions are interpreted and how damages are assessed, as well as how such adjudicative bodies interact with the right of States to regulate for fulfilling their legitimate public policy and sustainable development objectives.

### Endnotes:

<sup>1</sup> Report of the United Nations Commission on International Trade Law (UNCITRAL), Fiftieth Session, UN Doc. A/72/17, 3-21 July 2017. Available from <https://undocs.org/en/A/72/17>, para. 264.

<sup>2</sup> *Ibid.*, para. 250.

<sup>3</sup> *Ibid.*, para. 264.

<sup>4</sup> 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 (1-5 April 2019), para. 81. Available from <https://undocs.org/en/A/CN.9/970>.

<sup>5</sup> UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, UN Doc. A/CN.9/930/Rev.1 (27 November - 1 December 2017), para. 34. Available from <https://undocs.org/en/A/CN.9/930/Rev.1>.

<sup>6</sup> UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-nine session, UN Doc. A/CN.9/1044 (5-9 October 2020), para. 113. Available from <https://undocs.org/en/A/CN.9/1044>.

<sup>7</sup> See: Letter from the Chairperson and the Rapporteur of UNCITRAL Working Group III (WG-III) shared with stakeholders on the 1<sup>st</sup> February 2021.

<sup>8</sup> UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session, A/CN.9/1054, 27 May 2021.

<sup>9</sup> *Ibid.*, paras. 19 - 22.

<sup>10</sup> For example, the Secretariat has submitted to the WG-III different documents developed together with the Academic Forum on ISDS, International Centre for Settlement of Investment Disputes (ICSID) and others. It has also organized at least 10 webinars and 3 intersessional meetings in 2020.

<sup>11</sup> See Discussions of the Working Group III in its Sessions 34<sup>th</sup> to 36<sup>th</sup> in <https://undocs.org/en/A/CN.9/930/Rev.1>, <https://undocs.org/en/A/CN.9/935> and <http://undocs.org/en/A/CN.9/964> respectively.

<sup>12</sup> See: Colombia's statement on reform of investment protection agreements at opening session of the 12<sup>th</sup> Annual Forum of Developing Country Investment Negotiators in <https://us5.campaign-archive.com/?u=fa9cf38799136b5660f367ba6&id=2665084cdb>.

<sup>13</sup> Daniel Uribe, "Ecuador withdraws from its remaining investment treaties", SouthNews, South Centre, 23 May 2017. Available from <https://www.bilaterals.org/?ecuador-withdraws-from-its>.

<sup>14</sup> Felipe Hees, Pedro Mendonça Cavalcante and Pedro Paranhos, "The Cooperation and Facilitation Investment Agreement (CFIA) in the context of the discussions on the reform of the ISDS system", Investment Policy Brief, No. 11 (Geneva, South Centre, May 2018). Available from <https://www.southcentre.int/investment-policy-brief-11-may-2018/>.

<sup>15</sup> See: United Nations Conference of Trade and Development (UNCTAD), *Investment Policy Framework for Sustainable Development* (2015) in [https://unctad.org/system/files/official-document/diaepcb2015d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf).

<sup>16</sup> UNCITRAL, Submission from the Government of South Africa, Thirty-eight session of Working Group III, UN Doc. A/CN.9/WG.III/WP.176, para. 42 – 46. Available from <https://undocs.org/en/A/CN.9/WG.III/WP.176>.

<sup>17</sup> *Ibid.*, para. 45.

<sup>18</sup> South Centre, "Reforming investment dispute settlement" (13 November 2019). Available from <https://investmentpolicy.unctad.org/uploaded-files/document/High-level-IIA-Conference-13Nov2019-Statement-SouthCenter-reformingISDS.pdf>.

<sup>19</sup> *Ibid.*

<sup>20</sup> Nicolás M. Perrone, "The ISDS Reform Process: The Missing Development Agenda", Investment Policy Brief, No. 19 (Geneva, South Centre, March 2020). Available from [https://www.southcentre.int/wpcontent/uploads/2020/03/IPB19\\_The-ISDS-Reform-Process-The-missing-development-agenda\\_EN-1.pdf](https://www.southcentre.int/wpcontent/uploads/2020/03/IPB19_The-ISDS-Reform-Process-The-missing-development-agenda_EN-1.pdf).

<sup>21</sup> UNCITRAL, Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, 17 July 2019, para. 110. Available from <https://undocs.org/en/A/CN.9/WG.III/WP.176>.

<sup>22</sup> Damien Charlotin, "UNCITRAL Working Group III to consider whether it can wrap up ISDS reform by 2025", IAREporter (13 April 2021). Available from <https://www.iareporter.com/articles/uncitral-working-group-iii-plans-to-conclude-isds-reform-by-2025/>.

<sup>23</sup> UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, UN Doc. A/CN.9/930/Rev.1 (2017).

<sup>24</sup> See: UNCITRAL, "Selection and appointment of ISDS tribunal members", Working Paper 203, UN Doc. A/CN.9/WG.III/WP.203; "Appellate mechanism and enforcement issues", Working Paper 202, UN Doc. A/CN.9/WG.III/WP.202; and "Draft code of conduct", Working Paper 201, UN Doc. A/CN.9/WG.III/WP.201, 40<sup>th</sup> Session of Working Group III (2021) in [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>25</sup> The first draft of the Code of Conduct was released on May 1, 2020 and was open for comments by delegations of the Working Group III. The second draft, including commentaries, was published in May 2021. See: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft\\_code\\_of\\_conduct\\_v2.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_code_of_conduct_v2.pdf).

<sup>26</sup> See Article 3 of Draft Code of Conduct for Adjudicators in International Investment Disputes (Version Two), 19 April 2021 in [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft\\_code\\_of\\_conduct\\_v2.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_code_of_conduct_v2.pdf).

<sup>27</sup> See: Damien Charlotin, "UNCITRAL and ICSID release new version of draft code of conduct for adjudicators", IAREporter, 20 April 2021 in <https://www.iareporter.com/articles/uncitral-and-icsid-release-new-version-of-draft-code-of-conduct-for-adjudicators/>.

<sup>28</sup> See: Randall H. Warner, "All Mixed Up about Mixed Questions", 7 J. APP. PRAC. & PROCESS 101 (2005). Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol7/iss1/7>.

<sup>29</sup> UNCITRAL Secretariat Note on Appellate mechanism and enforcement issues, A/CN.9/WG.III/WP.202, 12 November 2020, para. 4.

<sup>30</sup> See: UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (2012), pp. 61-62. Available from [https://unctad.org/system/files/official-document/unctaddiaeia2011d5\\_en.pdf](https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf).

<sup>31</sup> World leaders call for new international treaty to improve pandemic response, UN News, 30 March 2021. Available from <https://news.un.org/en/story/2021/03/1088652>.

<sup>32</sup> Kathleen Livingstone, "The Paris Agreement Was a First Step, Not an End Goal. Still, the World's Nations Are Far Behind", Inside Climate News, 23 April 2021. Available from <https://insideclimatenews.org/news/23042021/the-paris-agreement-was-a-first-step-not-an-end-goal-still-the-worlds-nations-are-far-behind/>.

<sup>33</sup> Article 17.14 of the WTO Dispute Settlement Understanding

<sup>34</sup> Article V of the New York Convention

<sup>35</sup> UNCITRAL A/CN.9/WG.III/WP.202 - Possible reform of investor-State dispute settlement (ISDS) - Appellate mechanism and enforcement issues. Available from <http://undocs.org/en/A/CN.9/WG.III/WP.202>

<sup>36</sup> See [https://www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm).

<sup>37</sup> General Agreement on Tariffs and Trade (GATT), Punta Del Este Declaration, Ministerial Declaration of 20 September 1986. Available from [http://www.sice.oas.org/trade/Punta\\_e.asp](http://www.sice.oas.org/trade/Punta_e.asp).

<sup>38</sup> *Ibid.*

<sup>39</sup> Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001.

<sup>40</sup> *Ibid.*, para. 47.

<sup>41</sup>See: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session, UN Doc. A/CN.9/1054 (27 May 2021), para. 26. Available from <https://undocs.org/en/A/CN.9/1054>.

<sup>42</sup>Aileen Kwa, "The A La Carte Undertaking: A New Form of Special and Differential Treatment?", Focus on Trade Number 57, December 2000. Available from [https://www.iatp.org/sites/default/files/A\\_La\\_Carte\\_Undertaking\\_A\\_New\\_Form\\_of\\_Special\\_a.htm](https://www.iatp.org/sites/default/files/A_La_Carte_Undertaking_A_New_Form_of_Special_a.htm).

<sup>43</sup>Nicolas Lamp, "A Historical Perspective on India's and South Africa's Threat to Block the Implementation of the Joint Statement Initiatives in the WTO, and a Potential Way Forward", International Economic Law and Policy Blog, 26 February 2021. Available from <https://ielp.worldtradelaw.net/2021/02/a-historical-perspective-on-indias-and-south-africas-threat-to-block-the-implementation-of-the-joint.html>.

<sup>44</sup>UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session, A/CN.9/1054, 27 May 2021, para. 29.

<sup>45</sup>UNCITRAL Secretariat Note, A/CN.9/WG.III/WP.206, para. 11: "States may also refer to reform options that have been approved in principle as a model for their own practice pending their finalization and adoption by the Commission".

<sup>46</sup>Remarks by the Chair during the resumed 40<sup>th</sup> session of WG-III, 4-5 May 2021

<sup>47</sup>Remarks by Pascal Lamy to the Inter-Parliamentary Union, p. 18. Available from <http://archive.ipu.org/splz-e/Trade12/5.pdf>.

<sup>48</sup>UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session, A/CN.9/1054, para. 15, 31.

<sup>49</sup>UNCITRAL, UNCITRAL rule of procedure and methods of work, UN Doc. A/CN.9/638/Add.1 (2007), para. 41.

<sup>50</sup>Ibid., para. 40.

<sup>51</sup>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 (2019), para. 81.

**This brief is part of the South Centre's policy brief series focusing on international investment agreements and experiences of developing countries.**

**While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Systemic reforms that would safeguard the sovereign right to regulate and balance the rights and responsibilities of investors would require more concerted efforts on behalf of home and host states of investment in terms of reforming treaties and rethinking the system of dispute settlement.**

**Experiences of developing countries reveal that without such systemic reforms, developing countries' ability to use foreign direct investment for industrialization and development will be impaired.**

**The policy brief series is intended as a tool to assist in further dialogue on needed reforms.**

**\*\*\* The views contained in this brief are attributable to the author/s and do not represent the institutional views of the South Centre or its Member States.**



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The South Centre  
International Environment House 2  
Chemin de Balexert 7-9  
PO Box 228, 1211 Geneva 19  
Switzerland  
Telephone: (4122) 791 8050  
E-mail: [south@southcentre.int](mailto:south@southcentre.int)  
<https://www.southcentre.int>

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