

Submission of the European Union and its Member States to UNCITRAL Working Group III

18 January 2019.

Possible work plan for Working Group III

1. INTRODUCTION

1. This submission sets out the views of the European Union (EU) and its Member States on the possible process of Working Group III on ISDS reform and suggests that it is useful to think of phase three of the Working Group's work in terms of four related steps (which have already been initiated, as explained below).

2. PROCESS IN WORKING GROUP III

2. The statement made by Ecuador, on behalf of the Group of 77 and China, at the 36th meeting of the Working Group in Vienna from 29 October to 2 November 2018 notes:

[...] the Group of 77 and China reiterates that the effectiveness and legitimacy of this process rest on the active and wide participation of both developing and developed states to present their experiences and visions on the direction and content of any possible reform.¹

3. In this light, in order to ensure an effective process, it is suggested that the Working Group approach phase three of its work in four related steps, which have in fact already been initiated via the conclusions of the Working Group's 36th session,² and which could be formulated as follows.
4. **Step 1** involves the identification and proposal by governments of their preferred reform options, in conceptual form, on which they would like to see the Working Group eventually develop solutions. These options should respond to the concerns expressed in the Working Group in respect of which it was considered that reform was desirable.

¹ Statement of the Group of G77 and China delivered by Ecuador at the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) 36th session, 29 October – 2 November 2018. See also A/CN.9/964 - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (advance copy), 6 November 2018, para. 16, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf.

² A/CN.9/964 - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (advance copy), 6 November 2018, para. 140, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf.

5. In **Step 2** the Working Group would identify which of the reform options put forward under **Step 1** should be the subject of further work. This would entail a discussion at conceptual level of the options which have been put forward and then a decision on which option or combination of options the Working Group should engage in further work on.³
6. **Step 3** would involve a discussion and decisions in respect of the priority to be given, the sequencing of the deliberations, the possibility of multiple tracks, coordination with other international organisations and inter-sessional work of the options identified in **Step 2**.⁴ This could take place in conjunction with Step 2, so that the questions of which options to progress, and how, will be informed by the logistical possibilities and constraints within UNCITRAL.⁵
7. **Step 4** would involve, in light of the approach adopted in **Steps 2** and **3**, developing concrete solutions and text proposals, which could be adopted or endorsed by the UNCITRAL Commission and, ultimately, the General Assembly of the United Nations.
8. As noted in the conclusions of the 36th Session of the Working Group, it would be useful for discussions of **Step 3** to have full information from the UNCITRAL Secretariat on means to facilitate what might be a heavy workload. These might include the possibility of additional meetings, of using time normally set-aside for the Commission Sessions, or of sub-groups. It should also be considered whether intersessional meetings could be hosted by different governments allowing for more detailed work to be carried out between sessions. If this is done, efforts should be made to ensure that such meetings take place in different regions and are planned in a way to ensure broad and inclusive participation of all countries. These intersessional meetings could of course not substitute for the work to be done and decisions to be taken in the Working Group itself.
9. It would be important to sustain and encourage efforts to ensure that delegates of developing and least developed countries can fully participate in these deliberations.
10. The potential input from all participants, including representatives from civil society and the Academic Forum and Practitioner's Group, is to be welcomed at all stages of the process. This being said, it is recalled that the mandate of the Working Group calls for a government-led process:

“In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and be fully transparent.”

³ It is important to underline that for individual governments deciding to work on options in the Working Group would not imply acceptance either of the outcomes of the work or of the options as being necessarily considered desirable by that government.

⁴ See A/CN.9/964 - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (advance copy), 6 November 2018, paras. 19 and 140, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf.

⁵ See further paragraph 8 below.

As a consequence, it is considered that the most valuable input of these groups can come in particular in **Step 4** when governments are analysing different design approaches in creating concrete solutions to the problems identified. Lessons that can be drawn from other dispute settlement mechanisms and from practice would appear to be most relevant during that Step.

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