

# WEBINAR

## UNCITRAL Process on ISDS Reform:

What to expect at the  
upcoming working group  
meeting in New York

Tuesday, April 17, 2018  
9:00 a.m. ET  
3:00 p.m. CEST



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# Agenda

- Introduction and moderation: Howard Mann
- Nathalie Bernasconi-Osterwalder
  - **UNCITRAL reform**: What is the issue, current state of play, and the upcoming meeting
- Robert Howse
  - **UNCITRAL**: Is this the right place for the right issues?
- Q&A and final comments

# Introduction: Reform of ISDS and UNCITRAL Process



- ISDS has become the most used international dispute settlement system of all time, but also the most criticized
- Over **800 known cases** against states by investors
- Awards reaching **billions of dollars, has become routine**
- **Highly-criticized** international dispute settlement system
- Arbitrators often take on a **legislators role**

# Introduction: Reform of ISDS and UNCITRAL Process



- Conflicts of interests: law firms, arbitrators and counsel
- Multiple hats
- Inconsistent decisions, sometimes incoherent decisions
  - No coalescing around single standards of interpretation
  - Lack of effective oversight, review, appeal
- Will not discuss these issues today, well known

# What should governments expect of the UNCITRAL process?



- Nathalie Bernasconi-Osterwalder
  - **UNCITRAL reform**: What is the issue, current state of play, and the upcoming meeting





# UNCITRAL Process on ISDS Reform: From Vienna to New York

**Nathalie Bernasconi-Osterwalder**  
Group Director  
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# Outline

- UNCITRAL **mandate** to Working Group III on reform of ISDS
- What happened in **Vienna** at the first WGIII meeting on ISDS reform in Nov–Dec 2017
- What is to be expected in **New York** in April 2018?
- What next?



# UNCITRAL and ISDS Reform

## The new kid on the block

- The UN Commission on International Trade Law, established in 1966 "to promote the progressive harmonization and unification of [international trade law](#)"
- Meets in annual sessions in New York and Vienna
- Since 2004: 60 members, elected by GA for 6 years
- Representative of geographic regions and major economic and legal systems
- Works through intergovernmental working groups, meeting once or twice per year
- Decisions in WGs typically taken by consensus, not by vote
- Non-member states and other stakeholders can participate and take the floor (criteria for other stakeholders not clear)





# UNCITRAL developments leading up to a mandate on ISDS reform

- 2015–2016: UNCITRAL Secretariat conducted study on whether the UN Convention on Transparency in Treaty-based Investor–State Arbitration (Mauritius Convention) could provide a useful model for possible reforms in the field of investor–state arbitration
- 2016 (49<sup>th</sup> Session) presentation of report by Center for International Dispute Settlement (CIDS). Report explores two options for reform:
  - International Tribunal for ISDS
  - Appeal Mechanism for investor–state arbitral awards to supplement current ISDS ad hoc regime

# UNCITRAL entrusts Working Group III with broad mandate on possible ISDS reform



- July 2017 (50<sup>th</sup> Session)
- The Working Group would proceed to:
  - a) first, identify and consider concerns regarding investor–state dispute settlement;
  - b) second, consider whether reform was desirable in the light of any identified concerns; and
  - c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.
- Deliberations should be **government-led**, with high-level input from all Governments



# UNCITRAL Process on ISDS Reform: **What happened in Vienna?**



# First Working Group III meeting in Vienna

## A divide in perspectives amongst members?

- Tweak ISDS process through bilateral or regional treaties, not through a multilateral process
- Work towards the creation of a multilateral investment court or an appeals mechanism (or both)
- Use UNCITRAL process as basis for broader and flexible reform at the multilateral level

### Notes:

- Division leads to the second vote only in UNCITRAL's history
- Audio recordings increase transparency in WGIII





# Vienna Recap: What was discussed?

## Issues covered (based on WP 142):

Paper distinguishes between concerns:

- in the arbitral process
- about the arbitrators/decision-makers

Discussion in Vienna covered:

- Overall duration and costs of ISDS
- Allocation of costs
- Third-party funding
- Transparency
- Early dismissal mechanism
- Counterclaims
- Coherence and consistency



# Vienna Recap: What was discussed?

## Issues covered (based WP 142)

### Discussion in Vienna (continued):

WG debated (and left open) whether their work would cover:

- ISDS under laws and contracts
- Other types of ISDS mechanisms

### Note:

- EU and others point to the link of these problems to the ad hoc nature of arbitration and the lack of a more permanent structure.
- It was felt that any reform of ISDS procedure should take into account ongoing state reforms of the substantive standards





# Documents before Working Group III

## Vienna, Nov 27–Dec 1, 2017 (34th Session)

- Notes by the Secretariat
  - Concurrent proceedings in international arbitration (<http://undocs.org/A/CN.9/915>)
  - Ethics in international arbitration (<http://undocs.org/A/CN.9/916>)
  - Reforms of ISDS (<http://undocs.org/A/CN.9/917>)
  - Possible reform of ISDS (<http://undocs.org/A/CN.9/WG.III/WP.142>)
- Compilation of comments by states and international organizations on ISDS Framework (<http://undocs.org/A/CN.9/918>)
- Submissions by ICSID & PCA (<http://undocs.org/A/CN.9/WG.III/WP.143>)



# UNCITRAL Process on ISDS Reform: **What to expect in New York?**



# New York meetings

## Identifying and considering concerns continued

Issues to be covered (based on WP 142):

- Concerns in the arbitral process
  - Finality of awards and review mechanisms
- Concerns about the arbitrators/decision-makers
  - Appointment and ethical requirements
- Possibly: begin discussions on **phase 2** to discuss the desirability of ISDS reform

# New York meetings



## Moving beyond discussion concerns and thinking about what comes next

- Need to keep other institutions and processes in mind: UNCTAD, OECD, WTO, OHCHR
- Need to keep innovation and alternative models at the regional levels in mind: SADC, COMESA, MERCOSUR: State-State, regional courts, etc.
- Going beyond process: What about substantive rules?
- Going beyond ISDS and moving towards investment dispute settlement more broadly



# Documents before Working Group III

## New York, Apr 23–27, 2018 (35<sup>th</sup> Session)

- Note by Secretariat: Possible reform of ISDS  
(<http://undocs.org/A/CN.9/WG.III/WP.142>)
- Submissions by ICSID & PCA  
(<http://undocs.org/A/CN.9/WG.III/WP.143>)
- Report of 34<sup>th</sup> Session, Part I (<http://undocs.org/A/CN.9/930>)
- Report of 34<sup>th</sup> Session, Part II (to be adopted)
- Submission by the European Union  
(<http://undocs.org/A/CN.9/WG.III/WP.145>)
- Submissions by ICSID & PCA  
(<http://undocs.org/A/CN.9/WG.III/WP.146>)





# UNCITRAL Process on ISDS Reform:

Is this the right place for the  
right issues?

**Robert Howse**

Lloyd C. Nelson Professor of  
International Law, NYU  
School of Law





# What should governments expect of the UNCITRAL process?

- Robert Howse
  - **UNCITRAL**: Is this the right place for the right issues?
- George Kahale III Lecture: “But it’s important to go into [UNCITRAL] with eyes wide open and to understand that there are serious problems that may not be solvable in the near future. UNCITRAL now has a working group to address ISDS with a mandate to identify and consider concerns, to consider whether reform is desirable and, if so, to develop any relevant solutions to be recommended to the Commission. I’m not expecting meaningful reform any time soon, and in fact I wonder whether any reform might be a case of the cure being worse than the disease. That’s especially true if, as appears to be the case, the main efforts at reform are directed not to questions of substance, but to the creation of institutions such as permanent investment courts and appeals tribunals that at this stage can be expected to build upon and institutionalize the serious flaws in the existing system. I think it is better to recognize that the system was poorly designed and has been malfunctioning for three decades, and that dismantling it and starting from scratch is the wiser course. But that’s a discussion for another day.”



# What should governments expect of the UNCITRAL process?

- Questions and Answers
  - By chat
  - By “raising your hand”

# WEBINAR

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# Thank you!