

**Update: Investor-State dispute settlement reform
UNCITRAL Working Group III met in person in Vienna and remotely in May to
discuss workplan and resourcing plan for the ISDS reform.**

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I. Overview

UNCITRAL Working Group III held its resumed 40th session between 4 and 5 May 2021. The resumed session was devoted to revising the workplan for investor-State dispute settlement (ISDS) reform and the resource requirements. As generally accepted, the revised workplan, providing for 60-day formal sessions from 2021 to 2026 and 77-day informal inter-sessional meetings, presented a workable roadmap for the ISDS reform. Some delegations expressed their reservations for the expanded scope of work and the added conferences under the revised workplan. Their main concerns were about the increasing financial and human resources required to still guarantee meaningful participations under the expanded workplan. The majority of the delegations acknowledged and supported the compromise made in the revised workplan, reflecting divergent opinions within the Working Group.

II. Summary of the Discussions

The workplan was initially published in March 2021 for comments, reflecting deliberations during the Working Group III's 37th, 38th, and 39th sessions. On May 4, the first day of the resumed 40th session, there were heated discussions among delegations about the frequency of the planned Working Group sessions and informal meetings, scope of reform options, and "approval in principle." The Chairperson, the Rapporteur, and the Secretariat adjusted the workplan overnight and proposed a revised draft for discussions. The revised workplan presents the following key highlights:

1. **Working schedule:** The initial workplan proposed to have two additional formal sessions every year, totalling four sessions per year, with frequent informal meetings. In response to the steep increase of the workload, a number of delegates were concerned about the lack of sufficient financial and human resources, the difficulty in obtaining internal approval, and potential prejudice against States who cannot participate in all of the formal and informal meetings. Some delegates were also concerned that the schedule was unrealistic and concluding all discussions is overly ambitious. In view of that, the revised schedule provides for three formal sessions per year and extends the workplan into 2026.
2. **Scope of the reform:** The original workplan proposed reform topics including (i) ADR mechanism and dispute prevention, (ii) selection and appointment of arbitrators, (iii) code of conduct, (iv) ISDS procedural rules reforms, (v) multilateral advisory centre, (vi) appellate mechanism, (vii) multilateral permanent investment court, and (viii) multilateral instrument to implement reforms. The revised workplan further reflects the need to consider cross-cutting issues such as regulatory chill, the exhaustion of legal remedies and enforcement.

Some delegations asked for more resources to support structural reforms. The delegations also expressed different views as to whether the workplan should be flexible to reflect the evolving progress and circumstances, or should be fixed to make it easier

for resources planning purposes. The revised workplan provided UNCITRAL to approve the reform options on a rolling basis and decide on relevant measures to be implemented for each reform option.

3. **Resource requirements:** Despite their willingness to devote to ISDS reform, delegations from developing countries might be constrained as a cause of limited budget and human resources. Logistics, travel, interpretation and technological connectivity all these concepts require more funding to support more intense and frequent discussions for the foreseeable future. States are encouraged to continue contributing to the UNCITRAL trust fund to ensure adequate participation by developing States.

III. Concluding Remarks

The majority of the delegations supported the revised workplan and would further consider it before coming to their final positions. In the UNCITRAL's incoming 54th session, the revised workplan, along with the report of the resume 40th session, will be submitted for States' adoption. More details about Working Group III's resumed 40th session can be accessed [here](#).

As observer, it was fascinating to witness the Northern and the Southern States expressing divergent views, defending their home interests, and trying to identify the common ground. Specific to this resumed 40th session, the meeting schedule and resourcing plan will largely decide how States will participate in the ISDS reform discussions in the following five years or more. Even though the reform options will not have a binding effect over States, it is still crucial to allow meaningful participation by all relevant States and other stakeholders in the deliberations, securing a fair and balanced process for the ISDS reform.

Same as the 40th session and similar to other international conferences during the pandemic, the resume 40th session was held through a hybrid format. Some delegations encountered technological issues and resorted to written submissions. On the one hand, remote participation makes lively discussions possible and greatly saves time and travel costs, especially for a two-day session. On the other hand, the Working Group may still need to improve the current format if the coming sessions will stay remote in the foreseeable future. Unofficial hallway chats were greatly missed and providing in-meeting chat box for sharing official comments is simply not enough. It may be the time to bring back the off-the-table negotiations and to find the right platform to accommodate.