Chapter 6.2
The Reform of the Investor-State Dispute Settlement System at UNCITRAL Working Group III

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A. INTRODUCTION

Since the early 2000's, as the number of investor-state cases were brought to arbitration, States have faced the full panoply of the legal and financial effects of their old-generation investment treaties, which provided broad and unqualified protection standards to foreign investors and direct recourse against the host State for alleged breaches. Thus, the governments were caught off guard by the robustness of the investor's claims and the interpretations of their treaties by arbitral tribunals, which the States considered inconsistent with their intended scope.

In addition to the treaty-based standards of treatment which formed the legal basis for the investment disputes, the arbitral process itself came under increased scrutiny, from the perspective of its (in)adequacy for the resolution of investment disputes, and concerns of the State respondents related to specific steps in the arbitral proceedings. This includes the increasing duration and costs of the proceedings, equality of arms of the disputing parties, the inconsistency of ISDS awards, the perceived lack of independence and impartiality of arbitrators, and the States' right to regulate in the public interest for fear of facing ISDS claims.

Since 2018, the UNCITRAL Working Group III (ISDS Reform) has been the multilateral forum, allowing a government-led dialogue on the common concerns, areas of reform and concrete tools and solutions which could help improve and enhance the dispute resolution process in ISDS. The WGIII deliberations and instruments were meant to help overcome the identified procedural issues, without delving into the reform of substantive treaty protections or treaty interpretation issues which were also high on the reform priority list for the WGIII delegates.

Although the WGIII was meant to conclude its mandate by 2025, the reform process is still ongoing as the States are tackling the reform options addressing the existing ISDS system focused primarily on investment arbitration, as well as institutional and systemic proposals, which include the possible establishment of a multilateral investment court and appellate mechanism. This chapter will outline the mandate, reform areas and dynamics in the WGIII (B. and C.), then turning to the concrete reform instruments which were already adopted by the UNCITRAL Commission (D.), as well as those that remain on the WGIII agenda for the upcoming sessions (E.). As the reform process continues to evolve, its final contours are yet to be determined. However, the analysis in this chapter will provide a solid background of the remarkable work that has been done, which has already yielded tangible results. In any case, it indicates the reform direction and vision of the States for the future of ISDS.

B. MANDATE, SCOPE AND METHODS OF DELIBERATIONS OF THE UNCITRAL WGIII

Investment arbitration, the now default dispute resolution mechanism for investor-State dispute settlement (ISDS) emerged as a neutral, de-politicized forum which would provide the requisite legal protection to (largely) Western investors from developing countries seeking to invest in the developing world.[36] Although it was deployed through investment treaties into the context of public-private relations involving private investors and sovereign States, international arbitration is originally a creature of commercial

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[36] Wellhausen, *Recent Trends in Investor–State Dispute Settlement* (2016) 7 J. Int'l Dispute Settlement, p. 12; Kahale, *Rethinking ISDS* (2018) 44 Brooklyn J. Int'l L. p. 14; Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance* (2005) 25 Int'l Rev Law and Economic, p. 4.

law.[37] Thus its features and functions may not always be calibrated to the specific needs and dynamics of investor-State disputes and the concrete needs of the parties.

Over time, as the number of ISDS cases increased, and a significant body of case law had emerged, States became increasingly aware of some inadequacies and issues related to the process of outcomes of ISDS.[38] Since the network of investment treaties and the investment arbitration process form part of an international framework, domestic or bilateral reforms to improve the ISDS system would not be effective, as they would risk fragmentation and further uncertainty in the field.

The United Nations Commission for International Trade Law (UNCITRAL) Working Group III (ISDS Reform) (WGIII) was thus selected and empowered to serve as the venue for the state-to-state, multilateral discussions on the nature, scope and tools of ISDS reform.[39] The WGIII was given a broad mandate, but restricted to issues of arbitral procedure, and not the substance of international investment treaties.[40] Although some States and scholars have pointed to the inextricable nature of the two aspects of international investment law, and the risks of bifurcating their reform, the WGIII maintained its original mandate which remained unchanged since 2018.[41]

The WGIII deliberations unfold through biannual in-person sessions taking place in Vienna and New York, where various reform areas and draft instruments are discussed in detail by the delegations.[42] Such discussions are complemented by written submissions and commentary from the delegations, but also from international organizations, arbitration practitioners and scholars. As additional fora for state-to-state discussions, governments participating in the WGIII have hosted a number of inter-sessional meetings, where the ideas and proposals emerging from the WGIII are further considered from the State perspective.[43]

The work and outputs of each component of the WGIII ISDS reform process are meticulously documented and made available to the participating States and the public on the dedicated WGIII website. This enhances the transparency of this consequential initiative, and allows all interested stakeholders, including the general public, to remain informed on the progress of ISDS reform at the international level.[44]

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37 Landau, *Re-Politization of ISDS* (2023) Alexander Lecture.

38 Although investors did indeed start using ISDS more frequently to pursue treaty-based claims with notable success, the notion promoted by some ISDS critics that investors overwhelmingly prevail in ISDS cases is factually incorrect. According to data provided by UNCTAD, out of the 958 cases concluded as of 31 July 2024, 361 were concluded in favor of the State (either on jurisdiction or the merits), while 268 were decided in favor of investors. UNCTAD *Investment Settlement Navigator* (2024).

39 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session* (2017), p. 2.

40 *Ibid.* pp. 2-5.

41 Duggal et al*., Procedural versus Substantive Reforms: Is the Work of UNCITRAL WGIII Worth the Wait?* (2021); Verbeek, *ISDS Reform: The Need for a Substantive Overhaul to Investment Protection* (2018); UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session* (2017), p. 5.

42 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement*, pp. 6-10.

43 Reports from the inter-sessional meetings can be accessed from the home page of the WGIII website here: https://uncitral.un.org/en/working_groups/3/investor-state.

44 The working documents, stakeholder commentary and audio recordings from the WGIII are documented an regularly update on the WGIII website here https://uncitral.un.org/en/working_groups/3/investor-state.

The original timeframe for the WGIII ISDS reform mandate was until 2025. However, due to the broad scope of the reform agenda and the complexities of multilateral deliberations, the WGIII is likely to extend its term until the key reform instruments are adopted. With the existing momentum, and the level of global interest in the outcome of the ISDS reform process, such an extension was inevitable, and it demonstrates the diligence and dedication of the WGIII and the participating States to the reform priorities before them.

The following sections will outline the nature, scope and priorities of the ISDS reform process, before delving into the reform instruments which were already adopted, and those which remain on the WGIII agenda.

C. IDENTIFIED CONCERNS AND REFORM AREAS FOR ISDS

In order to narrow down the intervention area for the WGIII deliberations, the UNCITRAL Secretariat structured the discussion to (1) identify the most prominent ISDS concerns; (2) determine the need for reform in such areas; and (3) propose viable reform options.[45] Out of this process, the WGIII grouped the major concerns related to ISDS into three main categories:

During the first and second stages of the WGIII deliberations, the government submissions reflected the diversity of their priorities and needs related to ISDS reform in the identified areas of concern. From the voluminous submissions and proposals exchanged with the UNCITRAL Secretariat, the reform agenda was streamlined into the following set of reform areas:[46]

1. Structural and institutional reforms addressing multiple reform areas (multilateral advisory center[47], standalone appellate mechanism,[48] standing investment court with integrated appellate mechanism);[49]

2. Reforms directed at the conduct, appointment, independence and impartiality of ISDS adjudicators, understood as arbitrators and judges (appointments by neutral appointing authorities, enhances transparency of the appointment process, selection of adjudicators from rosters,[50] adoption of a code of conduct for ISDS adjudicators adapted for investment disputes);[51]

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45 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session* (2017) p. 5.

46 UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS), Addendum* (2019).

47 UNCITRAL Secretariat, *Possible Reform of investor-State dispute settlement (ISDS) Advisory Centre* (2019); Referenced in submissions by the governments of Morocco, Government of Thailand, Costa Rica, Turkey, the Republic of Korea and the European Union and its Member States; UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS), Addendum* (2019) p. 2.

48 Referenced in submissions by the governments of Morocco, Chile, Israel and Japan, Ecuador, China, European Union and its Member States. *Ibid.* Addendum, pp. 2-3.

49 Referenced in submissions by the governments of South Africa, Bahrein, Korea and the European Union and its Member States. *Ibid.* Addendum, p. 3.

50 UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS) Selection and appointment of ISDS tribunal members* (2019) http://undocs.org/A/CN.9/WG.III/WP.169; Referenced in submissions by the governments of China, Turkey, Chile, Israel and Japan, Thailand, Costa Rica, Ecuador, Bahrain and the European Union and its Member States; *Supra* n. 12, Addendum, p. 4.

51 UNCITRAL Secretariat, Possible future work in the field of dispute settlement: Ethics in international arbitration http://undocs.org/A/CN.9/916; Referenced in submissions by the governments of China, Turkey, Chile, Israel and Japan, Thailand, Costa Rica, Ecuador, Bahrain, South Africa, Morocco and the European Union and its Member States; UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS), Addendum* (2019) p. 5.

3. Reforms aimed at reducing the costs and duration of ISDS proceedings (early dismissal of frivolous claims,[52] expedited proceedings,[53] stricter procedural timelines and cost management,[54] dispute prevention and management mechanisms, consultations and mediation,[55] exhaustion of local remedies,[56] consolidation of related claims, security for costs, stay of proceedings, preliminary rulings,[57] disclosure of third-party funding,[58] allocation of costs[59]);

4. Reforms addressing the consistency and correctness of ISDS awards and treaty interpretation in ISDS (consultations of treaty parties in joint committees, joint interpretive notes, technical consultations, publication of the *travaux preparatoires*, state-to-state review and appeals mechanisms[60]).

The WGIII considered these areas to be most pressing, and determinative of the integrity and legitimacy of the ISDS process itself.[61]

Although the WGIII delegations found common ground on the areas of reform to be addressed in the deliberations, the proposed paths to their effective achievement differed. While most States preferred the targeted reform of the existing system, the EU and its Member States have been strongly advocating for the replacement of ISDS through investment arbitration with a standing, two-tier investment court (multilateral investment court MIC).[62]

The court model is already included into bilateral treaties the EU recently concluded with Canada, Singapore and Vietnam (the so-called investment court system).[63] Through the promotion of the MIC at the WGIII, the EU seeks to expand this model beyond its borders, as the only reform option which can effectively address all the ISDS-related concerns.[64] It should be noted that the ICS provisions in the EU

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52 Referenced in submissions by the governments of Indonesia, Turkey, Chile, Israel and Japan, Costa Rica, South Africa, and Morocco; *Supra* n. 12, Addendum, p. 9.

53 Referenced in submissions by the governments of Thailand, Turkey, Chile, Israel and Japan, and Costa Rica. *Ibid.* p. 10.

54 Referenced in submissions by the governments of Thailand, Morocco, Costa Rica, South Africa and Chile, Israel and Japan. *Ibid.* p. 11.

55 Referenced in submissions by the governments of Indonesia, Korea, China, South Africa, Turkey, Brazil, Costa Rica, Chile, Israel and Japan, Thailand, Morocco and the European Union and its Member States. UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS),* Addendum (2019) pp. 7-8.

56 Referenced in submissions by the governments of Indonesia, Morocco, and South Africa. *Ibid.* p. 8.

57 Referenced in submissions by the governments of South Africa, Turkey, Costa Rica, Chile, Israel and Japan, and the European Union and its Member States. *Ibid. p.* 10.

58 UNCITRAL Secretariat http://undocs.org/A/CN.9/WG.III/WP.172; Referenced in submissions by the governments of South Africa, Turkey, Costa Rica, Chile, Israel and Japan, China, Korea, Thailand, and Morrocco. *Ibid.* pp. 11-12.

59 Referenced in submissions by the governments of Morocco, Thailand, Costa Rica, South Africa and Chile, Israel and Japan. *Ibid.* p. 10.

60 Referenced in submissions by the governments of Morocco, Thailand, South Africa, Costa Rica, Chile, Israel and Japan, European Union and its Member States. *Ibid.* pp. 6-7.

61 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session* (2017) p. 6.

62 Puccio and Harte, *From Arbitration to the Investment Court System (ICS) - The Evolution of CETA Rules* (2017).

63 Delivorias, *Multilateral Investment Court (MIC), 'A Stronger Europe in the World'* (status as of June 2024).

64 Submission by the European Union and its Member States to the UNCITRAL WGIII (ISDS Reform) (2019); EU Parliament, *Multilateral Investment Court Overview of the reform proposals and prospects (Briefing)* (2020).

treaties have not entered into force as of the date of writing, pending the ratification in each EU Member State.

As it will be further explained in the following sections, some of the adopted WGIII reform instruments already accommodate the MIC model, by providing separate rules, or distinguishing the rules that would apply to the MIC in unified instruments applicable to both reform streams

Considering its broad mandate and the parallel tracks of reform, the WGIII has approached the third stage of the ISDS reform process by developing and deliberating separate reform instruments, starting from those that have received the most support among the delegates. This includes the codes of conduct for arbitrators and judges, documents related to dispute prevention and mediation, as well as the establishment of an Advisory Centre to support States in ISDS proceedings. The WGIII views these instruments as building blocks of the future reform package, from which the States will be able to create their tailored ISDS frameworks. The following sections will examine the reform instruments which have been adopted by the Commission to date.

D. ADOPTED REFORM INSTRUMENTS

I. Codes of Conduct

The regulation of the conduct and ethics of the adjudicators in ISDS proceedings was one of the top priorities at the WGIII since the earliest stages of deliberations, and the need for a Code of Conduct (CoC) geared for investment disputes was discussed already at the 39th WGIII session.[65] States expressed concerns about the vague standards of independence and impartiality, as well as issue conflicts,[66] the perceived widespread practice of repeat appointments[67] and "double hatting" of arbitrators,[68] who simultaneously acted as arbitrators and counsel, at times in related proceedings.[69] Since such practices were not expressly regulated in the existing rules governing arbitrator conduct and challenges, attempts to remove arbitrators on such grounds were rarely successful.[70]

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65 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Code of Conduct (2020),* p. 1.

66 Abdel Wahab, *The Issue With Issue Conflicts*, in Beaumont et al. (eds) *The Future of Investor-State Dispute Settlement: Reforming Policies, Practices and Perspectives* (2023); Issue conflicts may arise if arbitrators have previously taken public positions on certain legal issues which are central to the case, whether in previous awards, publications or public speeches, thus creating a perception that the arbitrator has prejudged such issues and would not be able to make an impartial decision in the case. Such challenges are case-specific and rarely successful under the existing rules where even the IBA Guidelines on Conflict of Interest in International Arbitration place them on the Green List. ICSID, *Background Papers – Code of Conduct: Issue Conflicts* (2020), p. 1.

67 Langford et al., *The Revolving Door in International Investment Arbitration* (J Intl Econ L, 2017).

68 Double hatting relates to situations where arbitrators appointed in Investor-State disputes simultaneously act as party representatives or experts in other investment disputes. It is considered harmful as it creates risks of conflicts of interest, or at least a perception of partiality if arbitrators are deciding on issues that they were arguing for or against as counsel. ICSID, *Background Papers – Code of Conduct: Double Hatting* (2020), p. 1.

69 See, for example *Tidewater v. Venezuela,* Decision on the Proposal to Disqualify Professor Brigitte Stern, ICSID Case No. ARB/10/5 of December 23, 2010, para. 68. See also *Participaciones Inversiones Portuarias SARL v. Gabon,* Decision on the Proposal to Disqualify an Arbitrator in ICSID Case No. ARB/08/17 of November 12, 2009.

70 Brodlija, *Back to Basics: Drawing the Line Between Disclosure, Challenge and Disqualification Standards in International Investment Arbitration* (2021); Brodlija, *The Draft Code of Conduct for Adjudicators in International Investment Disputes: Low-Hanging Fruit or Just an Appetizer?* (2023); Griffith and Kalderimis, *'Pure' Issue Conflicts in Investment Treaty Arbitration*, in Caron et al. (eds) *Practising Virtue: Inside International Arbitration* (2015) Oxford Academic, pp. 607-625 (47).

On the wings of the consensus within the WGIII on the need for such reform,[71] the secretariats of UNCITRAL and International Centre for Settlement of Investment Disputes (ICSID) embarked on the development of the draft CoC, envisioned as a set of rules to apply to all adjudicators in ISDS (excluding mediators, conciliators, expert witnesses and counsel), which would serve as binding rules rather than soft law guidelines.[72] However, the first draft CoC was perceived as too restrictive and was met by criticism by some States and prominent arbitrators, as expressed in their respective comments.[73]

Inevitably, the subsequent versions of the draft CoC were molded towards a compromise solution which would satisfy the proponents of strict and binding rules, as well as those calling for a degree of flexibility to protect part autonomy and diversity of the adjudicators.[74] In addition, given the inherently different role and position of judges in the potential standing investment court, the desire for a single legal document that would apply to all ISDS adjudicators also had to be reconsidered.[75]

Therefore, the development of the CoC, which was expected to be a streamlined and consensus-driven process, unfolded in protracted deliberations, resulting in a compromise solution which deviated considerably from its intended strict and binding nature. Nevertheless, the adopted Codes of Conduct provide unique and more defined standards for the conduct of arbitrators and judges in ISDS proceedings, addressing for the first time the practice of double-hatting, and enhancing the disclosure requirements which should help bring to light problematic repeat appointments and potential issue conflicts.[76]

Considering the dichotomy of the parallel reform tracks indicated above, the CoC for Adjudicators was separated into two draft reform instruments, following the 43rd session of the WGIII: Code of Conduct for Arbitrators (code for arbitrators) and a Code of Conduct for Judges (code for judges).[77] The code for arbitrators was adopted by the UNCITRAL Commission in July 2023, while the code for judges was adopted in principle, since its structure, features and mandate remain subject to discussion at the WGIII.[78]

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71 Chiara Giorgetti, *The Draft Code of Conduct for Adjudicators in Investor–State Dispute Settlement: A Low-Hanging Fruit in the ISDS Reform Process,* J of Int'l Dispute Settlement, idab032 (2021).

72 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Code of Conduct* (2020) p. 9. 'The proposed code seeks to reflect the deliberations of the Working Group to date taking into consideration that the code should be binding and contain concrete rules rather than guidelines. It provides applicable principles and detailed provisions allowing for flexibility to address unforeseen circumstances." UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Eighth Session* (2019) p. 15.

73 UNCITRAL and ICSID, *Draft Code of Conduct Comments by State/Commenter* (2021).

74 UNCITRAL and ICSID, *Draft Code of Conduct: Comments by Article & Topic as of January 14, 2021* (2021) pp. 31-33, 104-106, 122-124; The respective drafts of the Code, background documents and comments by states and other stakeholders are available on the UNCITRAL WGIII website https://uncitral.un.org/en/codeofconduct.

75 UNCITRAL and ICSID, *Draft Code of Conduct for Adjudicators in International Investment Disputes and Commentary Version Four – July 2022* (2022) comments by Armenia, pp. 6-9; comments by the European Union and its Member States, pp. 16-42.

76 The respective drafts of the Code, background documents and comments by states and other stakeholders are available on the UNCITRAL WGIII website https://uncitral.un.org/en/codeofconduct.

77 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-Third Session*, pp. 31-41; UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-Fourth Session* (Vienna, 23–27 January 2023) (2023) pp. 5-18.

78 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-Fifth Session* (2023) pp. 16-22.

With this decision, the WGIII prevented further delays in the completion of its reform agenda, in recognition of the necessary compromise and flexibility in multilateral deliberations.

The following excerpts lay out the central provisions of the CoC for Arbitrators, i.e. the double-hatting and disclosure standards.[79]

Double-Hatting (Article 4 CoC)

The central feature of the draft Code is the provision on double hatting, which was debated quite literally until the last minute of the 45th session.[80] The final solution threads the needle between a total ban on double hatting and party autonomy in the treatment of such practices.[81] Article 4 thus forbids arbitrators from holding multiple roles in cases involving the same (or related) parties, same measures, and provisions of the same instrument of consent (i.e., investment treaty, investment law, or contract).[82] In addition, former arbitrators are subject to a cooling-off period during which they cannot be engaged as party representatives or experts in such cases (three years for cases involving the same measures and parties, respectively, and one year for cases involving the same provision of the same instrument of consent).[83] These restrictions reflect the prevailing criticism of double hatting in the WGIII, but they can be waived by the parties.

Ongoing Duty to Disclose (Article 11)

Article 11 of the draft Code deals with disclosures, which are another an issue of considerable interest in the WGIII.[84] This provision imposes a two-tier disclosure obligation: (1) A general duty to disclose any circumstances that may raise justifiable doubts of the arbitrator's independence and impartiality; and (2) A specific set of minimum requirements, applicable regardless of the disclosure made under the first tier of assessment (relationship with the parties and other key stakeholders, any personal or financial interest related to the dispute, past appointments within five years, and present or future appointments as counsel or expert in investment disputes). One of the latest versions of the draft Code provided a combined objective-subjective disclosure standard in Article 11, requiring the candidates and arbitrators also to also consider the perspective of the disputing parties and the third parties when deciding whether to disclose certain facts and circumstances. This text was omitted in the final version of the draft Code in order to align it with the objective standard for disclosure and challenge under the UNCITRAL Arbitration Rules.[85] However, the Commentary provided several options for the Commission's consideration and adoption, including a reference to the subjective disclosure standard, allowing for broader disclosures.[86]

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79 Brodlija, *Weeding Out the Issues of ISDS Reform: The Progress and Milestones of the UNCITRAL Working Group III Five Years Later,* in Beaumont et al. *The Future of Investor-State Dispute Settlement: Reforming Policies, Practice and Perspectives* (2023) pp. 59-63.

80 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-Fifth Session* (2023) pp. 18-19.

81 Draft Code of Conduct for Arbitrators in Investment Dispute Resolution and Commentary, Art. 4.

82 *Ibid.*

83 *Ibid.*

84 *Ibid.* Art. 11.

85 UNCITRAL Arbitration Rules (2021) Art. 21; Art. 11 'When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.'

86 *Supra* n. 46, Commentary to Art. 11.

As an extension of Article 4, arbitrators are also obliged to disclose any prospective concurrent appointments as party representatives or arbitrators in any other international investment dispute or related proceeding. This delicate balancing act reflects the trade-offs and compromises which marked the drafting process of the draft Code of Conduct, from an intended binding and unified instrument to a bifurcated and more flexible tool. Such an approach was necessary in light of the broader dynamics of ISDS reform outlined above.

The double-hatting rules that emerged from the robust WGIII discussions were a compromise solution, short of a full prohibition, but creating clear temporal and substantive limitations on the practice, reinforced with ongoing disclosure obligations.[87]

Thus, arbitrators are precluded from simultaneously acting as counsel or experts in cases with the same (or related) parties, same State measure and same provision of the same instrument of consent underlying the claim.[88] In addition, former arbitrators are subject to a cooling-off period for such future engagements for three years if the future case involves the same (or related) parties and State measure, and one year if the case relates to the same provision of the same instrument of consent.[89]

Finally, if a former arbitrator becomes aware of a prospective opportunity of a concurrent appointment as counsel or expert witness in another investment dispute or related proceedings, they should disclose such circumstances to the parties, the arbitral institution and other members of the tribunal about this fact.[90] It is unclear from the CoC how this provision would be implemented in practice, and particularly what effects the notice and response from the parties (or lack thereof) could have on the arbitrator's appointment in the future case.

Any adverse consequences for the arbitrator would be reduced to the minimum, especially if the CoC applies as soft law in the relevant case. Any (non)disclosure does not automatically affirm the existence of a conflict of interest, although the arbitrators are directed to err on the side of disclosure in case of doubt.[91] Although the Code of Conduct does not expressly address issue conflicts or repeat appointments, the combined effect of the double-hatting and disclosure provisions can reduce the risks of conflicts of interest in that respect as well.

While the CoC provisions on double-hatting do have the potential to restrict and control double-hatting in investment disputes, they can be modified or derogated by the parties. This compromise is an obvious nod to party autonomy as a contrast to a full ban, but it also bears the risk of watering-down any intended effect of the double-hatting rules. It also leaves the door open for fragmentation which is contrary to the aims of the CoC.

The CoC itself does not provide for a concrete enforcement mechanism, but refers to the provisions of the relevant instrument of consent or applicable rules.[92] It remains to be seen in practice how the normative framework and novel standards of the CoC will interact with the existing enforcement and disqualification standards.

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87 Khalid Khan, *The Double Hatting Paradox in Investment Arbitration: Justification For Abolition?* (2023).

88 Code of Conduct for Arbitrators, Art. 4(1).

89 *Ibid,* Art. 4(2). Instruments of consent are defined as the legal basis of the relevant dispute, and can include investment treaties, national foreign investment legislation and investment contracts.

90 *Ibid.,* Art. 11.

91 *Ibid.,* Art. 11. (5) and (7).

92 *Ibid.,* Art. 12.

II. Reform Instruments on Investor-State Mediation

The dispute resolution clauses in most bilateral and multilateral investment treaties provide for a timeframe (most commonly 3 to 6 months) for an attempt at an amicable settlement between the disputing parties.[93] Although these so-called cooling-off clauses usually do not specify the methods for amicable settlement, or provide specific guidance on the process, mediation has recently emerged as a viable option in the ISDS context.[94] Therefore, in more recent treaties, States have started referencing mediation explicitly, while the EU has included detailed mediation rules into its recent treaties with Canada, Singapore and Vietnam, and it is also featured in newer Model bilateral investment treaties (BITs), such as those adopted by Bosnia and Herzegovina, Colombia an the Netherlands.[95] In the EU treaties, the Code of Conduct for the ICS judges also applies to mediators under the treaty.[96]

As a mode of facilitated negotiation, mediation presents multiple benefits compared to adversarial litigation or arbitration. This primarily relates to the ability of the parties to pursue interest-based resolutions of their dispute, which may allow them to maintain their underlying relations, lower costs and duration of the proceedings and the availability of mediation at any time before, during and even after the arbitral proceedings.[97] When compared to other alternative dispute resolution methods, mediation is more flexible than conciliation, and yet more structured and neutral than direct negotiations.[98] Therefore, it is particularly suitable for Investor-State disputes, in appropriate cases.

Arbitral institutions are also becoming more alive to the interest in Investor-State mediation and the need to give it a more prominent place among the services they provide to disputing parties. In this sense, leading arbitral institutions have recently adopted or amended their mediation rules, and enhanced the

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93 See for example, Peru-United Kingdom BIT (1993), Art. 10 ("Any legal dispute arising between one Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former shall, as far as possible, be settled amicably between the two parties concerned. If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to [ICSID] for settlement by conciliation or arbitration." For an overview of the existing mediation clauses in investment treaties, *see* generally ICSID, *Overview of Investment Treaty Clauses on Mediation* (2021).

94 Due to the lack of concrete information, there is a perception among practitioners and scholars that mediation is underutilized in ISDS due to the lack of experience in most States, the lack on internal capacity to participate in mediation and unclear settlement authorities. There are also anecdotal and reported accounts of concerns related to public scrutiny, reputational harm and liability for government officials involved in amicable settlement with foreign investors. Seraphina Chew et. al, *Report: Survey on Obstacles to Settlement of Investor-State Disputes* (2018). However, since mediation proceedings and the resulting settlements are largely confidential, there is no conclusive empirical data indicating the frequency and success rate of mediation in ISDS. (Frauke N.)

95 EU-Canada Comprehensive Economic and Trade Agreement (CETA), Art. 8.20; EU-Singapore Investment Protection Agreement, Art. 3.4, Art. 3 (Selection of the Mediator) of Annex 6 (Mediation Mechanism for Disputes between Investors and Parties); Annex 7 (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators); EU-Vietnam Investment Agreement, Art. 3.4; Annex 8 (Code of Conduct for Arbitrators and Mediators); Annex 9 (Mediation Mechanism). Art. 17.1 of the Netherlands Model BIT (2019) expressly provides for the possibility for the parities to initiate mediation at any time during the dispute, including after the initiation of arbitral proceedings. It provides that "[a]ny dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation… A disputing party shall give favorable consideration to a request for negotiations, conciliation or mediation by the other disputing party. …"

96 *Ibid.*

97 ICSID, *Background Paper on Investment Mediation* (2021).

98 *Ibid.*

administrative services available for mediation proceedings.[99] ICSID has been the most active in this sphere, recently adopting a new set of mediation rules, distinct from the conciliation process which has been a staple of the ICSID framework from its very beginning.[100] In addition, ICSID itself offers a wide range of administrative and capacity development services for States, simultaneously enhancing their ability to mediate investment disputes, but also normalizing mediation as a component of the ISDS process.[101]

With this momentum, and increased need for flexible and effective amicable settlement tools in the cooling-off period, the WGIII[102] and the Commission showed broad support for the development of reform instruments which would facilitate and promote mediation in investment disputes.[103] Given the general consensus about its benefits, as reflected in the recent treaty practice in the EU and other regions, the reforms in this area would apply to both the gradual and systemic reform tracks.

Considering the specialized rules and advanced work of arbitral institutions in the sphere of mediation, the WGIII did not aim to develop detailed procedural rules, but instead provided model language and procedural guidance for States seeking to integrate mediation into their legal frameworks, and to enable their effective participation in mediations with foreign investors. For the specific procedural and substantive rules governing investor-State mediation, the WGIII instruments refer the parties to the existing legal framework.[104]

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99 VIAC Rules on Investment Arbitration and Mediation (2021); ICC Arbitration and Mediation Rules (2021). There is also a robust international framework for non-institutional investor-State mediation, including the UNCITRAL Mediation Rules (2021). The cross-border enforcement of mediated settlements is ensured through the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation"); Most recently, on 3 May 2023, the United Kingdom signed the Singapore Convention, as an important factor to reaffirm its status as an international dispute resolution hub. Chartered Institute of Arbitrators, *UK Government Signs the Singapore Convention on Mediation* (2023).

100 ICSID published the updated Mediation Rules, making a clear distinction from conciliation and providing detailed procedural guidance for ISDS mediation under the ICSID framework. ICSID Mediation Rules (2022); ICSID also offers capacity development and guidance to individual states interested in ICSID Mediation, in an effort to promote the use of mediation in ISDS. ICSID, *Background Paper on Investment Mediation* (2021).

101 *Ibid.*

102 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS)* (2023). *Submission from the European Union and its Member States to the UNCITRAL WGIII* (2023). Numerous governments submitted reform proposals to the WGIII supporting the enhanced use of mediation in ISDS, including Thailand, Indonesia, Republic of Korea, Brazil, South Africa, China, Chile, Israel, Japan, Peru, EU and its Member States, Mali, Costa Rica and Mexico. The relevant submissions are available on the UNCITRAL WGIII website: https://uncitral.un.org/en/investmentmediationanddisputeprevention. See also Submission to the UNCITRAL WGIII from the Government of Indonesia (2018) p. 4.

103 Alternative dispute resolution and dispute prevention were proposed as possible reform options early in the work of WGIII. UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Dispute Prevention and Mitigation - Means of Alternative Dispute Resolution* (2020) https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/002/56/PDF/V2000256.pdf?OpenElement; UNCITRAL, *Official Records of the General Assembly, Seventy-Second Session, Supplement No. 17* (A/72/17), para. 264.

104 Specifically, the *Draft Provisions on Mediation* in draft provision 1, para.7, refer to the UNCITRAL Mediation Rules (2021), the ICSID Mediation Rules (2022), and the IBA Rules for Investor-State Mediation (2012).

The excerpts below outline the nature and scope of the WGIII reform instruments related to investor-State mediation: the UNCITRAL Notes on Mediation and the UNCITRAL Guidelines for Mediation in International Investment Dispute Resolution.[105]

UNCITRAL Model Provisions on Mediation

The UNCITRAL Model Provisions on Mediation provide model clauses that states can include in future investment treaties, but which may also be featured in the multilateral instrument for ISDS reform, contemplated by the WGIII.[106]

The model provisions define mediation in broad terms, as a mechanism available to the disputing parties at any time before, during or after a dispute.[107] *Further, the Draft Provisions include clauses defining the initiation of the mediation, the appointment and mandate of mediators and the relationship between mediation and other parallel proceedings.*[108] *Importantly, the Draft Provisions recommend regulating the form and effects of the settlement agreement, in alignment with the enforcement mechanism provided in the Singapore Convention.*[109] *(…)*

They are not intended as binding rules, but a helpful tool for mediators and parties navigating the mediation process.[110]

UNCITRAL Guidelines for Mediation in Investment Disputes

The Mediation Guidelines explain the nature and purpose of mediation, its timing and availability, the qualifications and appointment of mediators, as well as the key stages of the mediation process. A notable and potentially useful feature is the list of factors to determine the suitability of mediation for a particular dispute.[111] *In addition, the Mediation Guidelines clarify the role of different stakeholders in a mediation, including arbitral institutions, mediators, the parties, their legal representatives, as well as other parties.*[112]

There is also guidance on the option of conducting a part or the entire mediation online, as well as important notes on confidentiality and the use of information shared in and obtained through mediation.[113] *Finally, the Mediation Guidelines explain the importance of the form and validity of the mediated*

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105 Brodlija, *Weeding Out the Issues of ISDS Reform: The Progress and Milestones of the UNCITRAL Working Group III Five Years Later,* in Beaumont et al. *The Future of Investor-State Dispute Settlement: Reforming Policies, Practice and Perspectives* (2023) pp. 63-67.

106 UNCITRAL Secretariat, *UNCITRAL Model Provisions on Mediation* (2023).

107 *Ibid.*

108 *Ibid.* draft provisions 1-4.

109 *Ibid.* draft provision 5.

110 *Ibid.* para. 2.

111 *Ibid*. para.

112 The guidelines provide examples of other parties which could possibly be included in the mediation process, primarily: (i) States Parties to the underlying investment treaty not party to the dispute, (ii) local communities affected by the investment, the dispute, or any negotiated solution, (iii) the civil society at large, and (iv) other interested stakeholders. *Ibid*. para. 30.

113 *Ibid.* paras. 32-39.

settlements to ensure their enforceability under national mediation laws, as well as the Singapore Convention.[114]

III. Statute of the Advisory Centre

Aside from the reform of the procedural aspects of ISDS, the capacity of the respondent States to participate in such proceedings and effectively defend their case was a continuous concern in the WGIII. This particularly relates to least developed and developing States which largely rely on external counsel.[115] Such practices have had two negative effects over time: the mounting of significant costs of legal representation, and the lack of institutional knowledge on ISDS.[116]

As a potential solution to this issue, the WGIII has proposed the establishment of a multilateral Advisory Centre for States, which would offer continuous capacity development and technical assistance to its member states, as well as legal services related to concrete ISDS claims.[117] Although the proposal was in principle well accepted as a necessary component of the ISDS reform process, the discussion about its financing, beneficiaries and scope of services was subject of extensive discussions within the WGIII.[118] In particular, delegations expressed diverging views on whether the services of the Centre should be available only to states and regional economic integration organizations (REIOs), or if small and medium-sized enterprises should be given access to the capacity development services for a fee.[119]

The excerpts below illustrate the contours of the Advisory Centre as provided in its draft Statute, in the context of the broader WGIII deliberations.[120]

The Centre should be independent form any state or international body, or any other undue influence, including that of donors.[121] *Nevertheless, the Centre is expected to be partial towards its members in the*

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114 *Ibid.* paras. 40-41; Arts. 15 and 18 of the Singapore Convention; States are also encouraged to adopt the UNCITRAL Model Law on Mediation which provides an enabling and predictable framework for mediation based on international best practices.

115 UNCITRAL *Secretariat, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth session (Vienna, 27 November–1 December 2017)* (2017) p. 11.

116 The average legal costs of respondent states in investment disputes are around US$4.7 million, while the median amount is US$2.6 million. For investors, the average costs were US$6.4m, and the median amount is US$3.8 million. The average costs of ICSID arbitrations is US$958,000 and 745,000 (median), while for UNCITRAL arbitration, the average is US$1.05 million, with a median of respectively US$745,000 and US$775,000. ICSID proceedings last for approximately four years and eight months, while UNCITRAL proceedings conclude five months earlier, but the difference in median terms is not significant.

117 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS)* (2021) p. 2; UNCITRAL Secretariat, *Draft Statute of an Advisory Centre* (2023). The Draft Statute replaced the initial draft provisions deliberated by the WGIII at its 46th session. UNCITRAL Secretariat, *Draft Provisions on the Establishment of an Advisory Centre for International Investment Law* (2023).

118 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-Eighth Session (New York, 1–5 April 2024)* (2024).

119 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022)* (2022) p. 10.

120 Brodlija, *Sorting the Building Blocks of Investor-State Dispute Settlement Reform: Recent Developments from the UNCITRAL Working Group III*, in Lavranos and Mistelis (eds) European Journal of International Investment Law (2024) Vol. 8, Issue 2.

121 Draft Statute, Art. 3(2).

allocation of its resources and services.[122] As a general matter, least developed states would have priority status for the legal assistance and representation services, subject to the resources available to the Centre.[123] The Draft Statute classifies member states into least developed states, developing states and others, and provides annexes which will list the members in each category.[124] This classification will determine the membership fee and the order of priority for access to the services of the Centre among different members.[125]

The Draft Statute envisions the Centre with a two-tier structure, led by a Governing Committee comprised of member states' representatives, and a Secretariate, headed by an Executive Director.[126] Only states and Regional Economic Integration Organizations (REIOs) could become members of the Centre,[127] but non-member states and other entities would be able to take advantage of the Centre's services, under certain conditions, and for a service fee.[128] For example, non-member states would be allowed to use all types of services while other persons and entities, including micro, medium and small enterprises (MSMEs) could only request access to technical assistance and capacity building.[129] Access for both categories of users would be subject to specific criteria which will be determined by the Governing Committee, including that such access should be in furtherance of the objectives of the Centre, benefit the Members, without conflicts of interests or burdening the available resources.[130] The decision on non-member access to technical assistance services would be made by the Executive Director, while the Governing Committee would decide on their access to legal services at the Centre.[131]

The "two pillars" of the Centre are 1. capacity building and technical assistance[132] and 2. legal advice and support in investment disputes.[133] Both cover a wide range of possible services that would be available depending on the resources of the Centre.

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122 *Ibid.*

123 *Ibid.* Art. 7.

124 The WGIII will discuss further whether there should be objective criteria for the classification or if the states will apply for different lists themselves.

125 This refers to the categorization into least developed, developing and developed states, similar to the categories adopted by the UN, OECD or the WTO. UNCITRAL Secretariat, *Report of the UNCITRAL WGIII on the Work of its 46th Session* (2023).

126 Draft Statute, Art. 5.

127 *Ibid.*, Art. 4.

128 *Ibid.* Art. 6(5). The Draft Statute defines Non-Members as states and REIOS which have not signed the Advisory Centre Protocol, while other persons and entities may include arbitral institutions, international and regional organizations, investors, academics and other interested persons.

129 During the 47th WGIII session, delegations expressed opposing views on whether private entities should have access to the Centre, including micro, medium-sized and small enterprises (MSMEs). Critics noted that the Centre should not provide support to investors seeking to sue host states, and that MSMEs in need of financial support could turn to third party funders. In addition, some proposed that MSMEs should only be allowed to use the services of the Centre if third-party funding was ultimately prohibited in ISDS.

130 Draft Statute, Arts. 6(4) and 7(5). The Governing Committee can amend the criteria for Non-Member participation as appropriate.

131 *Ibid.*

132 *Ibid.* Art. 6.

133 *Ibid.* Art. 7.

The Draft Statute proposes a financing model that would combine contributions by the members, service fees and voluntary contributions.[134] In order to incentivize membership, some delegates suggested higher service fees for non-members, and a clear and transparent schedule for annual member contributions and service fees of the Centre (adjusted for member states of different development categories).[135] Given that least developed and developing states are those most in need of the Centre's services, it will be important to ensure that the financing of the Centre does not limit or preclude them from taking advantage of its benefits.[136]

Although the draft Statute on the Advisory Centre was adopted in principle by the Commission at its 57th session, there is a number of important questions which are yet to be addressed. This includes foundational issues, such as the location of the Centre, the possible establishment of regional centers, member contributions and the entry into force of the Statute. These issues will be further deliberated by the WGIII, while detailed rules on the administration and operation of the Centre, including the allocation of the funds and expenses, staffing and services will be determined by the Governing Committee once the Advisory Centre is established.[137] In any case, The WGIII was encouraged to continue making progress on the Advisory Centre, regardless of the dynamics of other reform areas contemplated by the WGIII.[138]

IV. Guidelines for the Prevention and Mitigation of Investor-State Disputes

Looking beyond the adversarial methods for the resolution of investor-State disputes, and the conventional amicable settlement methods, the WGIII has also dedicated attention to dispute prevention mechanisms, comprising of legal and institutional frameworks to identify and resolve disputes at the earliest stages.[139]

Over the years, States have established more or less formalized mechanisms aimed at dispute prevention, comprising a mosaic of country-specific solutions.[140] These include institutional focal points, coordination bodies, Ombudsperson offices, investment „home doctors", early grievance mechanisms,

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134 Draft Statute, Art. 8(4). The Draft Statute indicates that member states in default of their payment obligations may have limited access to the services of the Centre.

135 UNCITRAL Secretariat, *Report from the 46th Session of WGIII* (2023) p. 13; UNCITRAL Secretariat, *Sample Budget and Fee Schedule of the Advisory Centre for International Investment Law* (2024).

136 UNCITRAL Secretariat, *Comments from Delegations on the Initial Draft Provisions on the Establishment of Advisory Centre* (2021) pp. 10, 22, 30; UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa* (2019) p. 9; UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Mali* (2019) p. 3.

137 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Statute of an Advisory Centre on International Investment Dispute Resolution* (2024) p. 14.

138 As a general matter, WGIII delegations supported the establishment of the Centre as an independent body, separate from the influence of any institution. Its integration into an existing organization, such as the UN, was also considered as a viable option. The WGIII recommended the continuation of the deliberations on the Advisory Centre to take place through an informal, state-lead process, allowing the WGIII to focus on the remaining reform instruments left on its agenda. The UNCITRAL Secretariat offered support and coordination for the informal process, until a proposal is adopted or submitted to the Commission for adoption. *Ibid.* pp. 14-15.

139 Sattorova et. al, *Preventing, Mitigating and Managing Investor-State Disputes*, Academic Forum on ISDS (2021), pp. 5-8.

140 Energy Charter Secretariat, *Model Instrument on Management of Investment Disputes with Explanatory Note* (2018); UNCTAD, *Best Practices in Investment for Development – How to Prevent and Manage Investor-State Disputes: Lessons from Peru* (2011) p. 10; UNCTAD, *Investment Policy Framework for Sustainable Development* (2015).

etc.[141] Such bodies should provide agile and effective responses to investor grievances and issues which can be addressed at the technical level, thus preventing their escalation to legal disputes.[142]

Since the existing mechanisms were created organically in the national context of the relevant jurisdiction, the WGIII sought to develop a set of harmonized legislative guidelines which would help policy makers in the development of national dispute prevention mechanisms.[143] Although there was broad acknowledgment of dispute prevention as an important component of ISDS reform, the WGIII delegations preferred to have an informal guidance instrument, rather than a legislative direction which could be interpreted as favoring a specific policy solution for the States.[144] Thus, the WGIII opted to address dispute prevention through informal reform tools, as a more flexible and fluid format, which will also allow for continuous updates with emerging best practices to inspire reforms in different regions.[145]

As such, it can serve as soft law guidance for policy makers and other institutions interested in best practices for devising dispute prevention mechanisms for ISDS, including the Advisory Centre for International Investment Dispute Resolution.

The excerpts below highlight the key features and functions of dispute prevention mechanisms, as outlined by the Guidelines:[146]

[Dispute prevention mechanisms] would have the compounded benefits of reducing the costs of protracted legal proceedings and retaining much needed foreign investments in the country.[147] However, most countries do not have an established institutional framework or communication channels to enable the effective prevention, or mitigation of investment disputes,

In fact, government officials often complain that grievance letters and notices from investors are sent to the wrong institutions, only to circulate through the government structure without an adequate response.[148] In some instances, the letters never move from the first recipient institution.[149] This scenario is common not only for early grievances, but in some instances for notices of dispute which trigger the cooling off period before investment arbitration. Due to such a lack of coordination, the governments miss an opportunity to engage in amicable settlement with the investor, which could help avoid or mitigate the investment claim.

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141 *See* generally Compilation of best DPM practices.???

142 World Bank and Energy Charter Secretariat, *Enabling Foreign Direct Investment in Renewable Energy Sector: Reducing Regulatory Risks and Preventing Investor-State Conflicts* (2023), pp. 55-61.

143 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Legislative Guide on Investment Dispute Prevention and Mitigation* (2023).

144 UNCITRAL Secretariat, *Draft Guidelines on Prevention and Mitigation of International Investment Disputes* (2024).

145 UNCITRAL Secretariat, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Eighth Session (Vienna, 14–18 October 2019)* (2019), p. 15.

146 Brodlija, *Sorting the Building Blocks of Investor-State Dispute Settlement Reform: Recent Developments from the UNCITRAL Working Group III*, in Lavranos and Mistelis (eds) European Journal of International Investment Law (2024) Vol. 8, Issue 2.

147 Sattorova et al., *Preventing, Mitigating and Managing Investor-State Disputes*, Academic Forum on ISDS (2021) pp. 5-8.

148 GIZ, *Western Balkans Communication Roadmaps for Investment Dispute Prevention* (2021).

149 *Ibid.*

WGIII Delegations recognized the need for dispute prevention and mitigation mechanisms as a component of ISDS reform, and the Secretariat compiled a list of best practices from countries which have already established such mechanisms or practices, as well as those proposed by international development organizations and other bodies.[150] This compilation is continuously updated, and it now features examples such as the Brazilian Ombudsman for investment protection, the Korean "home doctors" for investments, and the Negotiating Body in Bosnia and Herzegovina.[151] While each of these models is tailored to the specific needs and circumstances of the implementing country, there are some common features which can serve as inspiration for others considering such reform.[152]

[A]head of the 47th session of the WGIII, the Secretariat published the Draft Guidelines on the Prevention and Mitigation of International Investment Disputes (Draft Guidelines) (…) largely maintaining the substance from the initial draft.[153] The Draft Guidelines emphasize the importance of proactive communication and coordination with the foreign investors and within the government, supported by the establishment of adequate institutional frameworks.[154] This approach should enable the retention of investments, and reflect a stable and supportive investment protection system for future investors.[155]

While acknowledging the likely financial implications of establishing and operating an infrastructure for dispute prevention, the Draft Guidelines recommend mechanisms such as 1. a grievance mechanism or lead agency to serve as a conduit for communication and the exchange of information between the investors and the competent institutions,[156] and 2. a coordination body which would assess possible disputes and decide the course of action with the aim of avoiding their further escalation.[157]

The Draft Guidelines suggest several structural variations for the coordination body, including a single agency established independently or within an existing institution, the designation of different roles to multiple agencies, or an inter-institutional coordination mechanism comprised of the representatives of the institutions competent for foreign investments.[158] The communication and coordination functions

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150 Energy Charter Secretariat, *Model Instrument on Management of Investment Disputes* (2018); Bonnitcha and Williams, *Investment Dispute Prevention and Management Agencies: Toward a More Informed Policy Discussion*, Int'l Inst. for Sustainable Development (IISD) (2022); World Bank Group, *Global Investment Competitiveness Report 2019/2022: Rebuilding Investor Confidence in Times of Uncertainty* (2020).

151 UNCITRAL Secretariat, *Compilation of Best Practices on Investment Dispute Prevention and Mitigation* (2022).

152 Peru was one of the earliest adopters of an effective institutional solution for dispute prevention, which combined information and knowledge management, a focal point for communication with foreign investors and intra-governmental coordination. *See,* UNCTAD, *Best Practices in Investment for Development - How to Prevent and Manage Investor-State Disputes: Lessons from Peru* (Investment Advisory Series, Series B, Number 10 (2011).

153 UNCITRAL Secretariat, *Draft Guidelines on Prevention and Mitigation of International Investment Disputes* (2023).

154 *Ibid.* p. 3. The Guidelines recommend improved communication through the accessibility of legal and regulatory instruments governing foreign investments, including investors in the policy-making process and establishing an accessible and responsive grievance mechanism, ideally on a single platform.

155 *Ibid.* p. 2.

156 The Draft Guidelines use the World Bank Systemic Investment Response Mechanism as an example of an early grievance mechanism. World Bank Group, *Retention and Expansion of Foreign Direct Investment, Political Risk and Policy Responses* (2019) pp. 41–43.

157 Draft Guidelines, s*upra* n. 114, pp. 7-8.

158 *Ibid.*

should also enhance the consistency between the various investment instruments of the government, as well as the measures affecting foreign investors, adopted at different levels of government.[159]

The Draft Guidelines make an important distinction between different levels of intervention, starting from an investor grievance (an issue which may be resolved at a technical or administrative level, thus preventing a dispute through a grievance mechanism), a dispute (a concrete contentious issue which has not yet evolved into a legal dispute, which could be mitigated through amicable settlement) and a legal dispute (a dispute framed as a violation of an investment protection standard, for which the investor is seeking relief through litigation or arbitration).[160]

[To] address one of the main obstacles to meaningful pre-dispute engagement between states and investors – the fear of personal liability and prosecution of state officials involved in amicable settlement with foreign investors,[161] *the Draft Guidelines propose the exclusion of liability for any government official engaged in dispute prevention and mitigation efforts, with the exception of willful misconduct or gross negligence.*[162] *Combined with the proposed intra-governmental coordination and shared responsibilities of the competent institutions, these provisions may encourage the effective use for the proposed mechanisms.*

E. REFORM INSTRUMENTS REMAINING ON THE AGENDA

Although the WGIII has made significant progress in the development of reform instruments to address the main concerns with ISDS, some of the key items remain to be deliberated. This includes primarily the proposal advocated by the EU to establish a multilateral investment court (MIC), which would replace the existing ad hoc ISDS framework as a systemic reform.

Furthermore, the appellate mechanism, which could be implemented as a component of the MIC or independent thereof, also remains on the reform agenda, as a reform option to improve the consistency and coherence of ISDS decisions. Finally, the WGIII is yet to adopt the set of procedural rules grouped

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159 Draft Guidelines, *supra* n. 76, pp. 6-7. This includes cohesiveness between different investment treaties, legislative and regulatory acts and provisions of investment contracts. One way to ensure a unified approach is for the competent institutions to mutually exchange model investment treaties and standard contract clauses, and to consult about intended measures which may impact foreign investors. Making such documents available to foreign investors, or even involving them in consultation rounds is an additional method to improve transparency and prevent possible disputes.

160 *Ibid.* 2. The Draft Legislative Guide provided detailed definitions of these terms "Definitions For the purposes of the system and the legislation: (a) "Grievance" means an unattended problem faced by an investor due to the conduct of the State or a governmental body, that has not yet become a dispute; (b) "Dispute" means a grievance which has devolved into a formal or legally contested disagreement between an investor and a State or a governmental body; (c) "Legal dispute" means a defined and focused disagreement between an investor and a State or a governmental body framed in legal terms with expectations of relief, which is formally lodged before a court or an arbitral tribunal based on an investment instrument ("legal proceeding"); (d) "Dispute prevention" means measures to avoid a grievance from devolving into a dispute through various means; (e) "Dispute mitigation" means measures to avoid a legal dispute by resolving a dispute through administrative means and non-binding alternative dispute resolution methods; (f) "Dispute management" means measures to handle a legal dispute and the proceedings relating to that dispute." UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Legislative Guide on Investment Dispute Prevention and Mitigation* (2023) Recommendation 2.

161 Centre for International Law (CIL), National University of Singapore, *Report: Survey on Obstacles to Settlement of Investor-State Disputes*, NUS-CIL Working Paper 18/01 (2018).

162 Draft Guidelines, *supra* n. 76, p. 10.

into the category of „Procedural and cross-cutting issues“, which directly address the concerns related to the existing ISDS framework, largely relying on investment arbitration.

The following sections will briefly outline the features and expected scope of these reform options. As of the date of writing, there are no concrete decisions on any of these reform areas, and they will be subject to further deliberations in the WGIII.

I. Standing Investment Court

The MIC has been strongly promoted by the EU and its Member States, as the only viable ISDS reform option which could have cross-cutting effects and address the major identified concerns at once.[163] In essence, the MIC would consist of a “tribunal” (roster) of full time judges who would be randomly appointed to panels (divisions) to decide individual cases, without any input from the disputing parties.

Such judges would be nominated to the tribunal by member States of the MIC, for fixed, renewable terms and they would be precluded from taking any parallel engagements deemed incompatible with their role of MIC judge. The EU purports that such a framework would resolve concerns related to the independence and impartiality of the decision-makers, the integrity of the process, and the consistency and correctness of the ISDS jurisprudence.[164]

The MIC proposal has not received broad support in the WGIII, and it has been presented only in broad terms until the UNCITRAL Secretariat recently published a draft Statute of a Standing Investment Court.[165] This document is currently under consideration by the WGIII. The excerpts below outline the proposals related to the MIC and the appellate mechanism respectively, as described in the published WGIII instruments:[166]

The MIC was introduced on the wings of a robust discussion of a broad range of issues and concerns raised by the WGIII delegations as a systemic solution that would address several of the key concerns at once. The EU Commission submitted its first written proposal of the MIC in January 2019, as the “only available option that effectively responds to all the concerns identified in the Working Group” and “the only option that captures the intertwined nature of those concerns”.[167]

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163 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and its Member States* (2019).

164 The idea of a standing court for the resolution of investment disputes has been a high priority of the European Commission since the EU assumed the competence over investment policies in the Lisbon Treaty. The CJEU decision in the *Achmea* case accelerated a comprehensive EU effort to abolish ad hoc ISDS and establish the MIC within and beyond the EU. In fact, the preliminary research and analysis of the issues underlying ISDS reform that preceded the UNCITRAL WGIII were commissioned in the context of a possible multilateral instrument establishing the MIC. Kaufmann-Kohler and Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards* (2017), para. 19; Kaufmann-Kohler and Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?: Analysis and Roadmap* (2016), p. 5.

165 The working papers, stakeholder comments and other resources related to the MIC are compiled on the WGIII website here: https://uncitral.un.org/en/multilateralpermanentinvestmentcourt.

166 Brodlija, *Sorting the Building Blocks of Investor-State Dispute Settlement Reform: Recent Developments from the UNCITRAL Working Group III*, in Lavranos and Mistelis (eds) European Journal of International Investment Law (2024) Vol. 8, Issue 2.

167 UNCITRAL Secretariat, *Submission from the European Union and its Member States to the UNCITRAL WGIII*

(…)

The proposal envisions a system employing full-time judges, nominated by the States for long-term, non-renewable mandates through a transparent appointment process.[168] The MIC judges should possess qualifications required in their respective countries for appointment to the highest judicial offices or be "jurisconsults of recognized competence in international law".[169] The proposal also emphasizes that the strict ethical standards and the long, non-renewable term would serve as a safeguard for the independence of MIC judges against State influence.[170]

The EU Commission proposed that the instrument establishing the MIC should also provide for a self-contained enforcement system (akin to that of the ICSID Convention), which would not be subject to review by domestic courts.[171] The proposal did not address the compatibility of such a body with EU law in the aftermath of the Achmea judgment, so it is likely that the CJEU would have to be approached to assess and approve the MIC, as it did with the investment court system in Canada-EU Trade Agreement (CETA) and the EU-Viet Nam FTA.[172] In addition, the EU Commission contended that the MIC awards could be enforced under the New York Convention, but that there would have to be a mechanism preventing the disputing parties from taking advantage of the set aside provisions under domestic laws.[173]

The financing structure of the MIC was not laid out in any detail, but it was indicated that all contracting States would make contributions, most likely through a trust fund or some other financial mechanism in line with the practices in other international courts.[174] This financing framework raises a very important question of a structural, but also a functional nature – how will the financial contributions and fees be separated from the remuneration of the judges so that they are not paid directly by the States? The MIC proposal brought up this issue and left it as a matter for future consideration.[175] (…)

Most recently, the MIC was discussed at the inter-sessional meeting held in Singapore in September 2023, which addressed the numerous open conceptual and functional questions surrounding the MIC, as well as potential solutions.[176] Several delegations took the opportunity to raise concerns about the

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(2019).

168 *Ibid. p.*5.

169 *Ibid.*

170 *Ibid.*

171 *Ibid. p.* 7.

172 CJEU Opinion 1/17 of the Court (Full Court) European Court of Justice (30 April 2019) para. 245; Upon a request from Belgium, the Advocate General Bot issued an opinion on the compatibility of the investment court system provided in CETA with EU law, which the ECJ largely followed in its Opinion. Opinion of Advocate General Bot in 1/17 (2019); European Commission, *Trade: European Court of Justice Confirms Compatibility of Investment Court System with EU Treaties* (2023).

173 European Public Health Alliance, *European Court of Justice Backs Legality of CETA's Investment Court System* (2019); Singh Jaswant, *Analyzing Features of Investment Court System under CETA and EUVIPA: Discussing Improvement in the System and Clarity to Clauses* (2019).

174 *Supra* n. 24, p. 8.

175 *Ibid.* p. 12.

176 The working papers, presentations and report from the Singapore inter-sessional meeting are compiled here: https://wg3intersessional.mlaw.gov.sg/programme/. See also Talašová et. al., *There's "No Alternative" to*

approach to the discussion on the MIC itself and the lack of a coherent and open exchange.[177] *This is particularly relevant for some key issues, such as the composition of the court (one tier or two tier body; part time or full time judges; stand-alone or part of an existing institution), selection and appointment of judges, financing and operations (member contributions, user fees or both), treaty interpretation and precedential force of the decisions, effects towards third states not acceding to the MIC and enforcement of the decisions.*[178] *None of these issues have been clearly defined to date, and the discussion at the inter-sessional meeting revealed the lingering disagreements about the need for the MIC itself, and its possible features.*

It should be noted that the Secretariat prepared several informal documents for consideration at the inter-sessional meeting, including a Draft statute of a standing mechanism and a document on the financing of a standing mechanism.[179] *On previous occasions, the Secretariat published documents dedicated to the selection and appointment of ISDS adjudicators, appellate mechanisms and enforcement issues, as well as an overview of „Pertinent elements of selected permanent international courts and tribunals."*[180] *These informal documents are meant to facilitate discussion, but there have been no concrete developments towards the establishment of the MIC to date.*

II. Appellate Mechanism[181]

The establishment of an appellate mechanism as a reform option to address the correctness and consistency of ISDS awards has only been deliberated at the WGIII at a general level, without prejudice on any state's position on its proper form or functions.[182] *In fact, there is still no consensus on whether the appellate mechanism is a necessary component of ISDS reform.*[183] *Nevertheless, the UNCITRAL Secretariat has already issued Draft Provisions on an Appellate Mechanism, outlining the scope of appeals, the grounds for appeal, time frame for appeals, the effects of the appeal on the first-tier proceedings, as well as the first-tier awards, annulment, set-aside and enforcement process, the conduct of the appeal proceedings,*[184] *and the effects of the decisions of the appellate mechanism.*[185]

Investment Arbitration, says Schreuer (2017); *See* generally, The Hon. Charles N. Brower and Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, Fordham Int'l Arbitration and Mediation Conf. Issue, Vol. 41, Issue 4, 2018.

177 Summary of the Inter-Sessional WGIII Meeting in Singapore, *supra* n. 92.

178 *Ibid.*

179 *Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes* (September 2023) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_statute_of_a_standing_mechanism_sept.2023.pdf; *Selection and Appointment of Tribunal Members of a Standing Mechanism* (September 2023) draft_provisions_on_selection_and_appointment_sept.2023.pdf (un.org); *Financing of a Standing Mechanism – An Outline* (2023).

180 UNCITRAL Secretariat, *Pertinent Elements of Selected Permanent International Courts and Tribunals* (2023).

181 Excerpt from Brodlija, *Sorting the Building Blocks of Investor-State Dispute Settlement Reform: Recent Developments from the UNCITRAL Working Group III*, in Lavranos and Mistelis (eds) European Journal of International Investment Law (2024) Vol. 8, Issue 2.

182 UNCITRAL Secretariat, *Possible Reform of ISDS – UNCITRAL WG III, Draft Provisions on an Appellate Mechanism* (2023) p. 1.

183 Report from the 44th session of the WGIII, *supra* n. 28, paras. 119-121.

184 The procedural aspects of the appeal process are also addressed in the Draft provisions on procedural and cross-

Although many details remain to be determined, the prevailing view in the WGIII is that the appellate mechanism should co-exist with the existing review mechanisms (under the national law, ICSID and New York Conventions) as an alternative, but not a third level of review.[186] However, even if the intention is to avoid multiple proceedings and additional delays and costs, it may be challenging for the parties to come to an agreement on the proper post-award mechanism, or to anticipate the attitudes of the national courts to the appeals decisions rendered in this framework.[187] (…)

While there appear to be no legal obstacles to the amendment under article 66 of the ICSID Convention and the inter-se modification under article 41 of the Vienna Convention on the Law of Treaties (VCLT), it is an open question whether there would be enough support for the proposal to ensure the votes of all the ICSID member states.[188] This will likely become clearer as the discussions on the appeals mechanism come into sharper focus in the WGIII.[189] It will also be important to clearly establish the effects of the appellate mechanism and appellate decisions on states which do not accede to this model, as well as their investors. From a broader, international law perspective, the possible implications of the appellate decisions on the interpretation of treaties falling outside of this framework will have to be considered, in light of the objectives of consistency and coherence, which prompted the efforts to develop the appellate mechanism.[190]

The EU has provided a glance into its model of the appellate mechanism in the provisions of its recent treaties concluded with Canada,[191] Singapore[192] and Vietnam.[193] These mechanisms are envisioned as the second tier of the investment court system, which is conceived as a permanent mechanism for ISDS under these treaties. For example, the EU-Singapore Investment Protection Agreement allows appeals to the first instance decisions on the grounds of errors in law or fact, or any of the grounds for annulment under the ICSID Convention.[194] The appeals tribunal can then revise or modify the award and refer it back to the first instance tribunal for revision.[195]

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cutting issues, discussed further below.

185 Draft Provisions on an Appellate Mechanism *supra* n. 101.

186 Summary of the 6th WGIII Inter-Sessional Meeting in Singapore, *supra* n. 92.

187 *Ibid.*

188 Art. 41 of the Vienna Convention on the Law of Treaties provides that two or more signatories to a multilateral treaty can conclude amongst themselves modifications of the framework treaty, if this is allowed or not prohibited by the treaty itself, it does not affect the rights or obligations of the remaining parties, and does not contravene the exercise of the object and purpose of the treaty.

189 The Appellate mechanism was discussed at the 48th session of the WGIII in New York, along with the proposal for the standing mechanism. Report on the 48th WGIII Session *Supra* n. 4., p. 20.

190 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate and Multilateral Court Mechanisms* (2019) p. 3.

191 Comprehensive Economic and Trade Agreement between the EU and Canada (2018).

192 EU- Singapore Investment Protection Agreement (2018).

193 EU - Vietnam Investment Protection Agreement (2019).

194 EU- Singapore Investment Protection Agreement (2018) Art. 3.19.

195 *Ibid.*

The treaties give the final awards under these provisions the status of enforceable judgments and prohibit further review by national courts.[196] Since none of the investment chapters in the recent EU treaties have entered into force to date,[197] they do not provide any practical guidance, from the operational or jurisprudential perspective, and thus remain only one of many possible models that are yet to be tested as possible solutions in the future.

III. Procedural and Cross-Cutting Issues

The variety of reform areas addressed under the umbrella of "procedural and cross-cutting issues" include matters which could be relevant as reform elements for the existing ISDS system, but also as components of a possible standing investment court. Furthermore, this category of reform options includes matters that are in the gray area between procedure and substance.

Among other issues, the WGIII is considering recourse to local remedies, shareholder claims, time limitations for access to various dispute resolution methods, waivers, counterclaims, the state's right to regulate, taking of evidence, bifurcation and the assessment of damages and compensation.[198]

The WGIII compiled these proposals as Draft Provisions on Procedural and Cross-Cutting issues, complemented with annotations to provide cohesion and structure to the discussion.[199] The Draft Provisions indicate the various areas which were previously not expressly regulated in investment treaties, which could enhance the ISDS process and balance the position of the disputing parties. For specific guidance, the Secretariat issued a Compilation of IIA Provisions and Arbitration Rules Related to Procedural and Cross-Cutting Issues, demonstrating how the relevant issues are regulated in other instruments.[200]

Considering the diversity of the procedural and cross-cutting issues, it is unclear whether they will be adopted as an integral part of some other reform (for example, the MIC or the Advisory Centre) or if they will be offered as menu options in the Multilateral Instrument for ISDS Reform (MIIR) which is contemplated as the vessel for the implementation of the WGIII reform instruments.[201]

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196 *Ibid.*

197 The entry into force of the referenced investment treaties concluded between the EU and third states is pending ratification at the national level by each EU member state.

198 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issue*s (2023); UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS): Annotations to the Draft Provisions on Procedural and Cross-Cutting Issues* (2023).

199 *Ibid.*

200 UNCITRAL Secretariat, *Compilation of IIA Provisions and Arbitration Rules Related to Procedural and Cross-Cutting Issues* (2023). The compilation compares the provisions in 5 instruments: Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA) (2016), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (2018), and Annex 14-D, ICSID Convention and Arbitration Rules and the UNCITRAL Rules.

201 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Multilateral Instrument on ISDS Reform* (2022), p. 2; UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Multilateral Instrument on ISDS Reform* (2020); UNCITRAL Secretariat, *Report from the 46th Session of WGIII Supra* n. 120, p. 15.

Since the provisions falling under this category relate mostly to the conduct of arbitral proceedings, there is also a question of whether there is a need for bespoke treaty provisions if the same effect can be accomplished by reference to the existing arbitral rules applicable to the dispute.

While some States continued to raise the need to address other issues verging on substance, such as the denial of benefits, shareholder claims, the state's right to regulate and damages, the WGIII decided to stay on course and focus on purely procedural issues as a priority, in line with its original mandate. As of the date of writing, there have been no decisions on the content or the way forward on the Provisions on Procedural and Cross-Cutting issues.

IV. Implementation of the WGIII Reforms – The Multilateral Instrument of ISDS Reform

The Commission granted the ISDS reform mandate to the WGIII following preliminary studies and analysis which explored the key issues and reform implementation models which could be considered by the States.[202] To ensure and protect the ability of each State to select the reform models most suitable to their legal and institutional frameworks, the proposed reform implementation model is a multilateral instrument on ISDS reform (MIIR).[203]

The MIIR would offer a menu of options for the States to consider and opt into the reform tools which fit their needs and priorities, similar to the mechanisms provided in the UNCITRAL Convention on Transparency in Treaty-Based Investor-State Disputes, or the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.[204]

The MIIR itself will be discussed at the forthcoming WGIII sessions, starting with the 49th session in Vienna (taking place in September 2024).[205] This model facilitates the implementation of the adopted reforms, since they would apply automatically to ISDS clauses in the treaties concluded by the relevant State. This can contribute to the desired consistency and predictability of ISDS proceedings and their outcomes.

F. CONCLUSIONS

The ISDS reform process conducted in the WGIII reflects the dedication and attention invested by the participating States to the recalibration of their investment protection policies, based on the experiences generated from the growing body of investor-State jurisprudence. It also highlights the complexity and

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202 UNCITRAL Secretariat, *Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration* (2017); UNCITRAL Secretariat, *Possible Future Work in the Field of Dispute Settlement: Ethics in International Arbitration* (2017). UNCITRAL Secretariat, *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)* (UNCITRAL, 20 April 2017); UNCITRAL Secretariat, *Compilation of Comments by States and International Organizations on "Investor-State Dispute Settlement Framework"* (2017).

203 UNCITRAL Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Multilateral Instrument on ISDS Reform* (2024).

204 Kaufmann-Kohler and Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?, Analysis and Road Map* (2016).

205 UNCITRAL Secretariat, *Draft Annotated Agenda of the 49th UNCITRAL WGIII Session* (2024).

challenges which emerge from multilateral reform efforts, even if the objectives and concerns of the relevant stakeholders are largely aligned.

As the analysis in this chapter demonstrated, the WGIII proceeded with a sharp focus on procedural issues, considering gradual and more systemic reforms of the existing ISDS framework, despite repeated calls to take into account the related substantive provisions of investment treaties which serve as the legal basis for investor-State claims. To date, the WGIII has successfully developed reform instruments addressing the conduct of decision-makers, dispute prevention and mediation, and the Advisory Centre for technical and legal support to States in ISDS. While progress is being made on the more contentious, systemic matters (the MIC, appellate mechanism and remaining procedural and cross-cutting issues), their final contours and functions are yet to be determined.

In anticipation of the conclusion of the WGIII process, it should be noted that the deliberations on the complex and consequential ISDS reform issues demonstrated the willingness of States and other stakeholders to engage in a patient, iterative and transparent discourse. While it is inevitable that the ultimate reform instruments will contain a degree of compromise and trade-offs, such a process is likely to yield meaningful improvements and result in a more cohesive and predictable ISDS system. The lessons from the procedure and outcomes of the WGIII deliberations can also serve as guidance in similar efforts pursued in other fields of international law and dispute resolution.