

The Intersection of Substance and Procedure in the Work of UNCITRAL Working Group III: The Questions of Damages, the Right to Regulate and Counterclaims

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1. Introduction

The distinction between substance and procedure has been repeatedly discussed in the multilateral reform negotiations in Working Group III (WG III) of the United Nations Commission on International Trade Law (UNCITRAL). However, there is still disagreement as to whether certain issues are covered by the mandate given to WG III, in particular the issues of damages and compensation, the right to regulate, and counterclaims. This concept paper provides some reflections on the scope of WG III's mandate. It reviews the initial terms of the mandate before considering how it has been applied to topics that span procedural and substantive aspects of investor-state dispute settlement (ISDS). It concludes that the degree to which substantive aspects of investor-state dispute settlement can be included within WG III's remit is context dependent and ultimately subject to State consent.

This paper draws on the official Secretariat reports of WG III's meetings and on the written submissions of States on relevant topics. However, it does not engage with the recordings of prior meetings. The reason for this methodological choice is that the recordings stop in early 2023, and the issues we are considering have been discussed extensively since then. As a result, relying on the available recordings risks being selective and may misrepresent the current positions being taken by States on these issues. We acknowledge that the diplomatic language of the Secretariat's reports may not fully capture the nature and extent of any underlying disagreements between States about different aspects of the mandate. However, given that WG III's mandate is a politically sensitive matter, the official language of the Secretariat's reports provides the most politically acceptable foundation on which to base conclusions about the likelihood of certain interpretations of the mandate being generally accepted by States.

2. The original mandate

WG III's mandate was originally conferred on it by UNCITRAL at the Commission's Fiftieth Session in July 2017. 'The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement', and '[t]he Commission agreed that broad discretion should be left to the Working Group in discharging its mandate'.¹ During the Commission's initial discussions in 2017, a variety of views were expressed regarding potential future work on ISDS reform.² On the one hand, '[I]t was generally agreed that discussion on investor-State dispute settlement reforms should be undertaken without prejudging the outcome and should not exclude any specific options. There was a general preference that work should cover the widest range of issues and possible solutions.'³

¹ A/72/17 [264].

² See generally A/72/17, [242]–[264].

³ A/72/17 [252].

There was also ‘general support that the working group ... should determine the specific issues to be considered’.⁴ It was also stressed that the process should be ‘government-led’.⁵ At the same time,

[i]t was mentioned that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States’ right to regulate, fair and equitable treatment, expropriation and due process requirements. Nonetheless, *it was stated that work on substantive standards was deemed less feasible than work on the procedural aspects*.⁶

At the first meeting of WG III dedicated to the topic of possible reform of ISDS in November and December 2017 (the Working Group’s Thirty-Fourth session), it was noted at the outset that ‘critical questions on possible ISDS reform involved the underlying substantive rules. Nonetheless, *it was clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement rather than on the substantive provisions*.’⁷

In WG III’s first meeting it was also debated whether the Working Group should address the issue of counterclaims, given the procedural focus of its mandate.⁸ *[I]t was reiterated that the nature of the substantive obligations themselves was not the focus of the Working Group*. It was noted that there was a distinction between substantive obligations provided for in investment treaties and the dispute settlement mechanisms used to enforce those obligations.⁹

Yet again in WG III’s Thirty-Fifth session in April 2018, ‘it was underlined that the mandate of the Working Group was understood to focus on the procedural aspects of ISDS rather than on the underlying investment protection standards, *thereby ensuring that any proposed reform would be feasible and achievable*’.¹⁰ Similarly, in WG III’s Thirty-Seventh session in April 2019, when the Working Group sought to identify ‘possible additional concerns not already addressed in its deliberations’, ‘[i]t was, however, reiterated that the mandate of the Working Group was to work on the possible reform of ISDS rather than reform of substantive standards in international investment agreements and that the focus of its work should be on the procedural aspects of ISDS’.¹¹ While ‘[t]he regulatory chill effect of ISDS was mentioned as an aspect that warranted consideration by the Working Group’, ‘[i]t was agreed that that aspect would not be addressed at this stage as a separate concern by the Working Group’, although ‘the potential impact of ISDS on the regulatory policy of States should guide the work on ISDS reform’.¹²

⁴ A/72/17 [254].

⁵ A/72/17 [250].

⁶ A/72/17 [257] (emphasis added).

⁷ A/CN.9/930/Rev.1, [20] (emphasis added).

⁸ A/CN.9/930/Add.1/Rev.1 [3]–[6].

⁹ A/CN.9/930/Add.1/Rev.1 [6] (emphasis added).

¹⁰ A/CN.9/935 [18] (emphasis added).

¹¹ A/CN.9/970, [26]–[27].

¹² A/CN.9/970, [36]–[37].

The upshot of this review of the original mandate conferred on WG III is that substantive standards of investment protection, such as the guarantee of fair and equitable treatment and expropriation, have consistently been seen as falling outside its scope. In contrast, purely procedural issues concerning dispute settlement are unquestionably within the scope of the mandate. However, grey areas remain in relation to WG III's mandate, and, as we will see in the following section, three issues have emerged as potentially falling within the scope of the mandate, namely damages and compensation, the right to regulate, and counterclaims.

3. Grey Areas in UNCITRAL Working Group III's mandate: Damages and Compensation, the Right to Regulate, and Counterclaims

These grey areas cover topics where it may be arguable whether they concern substance or procedure or topics that address concerns with ISDS that States have identified within the WG III process. This is notably the case of three topics: damages and compensation, the right to regulate, and counterclaims.

3.1. Damages and Compensation

Although there has been some disagreement over the extent to which various aspects of damages and compensation fall within WG III's mandate,¹³ there has been strong support expressed on repeated occasions in recent years in favour of the Working Group continuing work on this topic. For example, in the Working Group's Forty-Third session in September 2022, while there was some debate over the extent to which different aspects of the topic of damages were within the Working Group's mandate,¹⁴ ultimately:

Considering the support expressed to continue work on the assessment of damages and compensation, the Working Group requested the Secretariat to draft text comprised of draft provisions and guidelines that could address concerns about correctness and consistency, as well as cost and duration, that damages and compensation presented. ... It was noted that the draft text could address issues relating to, among others, the avoidance of relying on speculative evidence, clarification of causation requirements, allocation of the burden of proof and other evidentiary matters, allocation of costs based on the conduct of the parties, and the role of experts. Further, the Secretariat was requested to prepare explanatory texts to provide guidance on how a tribunal should apply any such provision. For instance, the draft provision on speculative evidence could be accompanied by guidance on valuation methodologies, valuation date, and interest rates.¹⁵

In the Working Group's Forty-Sixth session in October 2023 there was some debate over how to sequence the Working Group's work on procedural and cross-cutting issues and it was

¹³ See, for example, A/CN.9/1004*[102].

¹⁴ A/CN.9/1124, [93]-[99].

¹⁵ A/CN.9/1124 [100].

determined that the Working Group would first consider the draft provision on damages.¹⁶ After a detailed discussion of the initial draft provision on damages, the Working Group instructed the Secretariat to revise it and provided various specific drafting instructions for its revision.¹⁷ In addition to the draft treaty provision, the Secretariat was also requested to ‘prepare guidelines for arbitral tribunals on the assessment and calculation of damages and compensation’.¹⁸

In the Working Group’s Forty-Ninth session in September 2024, the Working Group ‘decided to continue its discussion on the assessment of damages and compensation’, given ‘the significance of and the number of requests to address the topic’.¹⁹ Again, there was a discussion of the revised draft provision (Draft Provision 20 in A/CN.9/WG.III/WP.244) and various new suggestions were made.²⁰

In short, while damages and compensation do not necessarily easily fit within a procedure-substance dichotomy, the overriding impression is that many States participating in the WG III process view this topic as falling within the Working Group mandate and there is widespread support for the Working Group continuing work on this topic. Although UNCITRAL reaches decisions by consensus, with voting ‘regarded as an exceptional procedure’,²¹ it has been observed that consensus does ‘not require unanimity, but was instead based on a widely prevailing majority and the absence of a formal objection that would trigger a request for a vote’.²² Given the widespread support for WG III to continue considering the topic of damages and compensation, it would appear challenging, although not impossible, for certain UNCITRAL Member States to object to this way of proceeding and require a vote. It is also possible that, without resort to voting, there might be a compromise struck between those States that favour inclusion of damages and compensation in WG III’s mandate and those that oppose its inclusion.

3.2. Right to Regulate

In contrast to damages, it is far less clear whether concerns over regulatory chill and how to address the right to regulate fall within WG III’s mandate. As noted earlier, in April 2019, when WG III was still in the process of identifying concerns regarding ISDS, ‘[i]t was agreed that ... [regulatory chill] would not be addressed at this stage as a separate concern by the Working Group, while the potential impact of ISDS on the regulatory policy of States should guide the work on ISDS reform’.²³ It also must be recalled that, as outlined above in section 2, on numerous occasions in the WG III process there has been a recognition that the mandate of the Working Group focuses on procedural aspects of ISDS, rather than the substantive standards of investment protection contained in investment treaties.

¹⁶ A/CN.9/1160, [97]-[98].

¹⁷ A/CN.9/1160, [114]-[115] and generally [99]-[115].

¹⁸ A/CN.9/1160 [114]-[115].

¹⁹ A/CN.9/1194 [99].

²⁰ See A/CN.9/1194 [99]-[103].

²¹ UNCITRAL rules of procedure and methods of work, Annex III to A/65/17, [1]-[4].

²² A/72/17 [259].

²³ A/CN.9/970 [36]-[37].

Nevertheless, in its Forty-Third session in September 2022, when the Working Group identified other ‘cross-cutting issues that could be addressed under the auspices of procedural reform’, besides damages and compensation, ‘regulatory chill’ was included in the list of issues requiring further work, on which the Secretariat was asked to prepare draft provisions.²⁴ Subsequently, in the first iteration of the draft provisions on procedural and cross-cutting issues, published by the Secretariat in July 2023, a multi-faceted provision was included on ‘right to regulate’.²⁵ It is possible that, at least in part, this approach was suggested to the Working Group by the publication in 2021 of a draft statute of a multilateral investment court written by two well-respected academics, where one of the general principles to govern the operation of that court was that it shall ‘take into account the Members’ right to regulate’.²⁶

However, when the Secretariat’s July 2023 document was discussed in the Working Group’s Forty-Sixth session in October 2023, ‘concerns were expressed that some of the issues addressed in the Draft Provisions did not fall within the mandate of the Working Group’ and the draft provision on right to regulate was one of several where ‘it was suggested that those provisions either be deleted or placed within square brackets’.²⁷ Diverse opinions were expressed within the Working Group, with one view being that the right to regulate was one of several issues that ‘deserved more attention’, and another suggesting ‘that those topics ... were outside the scope of the Working Group mandate, because they addressed substantive obligations and policy choices’.²⁸ Again in the Working Group’s Forty-Seventh session in January 2024, a variety of views were expressed, with one view being that some of the draft provisions on procedural and cross-cutting issues ‘did not necessarily fall within the mandate of the Working Group as they touched upon substantive obligations in investment treaties’.²⁹

Following WG III’s Forty-Sixth session in October 2023, States were invited to submit comments on the initial version of the draft provisions on procedural and cross-cutting issues.³⁰ Within the written comments made by delegations a diversity of views were again expressed in relation to the draft provision on ‘right to regulate’, with some delegations (e.g. the European Union (EU) and Israel) suggesting that this draft provision fell outside the mandate of the WG III.³¹ In contrast, Vietnam welcomed the effort to address this issue and Colombia agreed with the

²⁴ A/CN.9/1124 [101]-[104].

²⁵ A/CN.9/WG.III/WP.231 p. 6 (draft provision 12).

²⁶ Marc Bungenberg and August Reinisch, *Draft Statute of the Multilateral Investment Court* (1st edn, Nomos 2021) 62 (art 28(1)(e)), 33. See also Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (2nd edn, Springer 2020) 6 (‘An explicit reference to the right to regulate could also be included in the MIC Statute’).

²⁷ A/CN.9/1160 [88].

²⁸ A/CN.9/1160 [97].

²⁹ A/CN.9/1161 [113]-[114].

³⁰ A/CN.9/1160 [130]. See also A/CN.9/1161 [116].

³¹ Comments of the EU and its Member States, p. 15 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_the_eu_and_its_ms_wp.231.pdf. Comments of Israel, p. 4 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/israel_comments.pdf.

proposed wording and made certain specific drafting suggestions.³² In its comments the Africa Group also objected to a suggestion made during the Seventh Inter-sessional Meeting to suspend work on those cross-cutting issues falling within so-called category (iii) and highlighted the importance of reform addressing the right to regulate and damages and compensation.³³ In a joint submission, Brazil, Chile, Colombia, Costa Rica, Panama and Mexico also favoured the prioritization of issues in category (iii) or (c), i.e. those issues not found in existing procedural rules addressing so-called cross-cutting issues.³⁴

The revised version of the draft provisions on procedural and cross-cutting issues, published by the Secretariat in July 2024, includes a revised provision on ‘right to regulate’.³⁵ In initial discussion of this document in the Working Group’s Forty-Ninth session in September 2024, while ‘[s]upport was expressed for continuing work on the draft provisions in section C’, the scope of the Working Group’s mandate was again highlighted and there was a suggestion that the draft provision on right to regulate ‘need not be developed’.³⁶ Overall, the right to regulate seems to polarise delegations, and while some appear to strongly support its inclusion in the mandate, others clearly oppose its inclusion. While it is not impossible that the right to regulate might be addressed further by WG III, it is also unclear at this stage if this will happen.

3.3. Counterclaims

Similarly to the right to regulate, the extent to which counterclaims fall within WG III’s mandate remains contentious. Counterclaims span procedure and substance because counterclaim procedures can only function when substantive provisions exist to support their operation.³⁷ Hence, procedural rules governing the operation of counterclaims are likely to be shaped by the form and content of substantive laws setting out investor obligations. When WG III initially considered counterclaims at its first meeting in November 2017, it reiterated the procedural focus of WG III’s mandate and noted that there is ‘a distinction between substantive obligations provided for in investment treaties and the dispute settlement mechanisms used to enforce those obligations’.³⁸ Based on this distinction, WG III did not preclude counterclaims from the scope of its work because a State may bring a counterclaim if it can identify a legal basis for the counterclaim.³⁹

³² Comments of Vietnam, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/writte1.pdf>. Comments of Colombia, p. 5 [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments from colombia 0.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments%20from%20colombia%200.pdf).

³³ Comments of Africa Group https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/africa_group_statement_on_procedural_crosscutting_issues.pdf.

³⁴ Comments of Brazil, Chile, Colombia, Costa Rica, Panama and Mexico <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/presen3.pdf>.

³⁵ A/CN.9/WG.III/WP.244 p. 11 (draft provision 19).

³⁶ A/CN.9/1194 [65].

³⁷ See A/CN.9/930/Add.1/Rev.1 [3].

³⁸ A/CN.9/930/Add.1/Rev.1 [6].

³⁹ A/CN.9/930/Add.1/Rev.1 [7].

At WG III's Thirty-Seventh session in April 2019, WG III addressed the relationship between procedure and substance in the context of counterclaims. During this session WG III considered proposals suggesting that obligations of investors warranted further consideration and noted that investor obligations were closely linked to a State's ability to raise a counterclaim.⁴⁰ However, by its Thirty-Ninth session in October 2020, WG III drew a clear distinction between the procedural aspect of counterclaims (comprised of issues of admissibility and jurisdiction) and the substantive obligations of investors that would form the basis of the counterclaim.⁴¹ WG III decided that procedural issues associated with counterclaims could be considered within its mandate (and could also be linked to other areas of its mandate such as the creation of a multilateral standing body).⁴² Conversely, discussion of obligations that would form the legal basis of the counterclaim were classified as substantive in nature and fell outside the scope of WG III's mandate.⁴³ Consequently, the Secretariat was requested to prepare model clauses addressing consent to counterclaims and to clarify the conditions under which a counterclaim can be brought. Nonetheless, WG III appeared to acknowledge the impact of substantive provisions on counterclaim procedures when it requested the Secretariat to additionally undertake exploratory work to identify the applicable sources of existing substantive law that provided for investor obligations.⁴⁴

The interrelationship between procedure and substance in the context of counterclaims was raised again at the Fourth Inter-sessional meeting on ISDS reform, which was reported at the Working Group's Forty-Second session in February 2022. Whilst some States deemed that the procedural focus of WG III's mandate precluded reforms to substantive obligations, others suggested that reforms to substantive provisions were necessary to achieve a balanced approach to ISDS.⁴⁵ It was also identified during the Fourth Inter-sessional meeting that the form of procedural provisions will vary depending on the form and content of the investor's obligation.⁴⁶

WG III subsequently requested the Secretariat to focus on the procedural aspects of counterclaims,⁴⁷ which has resulted in a draft provision on counterclaims. In each iteration of the Draft Provision (now Draft Provision 10),⁴⁸ the commentary has noted that the investor obligations that form the basis of the counterclaim are not specified.⁴⁹ However, the commentary to each Draft Provision has also suggested that WG III may wish to consider whether there is a need for a substantive provision that imposes obligations on investors.⁵⁰ As part of their

⁴⁰ A/CN.9/WG.III/WP.193 [40].

⁴¹ A/CN.9/1044 [57].

⁴² A/CN.9/1044 [58].

⁴³ A/CN.9/1044 [59], [60].

⁴⁴ A/CN.9/1044 [61]-[63].

⁴⁵ A/CN.9/WG.III/WP.214 [36].

⁴⁶ A/CN.9/WG.III/WP.214 [37].

⁴⁷ A/CN.9/WG.III/WP.219 [46].

⁴⁸ A/CN.9/WG.III/WP.244.

⁴⁹ A/CN.9/WG.III/WP.219 [50] in relation to Draft Provision D; A/CN.9/WG.III/WP.232 [28] (in relation to Draft Provision 11 in A/CN.9/WG.III/WP.231*); A/CN.9/WG.III/WP.245 [38].

⁵⁰ A/CN.9/WG.III/WP.219 [50] in relation to Draft Provision D; A/CN.9/WG.III/WP.232 [28] (in relation to Draft Provision 11 in A/CN.9/WG.III/WP.231*); A/CN.9/WG.III/WP.245 [38].

comments on the procedural and cross-cutting issues submitted by States to WG III's Forty-Seventh session in January 2024, Argentina suggested the possibility of developing a provision containing investor obligations⁵¹ and Colombia expressed a desire to set out more clearly what obligations an investor could fail to fulfil.⁵² Consequently, there is support by some States to further develop the provisions on counterclaims.⁵³ Yet, simultaneously, other States have stated that counterclaims (amongst other topics) fall outside of the scope of WG III's mandate because of their substantive and policy driven nature.⁵⁴ At WG III's Forty-Ninth session in September 2024, concerns were raised regarding the source and scope of investor obligations that could provide the legal foundation of a counterclaim.⁵⁵

In summary, despite resistance from some States, there appears to be a consensus that *procedural* reforms to counterclaims fall within the scope of WG III's mandate. Although the initial focus of the Working Group's mandate was identified as being limited to dispute resolution mechanisms, the Working Group has kept the option open to additionally consider *substantive* provisions that would form the legal foundation of counterclaims. While some States support the inclusion of investor obligations within WG III's mandate, other States are likely to challenge the expansion of WG III's mandate beyond its current remit given that they do not believe that any discussion of counterclaims falls within the mandate.

4. Interpreting the Working Group III mandate going forward

The mandate has been interpreted to cover damages and compensation and there is strong support for the Working Group continuing its work on this topic. There is a lot less acceptance of whether the right to regulate falls within the Working Group's mandate. WG III's mandate appears to permit reforms to the procedures governing counterclaims but its extension to substantive obligations that might provide the legal foundation of a counterclaim is likely to remain contentious. This section outlines several considerations that may be relevant when deciding whether to include or exclude topics from WG III's mandate.

4.1 Factors that may influence the interpretation of the mandate

As outlined in section 2 above, WG III was conferred a 'broad mandate' by UNCITRAL and 'broad discretion [was] ... left to the Working Group in discharging its mandate', with the Working Group

⁵¹ Comments of Argentina, Disposición 11 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comentarios_argentina_wp.231.pdf. 'Con respecto al apartado 1.c), el cual permite que se interpongan reconvenções basadas en el incumplimiento de las obligaciones del inversor, se sugiere considerar la posibilidad de elaborar una disposición relativa a las obligaciones a los inversionistas' translated as 'With respect to section 1.c), which allows counterclaims to be filed based in the event of non-compliance with the investor's obligations, it is suggested to consider the possibility to develop a provision regarding obligations to investors'.

⁵² Comments of Colombia, p. 5 para 18 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_colombia_0.pdf.

⁵³ A/CN.9/1160 [97].

⁵⁴ A/CN.9/1160 [97].

⁵⁵ A/CN.9/1194 [71].

to ‘determine the specific issues to be considered’.⁵⁶ Despite these considerations, which suggest that the mandate of the Working Group is largely within its own hands, there are certain issues that most delegations do not view as falling within the current mandate, e.g. work on the substantive standards of protection contained in investment treaties.⁵⁷ The mandate is dependent on States’ consent, therefore where such consent is lacking (e.g. where a significant number of Member States view a topic as outside the Working Group’s mandate) it is likely to be difficult for WG III to undertake work on the topic.

Ultimately, the scope of the mandate is a political rather than a merely legal question.⁵⁸ It is also acknowledged that the Commission that gave the mandate could potentially clarify its scope if so requested.⁵⁹ It should also be remembered that the design of both the multilateral instrument on ISDS reform – to deliver the various reform options developed by WG III – and of the provisions on procedural and cross-cutting issues, remain under negotiation.⁶⁰ This is relevant because, to the extent these instruments preserve optionality for States, e.g. if certain issues are addressed merely as model provisions that States could choose to apply to their existing investment treaties or to adopt in future investment treaties, this may reduce the significance of whether a particular topic is (or is not) addressed by WG III. That said, as explained below, concerns exist about any expansion of WG III’s mandate given time and resource constraints. Obviously, a lack of consensus on addressing a topic within the WG III process does not prevent the topic from being addressed in other fora or ISDS reform processes. With these considerations in mind, let us now address the merits of taking a broader or narrower interpretation of the Working Group’s mandate.

4.1.1. Narrow Interpretation

If the mandate is interpreted too narrowly, this may result in this once in a generation reform process failing to address key concerns about the current system of ISDS, concerns which have been raised in the WG III process by delegations, particularly by developing States.⁶¹ In short, an overly narrow interpretation of the mandate may prevent there being meaningful reform of ISDS.

⁵⁶ A/72/17 [254], [264].

⁵⁷ Similarly: J Bonnitcha and others, ‘Damages and ISDS Reform: Between Procedure and Substance’ (2023) 14 JIDS 213, 215.

⁵⁸ Working Group III’s mandate is determined by the Commission, which is comprised of UNCITRAL’s member States (UNCITRAL rules of procedure and methods of work, Annex III to A/65/17, [1]).

⁵⁹ This prospect is recognised by UNCITRAL (A Guide to UNCITRAL available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> [16]).

⁶⁰ See, for example, the most recent discussion of the draft multilateral instrument on ISDS reform in A/CN.9/1196 [31]–[94]. It was noted that the ‘the exact structure of the [multilateral] Convention was yet to be determined’, and the Working Group left open the question of whether to distinguish between Protocols to the multilateral Convention and non-treaty texts developed by the Working Group: A/CN.9/1196 [32]–[33], [41]. ‘It was also suggested that certain provisions on procedural and cross-cutting issues could be included as substantive provisions in the [multilateral] Convention, including the provision on the right to regulate’: [94].

⁶¹ On the once in a generation nature of the Working Group III reform process see AK Bjorklund, ‘The Road(s) Not Taken—the Past, Present, and Future of International Investment Law Reform’ (2023) 39 Arbitration International 455, 467–68.

While the Working Group has sought to interpret its mandate in light of a procedure-substance dichotomy, at times there can be real difficulties in drawing a precise distinction between procedural and substantive issues. For example, Indonesia, in its main submission to WG III, argued that ‘procedural law is inherently substantive and vice versa. Substantive and procedural provisions in the international investment agreements (IIAs) are intertwined in nature’.⁶² Similar perspectives on the closely intertwined nature of procedural and substantive issues in ISDS were expressed by Thailand and South Africa.⁶³

4.1.2. Broad Interpretation

The history of repeated past failed negotiations at the multilateral level on substantive standards of investment protection – e.g. the failure of the OECD’s Multilateral Agreement on Investment (MAI) negotiations in the 1990s and earlier failures in the 1960s – may weigh against an expansive interpretation of the Working Group’s mandate. Put differently, history perhaps helps explain (in part) why many States have taken the position that WG III’s mandate does not extend to substantive standards of investment protection.

Another factor that may weigh against an expansive interpretation of the Working Group’s mandate is the slow pace of the current negotiations, resourcing concerns and eventual fatigue with the ongoing process. For example, the resources devoted to the Working Group have already been increased and the end date for the Working Group’s process has already been pushed back, with the most recent workplan foreseeing that the WG III process would be finalised in 2027 (i.e. 10 years after it began).⁶⁴ Arguably, adding controversial issues to the agenda of WG III is not conducive to a timely conclusion of the reform process.

4.2. Alternative Options

For issues where there is disagreement over whether the topic falls within the mandate, one option would be to negotiate an extension of the mandate.⁶⁵ However, the delegations that oppose the inclusion of the contentious topics in the mandate are likely to be reluctant to accept such an extension. Another option would be to provide a separate mandate, such as for the right to regulate, to be discussed at a later stage, as a next step or as a separate issue, so as not to endanger the momentum of the negotiations.

⁶² A/CN.9/WG.III/WP.156 [1]-[2].

⁶³ Thailand, A/CN.9/WG.III/WP.162 [28]. South Africa, A/CN.9/WG.III/WP.176, [19]-[20].

⁶⁴ A/CN.9/WG.III/WP.248, [21], [35]-[36].

⁶⁵ There is no formal procedure to extend a Working Group’s mandate, however, in theory, the Commission could reformulate the mandate to include new topics, if the Member States reached agreement on a new mandate. This approach runs counter to the Commission’s usual approach of defining a mandate in broad terms and conferring working groups with substantive discretion regarding the implementation and interpretation of the mandate (A/CN.9/638/Add.1 [29]).

A further option would be to leave certain issues (e.g. the right to regulate) to be addressed by other processes (e.g. perhaps the OECD's track 2 process within its work on the future of investment treaties), or to be addressed by States through investment treaty reform at a unilateral or bilateral level. Certain delegations have expressed the view that the issue of the right to regulate is being addressed in other ongoing international processes – e.g. the EU has noted that this topic is already being addressed in the OECD's work on the future of investment treaties.⁶⁶

5. Conclusion

The interpretation of the scope of the Working Group's mandate is a political decision, which is up to the States participating in the WG III process – and strictly UNCITRAL Member States – to decide. As has been stressed throughout the reform effort, this is a State-led process. Ultimately, it is up to States to shape the mandate and what matters is how they understand what it covers. Based on the above review, while there is widespread support for the WG III process to continue considering the topic of damages and compensation, there are diverging views amongst States over whether the right to regulate falls within WG III's mandate. States have generally accepted that WG III's mandate permits reforms to counterclaim procedures but extending the mandate to cover the substantive obligations that provide the legal foundation of the counterclaim may not receive widespread acceptance.

⁶⁶ Comments of the EU and its Member States, p. 15 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_the_eu_and_its_ms_wp.231.pdf.