Reform of Investor-State Dispute Settlement – Current State of Play at UNCITRAL

EI – IILCC Study Group on ISDS Reform*

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Abstract

In the last two decades, investor-State dispute settlement has received continuous criticism related to *inter alia* the legitimacy, transparency and efficiency of the current system. Since 2017, different options of how to improve the system are discussed at the United Nations Commission on International Trade Law (UNCITRAL). The reform options discussed in this context are of high political relevance, considering that investor-State dispute settlement often concerns sensitive topics related to States' sovereign regulatory powers. In order to provide a overview for all interested parties, this article summarizes and explains the different reform options discussed at UNCITRAL in the last four years. It also presents the positions of the relevant stakeholders, evaluates some of the reform options and gives an outlook over the next steps needed to move the reform efforts forward.

Keywords: ISDS Reform, UNCITRAL, Dispute Prevention, Investment Mediation, Consistency and Quality, Appointment of Adjudicators, Enforcement of ISDS Decisions, Counterclaims in ISDS, Advisory Centre on International Investment Law, Implementation of Reform Options

A. Introduction

Approximately ten to fifteen years ago, investor-State dispute settlement (ISDS) began to witness a major backlash. Some argued that the system was not legitimate, unbalanced, non-transparent, not efficient, too expensive, etc. Others argued that everything was working fine and that the system did not need to be fixed. Yet, due to the continuous political pressure by different groups – civil society, international organisations and in particular the European Union (EU) – this discussion was taken to various institutional fora, including the United Nations Commission on International Trade Law (UNCITRAL). Since 2017, UNCITRAL Working Group III (WG III) is mandated to discuss different options to reform ISDS.

Three fundamentally different reform options could be considered. A *first* option is an incremental reform. According to this approach, the current system generally stays as it is and only specific concerns are redressed on an individual basis. A *second* option is a systemic reform, whereby *ad hoc* arbitration is replaced by a Multilateral Investment Court (MIC) with an appellate body. A variant of this second option is the creation of a stand-alone appellate body without an MIC, thus preserving *ad hoc* arbitration on the first instance. The *third* option calls for a paradigm change. According to this approach, the entire system should be replaced and foreign investors should not be given any "special rights" to bring international claims against States.

At UNCITRAL, only the first two options are discussed. Hence, different ISDS-related topics are addressed following either the *incremental* or *systemic* reform approach. To this end, the UNCITRAL Secretariat has published a number of docu-

ments on the ongoing reform process. These documents reflect the positions taken by the States, which participate in the process, as well as the discussions held at the regular meetings of WG III. This information is supplemented by publications of the Academic Forum on ISDS. However, due to the multitude, complexity and interaction of the different topics, the information provided is sometimes difficult to grasp, especially for those who are no specialist in the field.

As a result, many interested stakeholder – journalists, politicians, lawyers and civil society – can hardly gain a meaningful overview of the ongoing reform process. Even some delegations of the participating countries, who are directly involved in the reform process, might lose the oversight. Due to the far-reaching political relevance of the ISDS reform, this state of affairs is problematic in terms of democratic theory. Only a few experts have the necessary expertise and sufficient human and financial resources to gather all the relevant information and to derive a well-founded negotiation strategy from it.

Against this backdrop, the Europa-Institut of Saarland University (EI) and the International Investment Law Centre Cologne (IILCC) formed a study group to develop the project "Executive Policy Papers on ISDS Reform". This project is aimed at summarizing the current status of the UNCITRAL reform process in a precise and succinct manner that is understandable and open-access for all interested parties. This article presents the results of the project in one comprehensive document covering the different topics discussed in WG III in the last four years and addresses Dispute Prevention and Alternative Dispute Resolution (B), Consistency and Quality in ISDS Decision-Making (C), Enforcement of ISDS Decisions (D), Appointment of Adjudicators (E), Treaty Parties' Involvement and Control Mechanisms (F), Counterclaims by Host States in ISDS (G), Advisory Centre on International Investment Law (H), and Implementation of Reform Options (I).

B. Dispute Prevention and Alternative Dispute Resolution[1]

At the beginning of the reform process, UNCITRAL WG III identified a number of concerns regarding ISDS. Among these concerns, procedural efficiency has always played an important role, especially the cost and duration of ISDS proceedings.[2]

One possibility to avoid lengthy and costly arbitral proceedings is to prevent investor-State disputes from occurring.[3] In addition to tackling procedural efficiency, dispute prevention may foster legal peace. This is particularly relevant in the context of foreign investments, whose long-term nature requires a good cooperation be-

1 The authors of this section are Bianca Böhme and Johanna Braun.

2 UNCITRAL WG III, Cost and Duration, Note by the Secretariat (31 August 2018), A/CN.9/WG.III/WP.153, available at: https://undocs.org/en/A/CN.9/WG.III/WP.153 (1/2/2022).

3 UNCITRAL WG III, Dispute prevention and mitigation – Means of alternative dispute resolution, Note by the Secretariat (15 January 2020), A/CN.9/WG.III/WP.190, available at: https://undocs.org/en/A/CN.9/WG.III/WP.190 (1/2/2022).

tween the host State and the investor. Preventing disputes from occurring can be one option to preserve that long-term relationship.

This goal – the promotion of legal peace and long-term relationships between investors and States – can also be pursued if a dispute arises despite the prevention efforts.[4] In this context, alternative dispute resolution (ADR) mechanisms, such as mediation, conciliation and amicable settlements could provide satisfactory alternatives to arbitration. In contrast to arbitration, these methods are non-confrontational – and may thus equally foster legal peace and preserve the business relationships between investors and host States.

I. Reform Options Discussed at Working Group III

WG III is dealing with methods to prevent investor-State disputes and with ADR mechanisms. While both mechanisms share certain purposes, they address different moments in time.

Dispute prevention aims at reducing the occurrence of investor-State disputes. Its purpose is thus to address the concerns of an investor *before* they turn into a dispute with the host State. ADR, by contrast, is a means to settle an already *existing dispute*. These mechanisms take a different path than international arbitration or national litigation to achieve legal peace among the disputing parties.

1. Dispute Prevention

A solution to prevent investor-State disputes could be an institution like an investment ombudsperson or a coordinator for dispute prevention. Such an institution could be implemented at a national level (e.g. as a lead agency) and also at a bilateral or multilateral level. Alternatively or additionally, WG III is contemplating a number of "softer" solutions such as information sharing, enhancing communication, or raising awareness on issues of international investment law.[5]

At a bilateral level, the contracting parties to an international investment agreement (IIA) could improve their communication with each other or invest in capacity-building programmes. These programmes could also play a role at a multilateral level. In that context, WG III is considering the creation of an Advisory Centre on International Investment Law[6] modelled after the Advisory Centre on WTO law, which is supposed to assist developing countries and/or small and medium enterprises in various aspects of international investment law and arbitration.

4 UNCITRAL WG III, Mediation and other forms of alternative dispute resolution (ADR), Note by the Secretariat, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf (1/2/2022).

5 For an overview of the different solutions envisaged see UNCITRAL WG III, Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution, Note by the Secretariat (15 January 2020), A/CN.9/WG.III/WP.190, paras. 10 ff.

6 See Section H on the Advisory Centre on International Investment Law.

Finally, WG III is dealing with rules on the exhaustion of local remedies, State-to-State cooperation and procedures to address frivolous claims. As shown below, rather than preventing investor-State disputes, these options may be regarded as an early phase of dispute management.

a) Exhaustion of Local Remedies

A first option discussed by WG III is a requirement to exhaust local remedies before resorting to international arbitration. As clarified above, instead of preventing a dispute, a requirement to exhaust local remedies would rather lead to dispute *resolution* in a different forum. In accordance with such a requirement, investors would have to exhaust any reasonably available domestic remedy before being able to submit a dispute to international arbitration. By submitting claims to national courts first, some investor-State disputes could be solved without the necessity of submitting them to international arbitration.

In April 2019, WG III agreed that requiring investors to exhaust local remedies was a tool to be considered rather than a concern to be addressed, which shows that this option has no prominent role in the discussions at UNCITRAL.[7] Since then, no further work was pursued on this issue. This hesitant attitude is equally reflected in the submissions by States participating in the reform process. Most submissions do not touch upon this issue. Only a few submissions (e.g. by Indonesia,[8] Morocco,[9] Colombia[10] and South Africa)[11] regard the exhaustion of local remedies as a viable reform option that should be considered.

Arguably, giving a more meaningful role to national courts and local remedies before resorting to international arbitration could strengthen the rule of law in host States. On the other hand, an additional requirement to exhaust local remedies could even cause more delays and increased costs. Most importantly, the exhaustion of local remedies does not, by itself, prevent investment disputes but merely places them within the sphere of domestic courts first.

7 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (9 April 2019), A/CN.9/970, available at: https://undocs.org/en/A/CN.9/970 (1/2/2022).

8 UNCITRAL WG III, Comments from the Government of Indonesia (9 November 2018), A/CN.9/WG.III/WP.156, available at: https://undocs.org/en/A/CN.9/WG.III/WP.156 (1/2/2022), para. 12.

9 UNCITRAL WG III, Submission from the Government of Morocco (11 February 2020), A/CN.9/WG.III/WP.161, available at: https://undocs.org/en/A/CN.9/WG.III/WP.161 (1/2/2022), para. 9.

10 UNCITRAL WG III, Possible Reforms of Investor-State dispute settlement (ISDS), Submission from the Government of Colombia (14 June 2019), A/CN.9/WG.III/WP.173, available at: https://undocs.org/en/A/CN.9/WG.III/WP.173 (1/2/2022), para. 29.

11 UNCITRAL WG III, Submission from the Government of South Africa (17 July 2019), A/CN.9/WG.III/WP.176, available at https://undocs.org/en/A/CN.9/WG.III/WP.176 (1/2/2022), para. 1.

b) State-to-State Cooperation in Dispute Prevention

Alternatively, States could create joint committees or commissions to prevent disputes from arising or, in case a dispute has already arisen, organise methods of alternative dispute settlement.[12] These commissions or committees would be staffed with States' representatives who would not actually render decisions but rather stay in contact and exchange information on dispute prevention and ADR. They should not be confused with joint interpretative commissions who issue binding interpretations of IIA provisions in case an investor-State dispute has arisen. Instead, these committees are supposed to deal with disagreements before they become a dispute, thereby supporting long-term business relationships and legal peace.

Even though some States like Morocco, South Africa, and Brazil have voiced their support, it is currently unclear whether and how these committees or commissions will be implemented. Among other things, it remains unclear whether they would be implemented at a national, bilateral, or multilateral level. Another possibility would be to affiliate the commissions or committees with an Advisory Centre.

c) Procedure to Address Frivolous Claims Including Early Dismissal

According to WG III, frivolous claims are one of the reasons for overly long and costly proceedings, potentially harming host States' reputation and causing regulatory chill.[13]

WG III is focusing on existing procedures to address frivolous claims, especially Arbitration Rule 41(5) of the International Centre for Settlement of Investment Disputes (ICSID), which enables States to file an objection at the preliminary stage of arbitral proceedings arguing that a claim is manifestly without legal merit. WG III also recapped how often this provision has been used in the past (33 times since 2006), its success rate (the objection was upheld five times) and the average time for tribunals to decide on the objection (three and a half months).

A number of States are generally in favour of introducing new procedures to address frivolous claims. According to South Africa, for example, frivolous claims should be dismissed. Indonesia and Costa Rica would encourage one or several mechanisms to dismiss frivolous claims "at an early stage".[14] Other States have

12 UNCITRAL WG III, Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution, Note by the Secretariat (15 January 2020), A/CN.9/WG.III/WP.190, paras. 24 f.

13 UNCITRAL WG III, Security for Cost and Frivolous Claims, Note by the Secretariat (16 January 2020), A/CN.9/WG.III/WP.192, available at: https://undocs.org/en/A/CN.9/WG.III/WP.192 (1/2/2022).

14 UNCITRAL WG III, Comments by the Government of Indonesia, Note by the Secretariat (9 November 2018), A/CN.9/WG.III/WP.156, para. 9; UNCITRAL WG III, Comments by the Government of Costa Rica, Note by the Secretariat (9 November 2018), A/CN.9/WG.III/WP.178, available at: https://undocs.org/en/A/CN.9/WG.III/WP.178 (1/2/2022), Annex II.

more detailed proposals. Morocco promotes its new model BIT, which establishes a mechanism for expedited processing of unfounded or frivolous claims. Turkey proposes a mechanism for early or expeditious dismissal by developing good practices and an institutional information mechanism. Turkey also encourages the revision of existing rules on early dismissal of frivolous and unmeritorious claims.

Other groups have voiced their support as well. The International Bar Association (IBA) suggests stronger clauses than the ones that already exist, including a possibility to dismiss a meritless claim *before* it moves on to a tribunal. It is unclear, however, who would be tasked with this dismissal. Public Citizen, on the other hand, is critical. It argues that a reform would not go far enough as the arbitrators who decide on a possible dismissal usually have a financial incentive to continue the proceedings. Other NGOs like Transport & Environment, the Centre for International Environmental Law, ClientEarth, and the Centre for Research on Multinational Corporations (SOMO) seem to be in favour of a reform of procedures to address frivolous claims, although their support is not worded as clearly.

While the investor groups have not commented on this issue, the Academic Forum encourages States to provide more guidance on the conditions for the application of summary dismissal provisions. One option would be to clarify if they apply to jurisdiction, admissibility and/or the merits. These clarifications could be incorporated into arbitral rules or IIAs.

Strictly speaking, an early dismissal of frivolous claims does not prevent disputes but require that a dispute has already arisen. Nevertheless, clear provisions on the topic could prevent investors from raising obviously unmeritorious claims. Going forward, WG III could develop a more predictable framework, which identifies the types of claims to be addressed and if the objection could only be filed regarding the merits of a case or also regarding jurisdictional issues. In addition, the consequence of a successful objection must be determined, such as an early dismissal or cost allocation.

WG III may also develop a framework that is connected to related issues, such as security for costs, third-party funding, or multiple proceedings. Finally, WG III could discuss how these proceedings would be implemented. Possible clauses could be included in IIAs, arbitral rules, or in a multilateral instrument on procedural reform.

2. Alternative Dispute Resolution

In April 2020, WG III noted a general interest to pursue further work on ADR methods.[15] There is a large consensus among all stakeholders that the use of dispute resolution methods other than international arbitration should be encouraged. In fact, the increased use of ADR methods has been mentioned as an element of reform

15 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (10 November 2020), A/CN.9/1044, available at: https://undocs.org/en/A/CN.9/1044 (1/2/2022).

in many submissions by States. In particular, WG III has focused its work on means to enhance the use of international mediation to solve investor-State disputes.

All relevant stakeholders consider international mediation as an effective means to reduce the duration and costs of ISDS, while increasing the flexibility and autonomy of the disputing parties. Despite this consensus, the statistics from arbitral institutions confirm a large underutilisation of international mediation in the context of ISDS. In order to change the *status quo*, the different stakeholders agree that the awareness of international mediation as an ADR method should be increased and access to mediation procedures should be facilitated through institutional support.

In particular, WG III addresses three different reform options to enhance the use of international mediation for investor-State disputes.[16]

First, WG III is considering developing a new set of mediation rules for the ISDS context. At the same time, WG III notes that there might be no need to do so, because of the numerous mediation rules that already exist and may be used in the ISDS context. Examples are the UNCITRAL Mediation Rules, the ICSID Mediation Rules and the IBA Rules for Investor-State-Mediation.

Second, WG III considers the development of model clauses to be included in investment treaties. Without an explicit provision in investment treaties, it is unlikely that the disputing parties would proceed with *ad hoc* mediation. Through the inclusion of mediation clauses in investment treaties, this ADR method becomes more visible for the disputing parties. Three different types of model clauses are contemplated by WG III. The first type refers to mediation as an available means for solving disputes. This option would fully preserve the voluntary nature of mediation. Mediation would only commence upon the invitation by one party and acceptance by the other. The second type of model clause requires the disputing parties to commence mediation. This option goes a step further than the first one by requiring that the disputing parties at least attempt mediation. A third type of model clause provides for mandatory mediation, requiring the disputing parties to follow a full procedure with the assistance of a mediator. In addition to any of these model clauses, investment treaties could determine which procedural rules apply to the mediation procedure.

Third, WG III considers the development of guidelines for the effective use of mediation.[17] To that purpose, the UNCITRAL Secretariat has prepared Draft Guidelines, on which the State delegations may comment. The Draft Guidelines were prepared with the substantive support of the ICSID Secretariat. They are meant to encourage disputing parties to explore mediation and other ADR methods. The Draft Guidelines address, for instance, the elements that should be considered to assess the suitability of mediation for a particular dispute; the support that may be provided by arbitral institutions; the role of the mediator and other participants in mediation and the conduct of the proceedings.

16 UNCITRAL WG III, Mediation and other forms of alternative dispute resolution (ADR), Note by the Secretariat.

17 Ibid.

II. Interim Conclusions

In sum, there is a consensus among all stakeholders that dispute prevention and ADR methods should be further enhanced. Still, this section has shown that not all instruments appear to be equally effective. One example is a requirement to exhaust local remedies, which may even be counter-productive, causing more delays and costs. In addition, whether State-to-State cooperation increases procedural efficiency largely depends on the specific form of cooperation.

Clauses that provide for an early dismissal of frivolous claims could provide a useful tool to remedy the high costs and the long duration of arbitral proceedings. However, as the ICSID rules already include such a provision, it is suggested here that WG III analyses the strengths and weaknesses of the existing clause before creating a new one. A revised provision on frivolous claims should clearly specify the requirements and legal consequences to provide a predictable framework – both for arbitrators applying the clause as well as for the disputing parties.

As for international mediation, there is large consensus that its use should be increased. But resorting to mediation is not always effective. It is not viable, for instance, if the relationship between the investor and the State is already irreparably damaged. Therefore, mandatory mediation in all investor-State disputes would be problematic. For those cases in which mediation appears to be suitable, WG III should address the problem of underutilisation, which constitutes the biggest challenge in this context.

C. Consistency and Quality in ISDS Decision-Making[18]

The lack of consistency in ISDS decisions has been identified in WG III as one of the major concerns necessitating reform. Today's international investment law regime is based on over three thousand IIAs. Even though these IIAs are independent legal instruments, they often share significant similarities in their wordings, especially with certain provisions common to investment treaty protection, such as provisions on expropriation, most favoured nation and national treatment, fair and equitable treatment, etc. Likewise, IIAs typically provide for investment arbitration. Each arbitration tribunal operates *ad hoc*, rendering its decision based on the facts and applicable IIA before it and without being bound to take prior decisions into account. As noted by the UNCITRAL Secretariat, such a fragmented system may allow inconsistent decisions to arise, and today several ISDS decisions exist that have led to a criticism of the current system based on conflicting outcomes.[19] The current situation creates a dilemma for ISDS actors, as it becomes difficult for States, on the one hand, to shape their investment policies in accordance with their

18 The authors of this section are Afolabi Adekemi and Julian Scheu.

19 See UNCITRAL WG III, Consistency and related matters, Note by the Secretariat (28 August 2018), A/CN.9/WG.III/WP.150, available at: https://undocs.org/en/A/CN.9/WG.III/WP.150 (1/2/2022), paras. 11 ff. (detailing the different scenarios and areas of law with inconsistent ISDS decisions).

international obligations based on a settled understanding of what the state of the law is. For investors, on the other hand, it becomes difficult to ascertain whether certain treatments they have received conform with the host States' international obligations.

Another cause for concern is the need to guarantee the quality of ISDS decisions in terms of "correctness". While consistency is desired, WG III generally agrees that the correctness (i.e. accuracy) of ISDS decisions to the applicable law and facts to a dispute should be the ultimate goal. Divergent outcomes justified by the rules of interpretation, or different facts and evidence presented to a tribunal should be upheld for its correctness, notwithstanding inconsistency with a similar case. Thus, the Working Group's focus is on how to prevent unjustified inconsistency.

As subsequently discussed, WG III is considering a number of potential solutions in addressing the issue of unjustified inconsistency. At the centre of this reform discussion is the introduction of an appellate mechanism, which is primarily meant to ensure the correctness of ISDS awards but may also serve as a corrective mechanism for unjustified inconsistency in the system.

I. Reform Options Discussed at UNCITRAL

In the quest for consistency and correctness in ISDS decision making, WG III has mainly focused on two out of multiple reform options originally identified by the Secretariat, i.e. a stand-alone Multilateral Investment Appeals Mechanism (MIAM), or a two-tiered Multilateral Investment Court (MIC) comprising a first and second instance (appellate) court. This is now examined below, including "other possible reform options" identified by the Secretariat.[20]

1. Stand-alone Multilateral Investment Appeals Mechanism (MIAM)

The proposal for the establishment of a MIAM is a reform idea shared by multiple States in WG III. The appellate mechanism is proposed "stand-alone" in the sense that it is not linked to any other body but constituted as an independent higher judicial authority set up to oversee the decisions of the decentralised ISDS tribunals at a centralised appellate level. This reform option will remedy the current lack of an adequate review mechanism to ensure the correctness of decisions rendered by the decentralised ISDS tribunals.

Equally, as recognised by the Secretariat, a standing appellate body as opposed to *ad hoc* tribunals would be better positioned to pursue consistency across the network of identical or similarly worded IIAs. This position is arguably borne out of the need for such a permanent body to preserve its public legitimacy as a steady, reliable, and predictable dispute settlement regime. Hence, the introduction of a MI-

20 Ibid., paras. 37 ff. (identifying the possible reform options on a multilateral basis to enhance consistency).

AM as a complement to the current ISDS system could help foster consistent outcomes.

To enrich the discussion, the Secretariat has published an initial draft on an appellate mechanism suggesting the "grounds for appeal" and "standard of review" of a possible future MIAM.[21] The grounds for appeal are: (i) error in the interpretation or application of the law; (ii) manifest error in the assessment of facts; (iii) error in the assessment of damages; and further includes the existing grounds for annulment and set aside procedures available in the current system under ICSID and UNCITRAL based arbitration. Overall, the broad appellate powers will, if applied in a consistent way, allow for the effective operation of a MIAM to foster correctness and to forestall unjustified inconsistency in the ISDS system.

2. A two-tier Multilateral Investment Court (MIC)

This option is unlike the proposed MIAM, where first instance decisions on appeal will still emanate from the current decentralised *ad hoc* arbitration system. In contrast, an MIC would encompass a standing first and second instance (appellate) court, thus foreseeing a fully centralised ISDS system. This centralised court is proposed to be comprised of full-time judges (both in the first and second instance court), divided into several chambers in the court, and with long term appointments. The collegiality that forms the MIC bench would promote consistency in judicial reasoning amongst the judges, necessitated by their shared responsibility to preserve the court's legitimacy, by offering legal certainty and predictability of the court's jurisprudence to its members. Similar to the MIAM, the appellate instance of the MIC would serve as a control mechanism to check inconsistent ISDS outcomes that lack a well-reasoned justification.

Furthermore, draft provision 11 of the "initial draft on a multilateral mechanism"[22] released by the Secretariat foresees the possibility of a future MIC President to "assign two or more cases to the same chamber if the preliminary or main issues in two or more cases before different chambers are similar". Such a provision would curtail the risk of inconsistent outcomes from different chambers right from the first instance. This solution would not be feasible in the current *ad hoc* arbitration system. Another opportunity an MIC presents is the possibility to have a matter decided by a grand chamber, i.e. all the judges of the court of first instance may sit as a plenary to decide on disputes of substantial importance.[23] An example would be a

21 See UNCITRAL WG III, Initial draft on Appellate Mechanism (second version), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_.pdf (1/2/2022), para. 12 ff.

22 See UNCITRAL WG III, Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters, Note by the Secretariat, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents (1/2/2022).

23 *Bungenberg/Reinisch*, Draft Statute of a Multilateral Investment Court, Article 17(5), p. 58.

dispute with a serious risk of departing from the court's previous decisions.[24] For these advantages, a two-tiered MIC may be considered as better positioned to promote consistent and correct decision making in ISDS.

3. Other Possible Reform Options

Besides the creation of a MIAM or MIC, there are other procedural reform options identified by the Secretariat that can be considered as possible solutions to the issue of inconsistency. Although the Working Group's deliberations are so far silent on these other options, it is still possible to adopt some of them as a complement to an established MIAM or MIC.

a) Introducing a System of Precedent[25]

As noted by the Secretariat, consistency requires that decision makers take into account precedent, i.e. pre-existing case law, and conform to this to the extent possible to the issues at stake. Although the use of precedent is already common in ISDS practice, the lack of a formal recognition yet allows inconsistent decisions to thrive, as some tribunals have maintained their autonomy to decide a case without considering the past decisions on a related matter. A formal introduction of precedent would ensure tribunals to be duty-bound to take into account precedent. However, this duty should not be equated as the common law rule of *stare decisis*. It only requires a tribunal to take a previous award into account but leaves it with discretion to either follow it or not if it disagrees with the previous reasoning. Arguably, the precedential system is best implementable in a MIAM or MIC with an appellate system to control a precedent that has been justifiably followed or departed from.

b) Prior Scrutiny Mechanism[26]

This option foresees the prior scrutiny by a review panel (different and independent of the deciding tribunal) of ISDS awards before they are released as final and binding on the parties. Prior to final release, the draft award is given to the parties, who may be allowed to submit written comments on any aspects of the award, and on that note draw the attention of the review panel to any issue that justifiably questions the award on correctness or consistency. It is suggested that this scrutiny mechanism could be modelled after that of the International Court of Arbitration of the International Chamber of Commerce.

24 See further on this, UNCITRAL Working Group III, Comments from Switzerland on the Initial draft on standing multilateral mechanism (19 November 2021), para. 47, available at https://uncitral.un.org/sites/uncitral.un.org/ (1/2/2022).
25 UNCITRAL WG III, Consistency and related matters, Note by the Secretariat (28 August 2018), A/CN.9/WG.III/WP.150, paras. 37 ff.
26 Ibid., para. 43.

c) Guidance Regarding Multiple Proceedings[27]

This option foresees the adoption of specific provisions that will guide tribunals when dealing with similar disputes, e.g. procedural guidance on when to order a stay of proceedings, dismissing a claim for abuse of process in the context of concurrent proceedings or ordering the consolidation of claims in related matters. These options can be used to complement the existing ISDS system through express treaty provisions like those already found in Article 14 Belarus-India BIT (2018), Article 14.D.12 CUSMA, or Article 8.24 CETA, and are also implementable in the procedural rules of a possible future MIC.

d) Introducing a System of Preliminary Ruling[28]

This option is contemplated to permit ISDS tribunals to refer any question concerning the application and interpretation of a legal matter to a specific body. This idea is inspired by the preliminary ruling procedure of the Court of Justice of the European Union. Comparable to the procedure under EU law, tribunals could refer disputes to a designated court. Upon referral, the main dispute is suspended until the designated court for the preliminary ruling returns with an answer. The decision of this specific body on the preliminary question is then binding on the referring tribunal. The preliminary ruling procedure addresses problems of inconsistent decisions *ex ante*, i.e., before they arise rather than wait and attempt to correct them *ex post*.

II. Stakeholders and their Position

Generally, a considerable number of States are in favour of the establishment of a stand-alone MIAM. Some notable proponents of this reform option include the Governments of Morocco, Chile, Israel, Japan, Ecuador, and China. These States commonly share the view that the limited review currently available in the existing system does little or nothing to promote consistency, thus calling for a much more standardised approach. As a solution, a standing MIAM would curtail conflicting interpretations with respect to the same facts and drive consistency in the interpretation of identical and similar treaty standards.

Efforts to achieve this level of ISDS reform are already visible in some IIAs foreseeing a future appellate mechanism either at a multilateral or bilateral level.[29] However, it is generally agreed that a multilateral approach would be much more efficient than implementing an appellate mechanism on a bilateral basis. As observed by Switzerland in its comments to the first initial draft on an appellate mechanism,

27 Ibid., para. 42.
28 Ibid., para. 46.
29 See UNCITRAL WG III, Initial draft on Appellate Mechanism (second version), para. 70.

multiple *ad hoc* or BIT-based appellate mechanisms are unlikely to make any significant contribution in achieving consistency in ISDS jurisprudence.

Prominent on the other side of the discussion is the EU strongly advocating for the establishment of an MIC. For the EU and its Member States, a stand-alone MIAM may not be sufficient to fully resolve the identified concerns of the current ISDS regime, including the lack of consistency. Alternatively, a multilateral appellate body should be established as a second instance court in a two-tiered MIC, staffed by tenured, full-time judges and supported by a permanent secretariat. This option for the EU presents the best solution to address all the concerns about ISDS that have been identified by WG III. Canada equally shares the same position with the EU. Besides Canada, States such as Vietnam, Singapore, and Mexico appear to have endorsed the new EU approach, by committing to a similar model in the form of an "Investment Court System" in recent investment agreements with the EU. Also, these States have committed to pursue with other trading partners the establishment of an MIC mechanism for investment dispute settlement in the future.

Notably, the MIC system does not appear to be as popular as the stand-alone MIAM amongst States in WG III. For example, South Africa has expressed strong criticism towards the EU approach, emphasising that the extent to which a court can guarantee consistency is dependent on the applicable law. Given the plurality in the substantive law of investment, achieving consistency within the fragmented legal framework will remain a challenge. Moreover, it is feared that a standing MIC poses a higher risk of expanding the scope of investor guarantees in a more permanent way to the displeasure of States in its quest for consistency than the current *ad hoc* arbitration system.

Regardless of the pros and cons of setting up a permanent MIC, States' delegations in WG III continue to consider all possible options towards realising its establishment and no option is yet off the table.

III. Next Steps

In December 2021, the Secretariat released a new version of the initial draft on an appellate mechanism, which is due for comments by delegations until 30 June 2022. Also, according to the work plan of WG III, the first reading of the draft for a Multilateral Permanent Investment Court is expected between 14-18 February 2022. The proposed draft for first reading by then should indicate the preferred direction of States as to the structural form and design of a possible future MIC. It will become clearer whether the UNCITRAL delegations favour an MIC with a first and second tier (appellate) system. As rightly noted by Colombia, this aspect is not clear from the initial draft released by the Secretariat.

For the establishment of an appellate system, either as a MIAM or set up in an MIC, the scope and standard of review adopted for the appellate court will determine the extent to which it may contribute to the achievement of consistency and correctness of ISDS decisions. For instance, from the initial draft on an appellate mechanism released by the Secretariat it appears that the option to limit the scope of

review to certain errors of law, such as on expropriation, fair and equitable treatment, and non-discrimination, is at least possible. Although this reference is omitted from the second released version by the Secretariat, it is conceivably a right call, as such a narrow scope may allow incorrect decisions or unjustified inconsistencies to remain unchecked in other investment protection standards not covered by the scope of review.

Further, while it is certain that appealable decisions are those from a first instance tribunal in an investor-state dispute, it is not clear from the initial draft whether decisions of a first instance tribunal in a State-to-State dispute would be likewise appealable before the court. As noted by the government of Canada, State-to-State disputes may also involve similar issues of treaty interpretation, therefore it is desirous to include such investment disputes within the jurisdiction of the appellate court in the interest of overall consistency and coherence. Such clarity may need to be offered in the future.

Another notable question unaddressed is how an appellate body would function if it has to co-exist with other pre-existing appellate regimes in the form of annulment and set-aside procedures. Any possibility for disputing parties to pursue an appeal before the different available fora either at a time or simultaneously could negatively affect the entrenchment of consistency in the ISDS regime and should, thus, be avoided.

Furthermore, where States prefer the establishment of an MIC, another open question is whether the appellate mandate of the second instance court would be limited to appeals arising from the first instance court, or may extend to decisions by regional investment courts, international commercial courts, and domestic courts in case of denial of justice. Such a possibility may further extend the capacity of the court to foster the harmonious development of investment law and enhance legal certainty for both States and investors across jurisdictions.

Concerning the judges to sit at an MIC mechanism, the initial draft for a standing multilateral mechanism suggests the consideration of full-time or part-time judges. So far, most delegates that have commented on the initial draft (including the EU, Canada, Colombia, Singapore, and Uganda) have all expressed to be in favour of full-time judges. However, depending on the number of cases before the court, Mali appears to consider a part-time appointment to be more appropriate. As noted by the EU and its Member States in its comments on the initial draft to a standing multilateral mechanism, full-time judges appointed for long and staggered terms "contribute to the creation of the continuous collegiality and institutional memory necessary to retain expertise and develop a more consistent case law". In contrast, part-time judges may not offer the same effect. Also, whether the MIC will seek to integrate other procedural reform options that foster consistency, such as the use of precedent, the power to order the consolidation of identical claims, or joint interpretation mechanisms is to be revealed in the future.

Another open question is the issue of enforcement. Certainly, the finality and enforceability of an investment court's decision must not be in doubt to ensure consis-

tency across the regime. Any possibility for a MIAM or MIC decision to be subject to further review in State courts would undermine this goal.

IV. Interim Conclusions

In the quest towards enhancing consistency and quality in ISDS decision-making, State delegates in WG III continue to engage and explore the possibilities for the realisation of an appellate mechanism either as a MIAM or one integrated into a two-tiered MIC. In this regard, the Secretariat has been supportive with initial drafts on both available options to guide the considerations of States. While the State delegates continue to engage on the proposed drafts by the Secretariat, more compromise and political will are needed to reconcile the differences in positions identified so far in the ongoing discussions in order to achieve the consensus necessary to bring either a MIAM or an MIC into reality.

D. Enforcement of ISDS Decisions[30]

WG III has equally entertained the question of enforcement as a crucial element for the implementation of systematic reforms of ISDS,[31] i.e. the establishment of a standing MIC or a stand-alone MIAM[32] for the settlement of investment disputes (conjunctively referred to as "Permanent Adjudicatory Bodies").

Undisputedly, in any dispute settlement mechanism, the losing party has the obligation to comply with the decision rendered against it. Should this not occur, the winning party may be provided with a tool to force the compliance through an enforcement mechanism, which guarantees the effectiveness of the respective dispute settlement mechanism. This section seeks to shed some light on the possible avenues for enforcement of decisions rendered by a Permanent Adjudicatory Body, which have been mentioned by WG III when discussing systematic ISDS reform options.

I. Reform Options Relevant to Enforcement: Permanent Adjudicatory Bodies

An MIC seeks an overhaul of the existing ISDS system, i.e. of dispute settlement by way of investment arbitration, by centralising dispute settlement at a two-instance permanent body. A MIAM on the other hand, which is designed in a court-like fashion, seeks to preserve investment arbitration but adding an appeal mechanism as an extra layer. Admittedly, some States oppose to the Permanent Adjudicatory Bod-

30 The authors of this section are Andrés Alvarado and Carla Müller.

31 UNCITRAL WG III, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eight session (28 January 2020), A/CN.9/1004/Add.1, available at: https://undocs.org/en/A/CN.9/1004/Add.1 (1/2/2022), paras. 62 ff.

32 Ibid., para. 25.

ies for ISDS as an alternative to investment arbitration,[33] whereas some others support the creation of either the MIC or the MIAM.[34]

II. Reliance on Existing Mechanisms for the Enforcement of Arbitral Awards

The current system of ISDS enjoys a robust enforcement mechanism, by which a winning party may seek assets of the losing party in a multitude of jurisdictions including States where neither party to the dispute is based. This is carried out mainly through two instruments: the ICSID Convention[35] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).[36] Against this backdrop, it is indicated to analyse whether a newly established Permanent Adjudicatory Body could benefit from those enforcement instruments.

1. ICSID Convention?

Here, it is important to differentiate between enforcement within States that are members to the ICSID Convention and to the new MIC/MIAM ("Contracting Parties") and enforcement in States that are members to the ICSID Convention but *not* members to the MIC/MIAM ("Third Parties").

a) Contracting Parties to an MIC or MIAM

A decision rendered by an MIC/MIAM must be deemed an "award rendered pursuant to [the] Convention"[37] to benefit from the enforcement mechanism under the ICSID Convention. However, the ICSID Convention contemplates the settlement of investment disputes through the traditional system of investment arbitration and excludes the possibility of appeals. As such, the utilisation of the ICSID Convention for the enforcement of decisions of an MIC or MIAM would require the modi-

33 UNCITRAL WG III, Submission from the Government of Bahrain (29 August 2019), A/CN.9/WG.III/WP.180, available at: https://uncitral.un.org/sites/uncitral.un.org/files/wp_180_bcdr_clean.pdf (1/2/2022), paras. 26 ff.; UNCITRAL WG III, Submission from the Government of the Russian Federation (31 December 2019), A/CN.9/WG.III/WP.188, available at: https://undocs.org/en/A/CN.9/WG.III/WP.188, paras. 15–17.

34 See for instance, UNCITRAL WG III, Submission from the European Union and its Member States (24 January 2019), A/CN.9/WG.III/WP.159/Add.1, available at: https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1 (1/2/2022); UNCITRAL WG III, Submission from the Government of China (19 July 2019) A/CN.9/WG.III/WP.177, available at: https://undocs.org/en/A/CN.9/WG.III/WP.177 (1/2/2022); UNCITRAL WG III, Submission from the Government of Morocco (11 February 2020), A/CN.9/WG.III/WP.195, available at: https://undocs.org/en/A/CN.9/WG.III/WP.195 (1/2/2022).

35 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

36 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention).

37 Article 54(1) ICSID Convention.

fication of the ICSID Convention. Considering that *all* ICSID members must ratify, accept or approve it, for the modification to enter into force,[38] and the high number of ICSID members, the modification of the treaty seems extremely unlikely.

One may consider an *inter se* modification of the ICSID Convention between the Contracting Parties to the newly created Permanent Adjudicatory Body as per Article 41 of the Vienna Convention on the Law of Treaties (VCLT). Thus, it seems theoretically feasible that Contracting Parties to an MIC/MIAM may avail themselves of the ICSID Convention insofar the enforcement is sought within their territories.

However, it is controversial whether extending the enforcement mechanism under the ICSID Convention to decisions of Permanent Adjudicatory Bodies would be compatible with the object and purpose of the Convention, particularly, by including an appeal option which is expressly prohibited under Article 53 ICSID Convention or by reformulating the arbitral process. These uncertainties could be avoided by way of a tailor-made inherent enforcement mechanism (see below).[39]

b) Third Parties

Even if the Contracting Parties to the Permanent Adjudicatory Body undertake an *inter se* modification of the ICSID Convention, given the principle that a "treaty does not create either obligations or rights for a third State without its consent",[40] Third Parties would not be bound by it. The question here is whether those Third Parties, who are indeed members to the ICSID Convention, could enforce decisions of an MIC/MIAM.

The design of an MIC would differ from the traditional *ad hoc* arbitration and would include an appeals instance, coming into conflict with the provisions of the ICSID Convention. Moreover, Third Parties would not be bound by any *inter se* modification between the Contracting Parties to the MIC. Consequently, it is conceivable that the courts of Third Parties would not consider an MIC decision to fall within the scope of the ICSID Convention, thereby refusing to enforce that decision as per Article 54 thereof.

With the MIAM, the first instance decision would be rendered in accordance with the traditional model of investment arbitration as a result of either ICSID or non-ICSID arbitration proceedings. In the former case (whereby the first instance decision was rendered pursuant to ICSID proceedings) the specific design of the MIAM could permit enforcement through the ICSID Convention.

As suggested by the ICSID Secretariat in 2004 when discussing the possibility of an Appeals Facility, the MIAM Contracting Parties may devise the decision of first instance as "provisional" and only the last decision of the MIAM would be consid-

38 Article 66 ICSID Convention.

39 UNCITRAL WG III, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eight session (28 January 2020), A/CN.9/1004/Add.1, para. 64.

40 Article 34 VCLT.

ered an "award", as only the latter can be enforced through the ICSID Convention. Alternatively, the appeal decision would remand the case to the first instance, the latter endorsing the decision as an "award". This "award" could then arguably be enforced through the ICSID Convention in Third Parties, but it would be equally subject to other remedies within the Convention such as annulment. Given that this may very well render proceedings more costly and lengthy, States will have to consider carefully if this is a desirable outcome.

2. New York Convention?

Alternatively, the NYC may serve as basis for the enforcement of decisions from a Permanent Adjudicatory Body.[41] As with regard to the ICSID Convention, the Member States of a Permanent Adjudicatory Body could seek recourse to an *inter se* modification of the NYC. Whilst this appears to be feasible, the NYC becomes most relevant when it comes to the enforcement in the territories of Third Parties.

Any enforcement under the NYC requires that the decision from a Permanent Adjudicatory Body falls within its scope of application. Thus, in the following, it will be addressed (i) if a Permanent Adjudicatory Body can be a permanent arbitral body, (ii) whether there is a voluntary submission of the dispute by the parties, (iii) whether the decisions from Permanent Adjudicatory Bodies can be qualified as foreign or non-domestic awards, and (iii) whether an appeal mechanism would be an obstacle for the NYC.

First, Article I(2) NYC stipulates that not only arbitrators appointed for a specific case but also a permanent arbitral body may render an award. Here, an analogy from the Iran-US Claims Tribunal (the IUSCT) to a Permanent Adjudicatory Body could be envisaged as national courts have qualified the IUSCT as a permanent arbitral body and enforce its decisions through the NYC. However, the IUSCT was established under particular circumstances (Iran hostage crisis in 1979) and for the settlement of *existing* disputes between each State and the nationals of the other State. Conversely, a new Permanent Adjudicatory Body would seek to address the concerns on investment arbitration and would include prospective claims.

On a side note, UNCITRAL could also consider issuing a recommendation to assert the Permanent Adjudicatory Body to be created as an arbitral body to provide guidance for national courts.

Second, the NYC requires the voluntary submission of the dispute by the disputing parties. The instrument establishing the MIC/MIAM should thus avoid imposing compulsory jurisdiction and preserve the possibility for the investor to resort to domestic courts. Whereas establishing a compulsory MIC/MIAM jurisdiction may not necessarily exclude enforcement via the NYC, courts of Third Parties might be more reticent to allow NYC enforcement proceedings for such decisions. There-

41 UNCITRAL WG III, Appellate mechanism and enforcement issues, Note by the Secretariat (12 November 2020), A/CN.9/WGIII/WP.202, available at: https://undocs.org/en/A/CN.9/WG.III/WP.202 (1/2/2022), paras. 41–44.

fore, the investor's decision to initiate proceedings in front of the Permanent Adjudicatory Body instead of national courts could be qualified as a voluntary submission. This latter argument is even stronger should the founding instrument of an MIC/MIAM allow for other avenues of dispute resolution.

Third, the NYC stipulates provisions for the enforcement of foreign or non-domestic awards. A foreign award is an award, which has been handed down under the *lex arbitri* of another State, i.e. the arbitral tribunal had its seat in another State. A non-domestic award was rendered in the territory of the State where enforcement is sought but national law was not applied. Both kinds of awards have generally been considered to fall within the scope of the NYC. Additionally, national jurisprudence and legal scholarship regularly accept that so-called "a-national decisions", i.e. decisions rendered by a tribunal without a seat, are susceptible to enforcement under the NYC.

Fourth and finally, it can be questioned whether an appellate mechanism would affect the enforcement under the NYC. There is no indication that the NYC categorically opposes appeal proceedings. Nevertheless, one needs to keep in mind that the NYC only allows the enforcement of binding decisions. Therefore, if an appeal is pending or if the timeframe for an appeal has not yet elapsed, the existence of an appeal mechanism will hinder the enforcement of a decision of first instance.

In conclusion, it seems feasible that decisions from a Permanent Adjudicatory Body can be enforced under the NYC, but the final decision lays with the State court of enforcement. Accordingly, the Contracting States to an MIC/MIAM may wish to exclude the grounds of refusal of enforcement provided in the NYC for decisions of the respective Permanent Adjudicatory Body. Yet, this would not be binding for Third Parties. Such exclusion could nevertheless prevent Contracting States to the MIC/MIAM from invoking any of the grounds of refusal even where enforcement is sought in a Third Parties' territory.

Be that as it may, if the domestic court of enforcement has too many concerns with regard to the enforcement, it might rely on *ordre public* considerations and refuse the enforcement. This issue will more likely come up in Third Parties but could theoretically also worry Contracting Parties to the MIC/MIAM.

III. Adoption of New Instruments for Enforcement

In lieu of relying on existing enforcement mechanisms, the member States can opt for the establishment of an enforcement system dedicated to the decisions of the Permanent Adjudicatory Body. This approach would avoid the intricacies and risks of treaty modification or of treaty references delineated above. Nevertheless, a new enforcement instrument would not bind Third Parties unless they voluntarily adhere to it.

1. Statute or Treaty Setting Out the MIC or MIAM: Only Contracting Parties

Contracting Parties may decide to design their *sui generis* enforcement mechanism within the Statute setting out the respective Permanent Adjudicatory Body. Even though States did not yet issue a clear position on enforcement, in the absence of any substantive discussions at WG III, State delegations signalled their preference for an inherent enforcement system in their first submissions. They would not have to start from scratch but can model their enforcement regime after the existing mechanisms. It should be noted though, that the effectiveness of those enforcement instruments relies on the large amount of member States. Hence, Contracting States should aim at including as many States as possible into an MIC/MIAM to ensure its effectiveness. Certainly, being a multilateral instrument, an enforcement regime within the Statute setting out the respective Permanent Adjudicatory Body would already cover enforcement in a number of States as opposed to the current mostly bilateral system of ISDS, which requires enforcement mechanisms in other States.

Further, such an enforcement regime could be complemented by a fund to assure the effective satisfaction of claimants, as suggested by *Bungenberg* and *Reinisch*. A successful claimant could obtain compensation from the fund and their claim would then be assigned to the Permanent Adjudicatory Body. In order to equip the fund with the necessary financial means, every Contracting State could pay a certain sum. There are several ways to determine the amount of the deposit: the same amount for all Contracting States, or alternatively, an amount linked to the economic situation of the State or to the foreign direct investment, or finally the amount could be determined contingent upon the number of successful cases brought against a State. The latter option seems most problematic, as it might discourage (third) States from joining the Permanent Adjudicatory Body and the fund.

Additionally, it seems preferable to limit the access to the fund to preserve it against a fast depletion and reserve it for cases where its stepping in is necessary. This could either be done by limiting the fund to small and medium enterprise (SME) claimants and/or by determining a maximum threshold of compensation for which the fund steps in. It could also be required from the claimant to substantiate why they cannot seek enforcement directly or the urgency to be paid immediately from the fund.

For the sake of clarity, it should be pointed out that such a fund can also be established if the Contracting States wish to rely on one of the already existing mechanisms. Nevertheless, the Contracting States would need to ensure sufficient linking of the Permanent Adjudicatory Body and the fund with the existing mechanisms insofar as to ensure the fund's functioning, e.g. the subrogation of the Permanent Adjudicatory Body in the rights of the party which the fund compensated.

2. Treaty or Additional Protocols: For Third Parties

Contracting Parties to a Permanent Adjudicatory body may as well intent to secure the enforcement of decisions in Third Parties via a new treaty or additional proto-

cols to an existing instrument, i.e. the NYC. The advantage of this option lies in the possibility to tailor the new treaty or protocol in accordance with the unique design of the MIC or the MIAM. Accordingly, a new treaty or additional protocol for the enforcement of decisions rendered by a Permanent Adjudicatory Body would be open for accession to all States irrespective of their membership to the MIC/MIAM.

A new treaty could foresee a similar Article V NYC provision to bestow certain powers of control on the enforcing courts. This might be decisive for Third Parties deciding to join the new treaty. The only difference with a protocol to the NYC is that in the latter option, only a provision extending the applicability of the NYC would be needed, avoiding the negotiation of an entire treaty from scratch. However, a new treaty or such protocol would require the ratification by the respective Third Parties.

IV. Interim Conclusions

If one cannot enforce a decision effectively, it is not worth a lot. Decisions of an MIC or MIAM are no exception to this rule. The preferable solution is to create an instrument of enforcement inherent to the Permanent Adjudicatory Body that the Contracting States can establish with the characteristics they deem necessary and reasonable. However, such instrument of enforcement would not bind Third States.

Should the Contracting States conversely decide to profit from the existing enforcement mechanisms for arbitral awards, they may rely on the ICSID Convention or the NYC. However, it is not predictable with certainty whether the domestic courts will apply the ICSID Convention and the NYC to decisions of an MIC or MIAM.

E. Appointment of Adjudicators[42]

The current ISDS system provides for *ad hoc* appointment of arbitrators with both disputing parties having free choice on the selection, screening and appointment of an arbitrator. It is criticized that this system has led to the establishment of a small, mainly male, and white circle of candidates chosen in a majority of arbitration proceedings. A second main point of discussion has been and still is the (democratic) legitimisation of party-appointed arbitrators ruling on public policy issues.

This in turn prompted a discussion in recent years about the degree of necessary legitimacy of adjudicators, more specifically their impartiality and independence in the current system. UNCITRAL's WG III seeks to address this prominent criticism. All reform options currently discussed provide for solutions regarding the appointment of adjudicators. This section seeks to give a short overview over the reform process on the selection and appointment of arbitrators, the reform options discussed at UNCITRAL and what will come next.

42 The authors of this section are Lisa Schöttmer and Marc Bungenberg.

I. Why Reforming the Status Quo?

The criticism about the current ISDS system touches on the appointment of adjudicators on many levels as the core of forming an *ad hoc* tribunal. Addressing these concerns, therefore, has to entail reviewing the way adjudicators are appointed. Under the current system, the claimant and the respondent typically appoint one arbitrator each, and the presiding arbitrator is then either commonly appointed by both disputing parties, the other party-appointed arbitrators or by an institution specified in the underlying investment agreement.

One of the essential concerns about the current system is the possibility of lacking impartiality and independence of party-appointed adjudicators. Therefore, the reform must not only focus on actual impartiality and independence but also the appearance thereof.[43] The apparent lack of impartiality partially results from the selection of arbitrators by the disputing parties themselves.[44] The fact that dissenting opinions are mostly filed by the arbitrator chosen by the losing party also contributes to the appearance of lacking impartiality.[45] The lack of diversity also leads to this perception, as a huge part of investment disputes are handled by "members" from a small group of arbitrators from only a few countries.[46]

Another aspect of the current ISDS system being heavily criticised is the so-called "double hatting", which describes a situation where an arbitrator simultaneously acts as both counsel and arbitrator in different cases, potentially leading to a conflict of interest. In this context, it should be noted that the Court of Justice of the European Union (CJEU) stressed in its Opinion 1/17 on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) certain conditions resulting from the EU constitutional framework that have to be fulfilled for the EU to conclude an investment agreement providing for external dispute settlement. One of them is the right to an effective remedy provided in Article 47 of the Charter of Fundamental Rights of the European Union (ChFR). Therefore, "double hatting" has to be limited.

Another possible problem is the so-called "issue conflict", which might arise out of an arbitrator's previous publications, rulings or other involvement in a specific case.

43 UNCITRAL WG III, Report of Working Group III on the work of its thirty-fifth session (14 May 2018), A/CN.9/935, available at: https://undocs.org/en/A/CN.9/935 (1/2/2022), para. 53 f.; UNCITRAL WG III, Report of Working Group III on the work of its thirty-sixth session (6 November 2018), A/CN.9/964, available at: https://undocs.org/en/A/CN.9/964 (1/2/2022), para. 83.

44 UNCITRAL WG III, Report of Working Group III on the work of its thirty-fifth session (14 May 2018), A/CN.9/935, para. 56.

45 Ibid., para 58.

46 Ibid., para 61; UNCITRAL, Report of Working Group III on the work of its thirty-sixth session (6 November 2018), A/CN.9/964, para. 98.

II. Reform Options Discussed at UNCITRAL

Regarding the appointment of adjudicators, the discussed options can be categorized into three different reform proposals: Reforming the arbitration system without changing the core of party-appointment (1), the establishment of a Multilateral Investment Court (MIC) with a standing body of adjudicators (2), or a combination of *ad hoc* arbitration and a permanent body of adjudicators in a second instance in the form of a MIAM (3).

1. Reforming Arbitration

The first option discussed by WG III does not change the current system of party-appointment of adjudicators but attempts to address the criticism and thereby improve the current system through additional measures. Part of this first reform option is a code of conduct.

There is a broad consent on a code of conduct and other ethical measures to ensure impartiality.[47] Different draft codes have been brought up in the discussion, the latest being a draft code of conduct established by ICSID and UNCITRAL.[48] This draft in particular includes Draft Article 3, which deals with the issues of independence and impartiality, and Draft Article 4, which limits "double hatting" and the possibility of one person holding multiple roles. It also regulates "issue conflicts" of adjudicators, as it requires the adjudicator to disclose any previous publications on related topics. The code of conduct is still under discussion. No final outcome has yet reached a consensus.

Another connected point of discussion is a list or roster of arbitrators for *ad hoc* appointments.[49] While a roster of screened adjudicators would preserve party autonomy to some extent, it would also limit the power of the disputing parties to influence the appointment process. This could either be achieved by a roster itself, or even going further by changing the party-appointment to an appointment by an institution, meaning that not the disputing parties but an independent body would be solely responsible for the appointment of adjudicators.[50] However, concerns have been raised about the effectiveness of such a roster since it would not necessarily

47 UNCITRAL, Report of Working Group III on the work of its thirty-fifth session (14 May 2018), A/CN.9/935, para. 64.

48 ICSID, UNCITRAL, Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/code_of_conduct_v3.pdf (1/2/2022).

49 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (28 January 2020), A/CN.9/1004/Add.1, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/007/33/PDF/V2000733.pdf?OpenElement (1/2/2022), para. 105 ff.

50 UNCITRAL WG III, Selection and Appointment of ISDS Tribunal Members, Initial Note by the Secretariat (2020), para. 25 ff.

solve the problem of lacking diversity and impartiality of adjudicators.[51] While the roster itself might give a more diverse selection of arbitrators, it would only give directions without influencing the actual appointment by the parties, if it is still the parties appointing the adjudicators and not any specific institution.

Concern was also raised by the European Union that any constellation of an *ad hoc* arbitration will not be sufficient to provide the wanted predictability and legitimacy that are necessary to meet the conditions resulting from the EU constitutional framework.[52] The same holds true for the issue of impartiality of adjudicators. While a roster can provide guidance on the suitability of a candidate and the code of conduct gives guidance on double hatting and issue conflicts, these concepts necessarily remain part of the system. Completely banning "double hatting" might affect the ability of the disputing parties to choose adjudicators with a more diverse background and create even higher barriers for new adjudicators to be appointed, or even reduce the group of adjudicators. An effective limit on double hatting, on the other hand, could restrict the appointments of some arbitrators. In this context it could also be ensured that arbitrators do not accept more appointments than they can productively manage.

2. Establishment of an MIC

A second option discussed by WG III is the establishment of an MIC.[53] This would entail a permanent body of adjudicators elected by the member states to the MIC. The selection and appointment of adjudicators would then be governed by rules in the context of a standing multilateral tribunal.[54] The most important aspect of those rules would be a screening process of adjudicators, ensuring that candidates brought forward possess the qualities of a fit adjudicator. An independent screening body would assess the candidates – brought forward either by the member states or through self-nomination – and determine their suitability. Such a screening body could again be formed by an institution. Therefore, the member states should decide on a set of requirements to be highlighted in the screening process, including aspects like expertise, impartiality, independence and diversity.

51 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (28 January 2020), A/CN.9/1004/Add.1, para. 113.

52 See UNCITRAL WG III, Working Group III, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat (19 October 2020), A/CN.9/WG.III/WP., available at https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159043.pdf (1/2/2022), Comment No 6.

53 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (28 January 2020), A/CN.9/1004/Add.1, para. 114 ff.

54 Ibid., paras. 95–133; UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session, A/CN.9/1050 (2021, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V21/016/78/PDF/V2101678.pdf?OpenElement (1/2/2022), paras. 17–56.

Due to the nature of the permanent body of adjudicators, the problem of "double hatting", which presents itself in the current system, is resolved automatically. Permanent judges would most likely be appointed full time and be remunerated in a way that their obligation to cease any other activity will not pose a problem.

On the one hand, such a permanent body would completely move away from the current idea of high flexibility and party autonomy, as the adjudicators would be State-appointed and the bench deciding on a specific case would be predetermined. On the other hand, this solution would ensure a high level of predictability, consistency, and legitimacy.

3. Establishment of a MIAM

The third reform option is a combination of the two previous proposals, i.e. the current *ad hoc* system would stay in place with additional measures to enhance impartiality and diversity in a first instance, while a second instance is created in the form of a standing tribunal as appellate body. This would ensure a higher level of predictability and consistency, as the standing appellate body would decide on matters more consistently, while also providing the disputing parties with the flexibility and autonomy to appoint their own arbitrators in the first instance.

III. Stakeholders and their Position

The main stakeholders in the discussion are, on the one hand, States and the EU participating in ISDS, and, on the other hand, foreign investors. Furthermore, multiple interest groups aim at influencing the outcomes of the ongoing reform debates. While in the current system both disputing parties have an equal right to appoint the arbitrator of their choice, a standing adjudicating body would consist solely of State/treaty parties (or possibly respondent)-appointed adjudicators.

Multiple States expressed the view that the current appointment process was adequate to ensure independence and impartiality.[55] At the same time, however, they recognised that the appearance of independence and impartiality has to be reinforced, which is in the view especially of interest groups representing investors not always guaranteed under the current framework.[56] Investors might fear that State-appointed adjudicators would then decide State-friendly. However, as discussed in WG III, there is evidence that State-appointed adjudicators in international courts also rule against their own countries.[57] Multiple examples in existing international courts show that highly qualified judges are mostly impartial and, more importantly, not necessarily State-friendly. It was also discussed that a high level of diversity

55 UNCITRAL WG III, Report of Working Group III on the work of its thirty-fifth session (14 May 2018), A/CN.9/935, para. 50 f.
56 Ibid., para 53.
57 Ibid., para 68.

should automatically ensure more impartiality.[58] The adjudicators' impartiality might also be achieved by long periods "on the bench" or no re-appointment-possibilities. It was equally noted that States or the EU might appoint "investor-friendly" adjudicators, considering that investors from industrialized countries are those that mostly initiate ISDS proceedings.

Further, as the discussions about the possible reform options are becoming more concrete, different States position themselves towards different options. The EU and most EU Member States expressed their strong support for an MIC, arguing that the other options could not properly address the objectives of the reform process,[59] while other States, such as Russia, expressed the need to explore the option of a reform of the current system with a roster and code of conduct in more detail.[60]

IV. Next Steps

The debate around an *ad hoc* or a permanent structure of ISDS will determine the possible reform options of the selection and appointment of arbitrators.[61] Although the process of drafting provisions for such a permanent structure seems quite advanced, there is still no general consent on which reform option is the preferred one.

The UNCITRAL Secretariat, *Bungenberg* and *Reinisch*[62] as well as others prepared draft provisions on the selection and appointment of ISDS tribunal members which now need to be discussed further. So far, the main points discussed in the drafts on appointment and selection procedures, which have to be analysed in more detail during the next sessions of WG III, are the number of adjudicators based on a selective representation approach with the possibility of *ad hoc* tribunal members,[63] the establishment of a screening process (draft provision 6 to 8 providing for election of tribunal members by an intergovernmental body voting from a list of nomi-

58 Ibid.

59 UNCITRAL WG III, Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat (19 October 2020), A/CN.9/WG.III/WP, Comment No 4.

60 UNCITRAL WG III, Comments of the Russian Federation on the drafts of the Working Papers on appellate mechanism and on selection and appointment of the tribunal members in investor-state dispute settlement developed by the UNCITRAL Secretariat, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_on_appellate_mechanism_and_appointment_of_arbitrators.pdf (1/2/2022), p. 4.

61 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (28 January 2020), A/CN.9/1004/Add.1, para. 133.

62 *Bungenberg/Reinisch*, Draft Statute of the Multilateral Investment Court, Articles 12–15; See also on this, *Bungenberg/Reinisch*, From Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, mn. 119 ff.

63 UNCITRAL WG III, Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters, Note by the Secretariat (7 September 2021), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf (1/2/2022), para. 12 ff.

nated candidates),[64] and questions regarding the terms of office, renewal and removal of adjudicators.[65]

Especially the establishment of a screening process for possible adjudicators is a point of ongoing discussion, that could not be decided on so far. Consent has to be established on how extensive such a screening process should be and, more importantly, what parameters should be set to determine whether a candidate is suitable or not and how those parameters should be assessed and interpreted.

Further unsolved problems in relation to the establishment of an MIC include, among others, how to ensure regional and legal diversity in a system evolving over time as well as the question on how to increase the number of adjudicators in a standing body of adjudicators. In light of the circumstance that not all parties would be able or willing to join an MIC at the same time, it is essential to find a solution on how to keep the appointed body of adjudicators diverse and to ensure the representation of all participating parties.

Additionally, a long-term appointment could have an effect on enforcement of the issued awards. Only decisions by arbitral tribunals, not those issued by international courts, fall under the enforcement rules of national legislation of most states and international instruments, such as the New York Convention. This gives rise to the question of whether an MIC with permanently appointed adjudicators could be perceived as an arbitral tribunal or must rather be seen as an international court, as the name already suggests.[66]

V. Interim Conclusions

Most of the concerns regarding the appointment of adjudicators addressed with a comprehensive reform of the system towards the establishment of an MIC seem to be rooted less in actual evidence, but in the general perception of problems arising out of the current ISDS system. One should discuss whether the perception of lacking impartiality and independence of adjudicators in the current system is in fact ground enough to create a completely new appointment process. If this is affirmed, the options described above are available. If the UNCITRAL reform discussion opts for a permanent court – thus an MIC – is seems inevitable to introduce a selection, screening, and appointment system as discussed above.

F. Treaty Parties' Involvement and Control Mechanisms[67]

At many occasions, State parties to investment treaties have raised discontent on the interpretation of their treaties by arbitral tribunals. States have highlighted this issue in the November 2018 meeting of WG III in Vienna wherein they identified legal

64 Ibid., para. 24 ff.
65 Ibid., para. 42 ff.
66 On this topic see also Section D on the enforcement of ISDS decisions in more detail.
67 The authors of this section are Leonard Funk and Angshuman Hazarika.

consistency as one of the issues to be tackled in the ISDS reform process.[68] To resolve this issue, one of the solutions suggested by States was to provide greater control to State parties over the interpretation of their investment treaties. This could be achieved by mechanisms such as joint interpretative statements, joint interpretative agreements and mechanisms to enable treaty parties to present their interpretations to an arbitral tribunal before the final award is rendered.[69] Based on this discussion, the Secretariat has prepared a note for consideration by WG III, which focusses on the exercise of powers provided by treaties to State parties to interpret their treaties and on remedies for identified concerns.[70]

I. Why Reforming the Status Quo?

The UNCITRAL Secretariat has expressed that there is a need for certainty, predictability and equal treatment which can be linked to having consistent and coherent decisions.[71] States would need to understand the consequences of their activities and whether they may be unknowingly violating their obligations under investment treaties. One possible path to achieve certainty in interpretation of treaties is by providing an option for greater control for State parties to treaties in the process of their interpretation. State parties willing to exercise control over their treaties may use interpretative tools provided in the treaties, such as a possibility for joint interpretations (wherever they are available in the treaty), which are binding on arbitral tribunals. Where such tools are not provided, States may update their treaties.[72]

In reaching this stage wherein States have desired to exercise greater control over their treaties in their statements in WGIII, they have passed through various stages which have influenced this decision. This begins with States who have sought to provide joint interpretative statements to guide future investor-State arbitral tribunals (e.g. the India-Bangladesh Joint Interpretative Statement), which then moves on to States who have sought to provide non-disputing party submissions in ongoing disputes (e.g. in *Methanex v USA*) and finally to States who have expressed their

68 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (6 November 2018), A/CN.9/964, available at: https://undocs.org/en/A/CN.9/964 (1/2/2022), para. 54 ff.

69 UNCITRAL WG III, Consistency and related matters, Note by the Secretariat (28 August 2018), A/CN.9/WG.III/WP.150, available at: https://undocs.org/en/A/CN.9/WG.III/WP.150 (1/2/2022), para. 32; UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat (5 September 2018), A/CN.9/WG.III/WP.149, available at: https://undocs.org/A/CN.9/WG.III/WP.149 (1/2/2022), para. 29 f.

70 UNCITRAL WG III, Interpretation of investment treaties by treaty Parties, Note by the Secretariat (17 January 2020), A/CN.9/WG.III/WP.191, available at: https://undocs.org/en/A/CN.9/WG.III/WP.191 (1/2/2022), para. 23 ff.

71 UNCITRAL WG III, Consistency and related matters, Note by the Secretariat (28 August 2018), A/CN.9/WG.III/WP.150, para. 28.

72 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat (5 September 2018), A/CN.9/WG.III/WP.149, para. 29.

discontent over the treaty interpretation by investor-State arbitral tribunals after conclusion of the dispute.[73]

To begin with, by consenting to ISDS, States have given authority to arbitral tribunals to interpret and apply provisions of IIAs to specific disputes.[74] The UNCITRAL Secretariat found that there are unjustifiably inconsistent interpretations of IIA provisions and other relevant principles of international law. Under normal circumstances, the decisions should be coherent and predictable while taking into account consistent and predictable approaches to the interpretation of treaties. This consistency may be maintained even while dealing with conflicting decisions arising from different cases.[75] Ideally, decisions by arbitral tribunals would take into account pre-existing case law and contribute to the development of jurisprudence, but such arbitral tribunals are typically constituted on an *ad hoc* basis and there is no system of binding precedence.[76] As a result, WG III in phase 1 of its deliberations has identified concerns regarding the correctness, predictability, and coherence of ISDS decisions. Against this background WG III concluded that reforms are desirable.[77]

State parties to investment treaties have repeatedly expressed that arbitral tribunals at various instances have interpreted the treaties in a manner which is inconsistent with the intention of the parties at the time of the conclusion of the treaties.[78] An improper interpretation of treaties by tribunals only leads to post award remedies remaining for the resolution of the error, which are very limited.[79] As such, as an option to resolve this issue, States may choose to exercise a greater degree of control on the decisions regarding the interpretation of the treaties before they are actually made by the arbitral tribunals. This would prevent an erroneous and unacceptable interpretation from being released in the first place.[80]

In a nutshell, exercising better control by State parties to investment treaties may be a path to ensuring issues of consistency, predictability, coherence, and correctness of decisions by arbitral tribunals.[81] Therefore, mechanisms may be required that enable

73 *Obadia*, ICSID Review 2/2007, p. 369.
74 UNCITRAL WG, Interpretation of investment treaties by treaty Parties- Note by the Secretariat (17 January 2020), A/CN.9/WG.III/WP.191, para. 13.
75 UNCITRAL WG III, Consistency and related matters, Note by the Secretariat (28 August 2018), A/CN.9/WG.III/WP.150, para. 38.
76 Ibid., para. 39 ff.
77 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (6 November 2018), A/CN.9/964, para. 39 f.
78 Ibid., para. 34.
79 Ibid., para. 57.
80 UNCITRAL WG III, Interpretation of investment treaties by treaty Parties, Note by the Secretariat (17 January 2020), A/CN.9/WG.III/WP.191, para. 41.
81 Ibid., para. 6.

- the treaty parties to determine the law and principle of interpretation that may be utilized by an arbitral tribunal to interpret a treaty as intended, and
- arbitral tribunals to consult States to resolve doubts about the interpretation of treaties.[82]

II. Reform Options Discussed at UNCITRAL

The UNCITRAL Secretariat has expressed that State parties retain the power to clarify the meaning of a treaty through an authoritative interpretation, as a means of achieving control over their treaties.[83] In order to exercise this power, the Secretariat has suggested a plethora of options which are available to treaty parties,[84] as masters of their treaties under public international law:

- Before conclusion: Precision of treaty terms and the preamble of the treaty; determination of interpretation rules; provision of specific mechanisms (e.g. *renvoi*; the possibility for treaty parties to comment on draft awards; non-disputing party submissions),
- At conclusion: Adoption/Publication of additional instruments (formal or informal),
- After conclusion: Subsequent interpretative agreement, referral procedures for interpretative statements of the treaty parties during a proceeding, or practice establishing an agreement of the treaty parties, Article 31(3) (a) and (b) VCLT.

State parties additionally have the option of being involved in the preliminary settlement of disputes which would include a mechanism for referring sensitive issues to State-to-State dispute settlement where the State parties may determine whether a claim is frivolous, or if it falls within the group which could be referred to ISDS.[85]

While States may have a number of tools to ensure a correct and consistent interpretation of their treaties, they have rarely made use of these possibilities.[86]

1. Exercising Control at the Time of Drafting a Treaty

Treaty parties may choose careful inclusion of treaty language as an efficient way to ensure that interpretations are aligned with the intent of the parties.[87] The precision of the treaty terms and the inclusion of a preamble which reflects the object and purpose of the treaty are considered as tools which aid the process of interpretation

82 Ibid., para. 8 ff.
83 Ibid., para. 15.
84 Ibid., para. 24 ff.
85 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat (5 September 2018), A/CN.9/WG.III/WP.149, para. 31 f.
86 UNCITRAL WG III, Interpretation of investment treaties by treaty Parties, Note by the Secretariat (17 January 2020), A/CN.9/WG.III/WP.191, para. 17.
87 Ibid., para. 24.

by arbitral tribunals. Additionally, mentioning rules or standards to be followed in the interpretation process can guide a tribunal in the interpretation process.[88]

A mechanism of *renvoi* which might permit referral of disputes by the arbitral tribunal to the treaty parties for interpretation and enable the treaty parties to decide on the matters themselves or through a commission/committee may also be included. Additionally, similar to inter-State arbitration provisions in many free trade agreements, treaty parties may require the tribunal to circulate a draft award for consideration and comments.[89] Non-disputing parties may also be provided an opportunity to present their statements in an investment dispute.

2. At the Time of the Conclusion of the Treaties

When concluding treaties, the parties may adopt additional instruments, *inter alia*, formal or informal side-agreements, understandings or exchanges of letters, *travaux préparatoires* and model investment treaties.[90] Among the unilateral tools, State parties and their governments and parliaments may adopt commentaries, official statements and parliamentary debates which may aid in clarifying the meaning of treaty provisions.[91]

3. After the Conclusion of the Treaties

In line with the interpretative rules found in Articles 31 and 32 of the VCLT, treaty parties can clarify the provisions of their treaties through subsequent agreement (Article 31(3)(a) VCLT) and subsequent practice or conduct (Article 31(3)(b) VCLT). This follows from the understanding that subsequent agreements and practice must be taken into consideration while interpreting treaties (Article 31(3) VCLT).

In order to utilize the provisions for interpreting treaties after conclusion and to enhance treaty parties' control over the interpretation of their treaties and to strengthen the involvement of State authorities,[92] the reform options discussed below which aim at fostering a proactive and systematic use of control mechanisms may be utilized.[93] It must, however, be noted that to aid and facilitate the use of these mechanisms, State parties may choose to include a provision in the treaty to indicate the binding nature of these interpretations when issued by the authorities mentioned in the treaties (treaty parties, commissions, committees).

88 Ibid., para. 27.
89 Ibid., para. 29 f.
90 Ibid., para. 42.
91 Ibid., para. 32 f.
92 Ibid., para. 10; UNCITRAL WG III, Interpretation of investment treaties by treaty Parties, Note by the Secretariat (30 July 2019), A/CN.9/WG.III/WP.166/Add.1, available at: https://undocs.org/en/A/CN.9/WG.III/WP.166/Add.1 (1/2/2022), p. 6 f.
93 UNCITRAL WG III, Interpretation of investment treaties by treaty Parties, Note by the Secretariat (17 January 2020), A/CN.9/WG.III/WP.191, para. 44.

The four mechanisms, which may be used by State parties, are:

- Unilateral Interpretation Mechanisms: Unilateral statements or practice, even though they may not establish an agreement of all treaty parties, may be taken into account as supplementary means of interpretation.[94] State parties may be made aware about the possibility of making such unilateral interpretations and the possible impact of such a step.
- Consultations between the treaty parties on the proposal of a State party are being considered as an option to discuss issues of interpretation.[95]
- Joint Interpretation Mechanisms: Treaty parties may include provisions in the treaty which permit the establishment of *ad hoc* or institutional mechanisms for interpretation.[96]
  - Treaty parties can provide for an express mechanism to agree upon interpretation issues over time. A reform option would be to provide for model treaty provisions which may be inserted in future IIAs as well as being made applicable to existing IIAs.[97] Further, even after a dispute based on a treaty has been concluded, State parties may choose to issue a reaction statement. Such a reaction may be issued either unilaterally or jointly to communicate an agreement or disagreement on the interpretation of the treaty by an arbitral tribunal. When issued, these statements would act as guidance for future tribunals.[98]
  - States may issue joint interpretative agreements on issues referred to them by any of the disputing parties or the arbitral tribunal.[99] Alternatively, a standing body such as an *ad hoc* advisory center composed of representatives of the State parties may provide an interpretation of the treaty.
  - A multilateral framework may be established to clarify core obligations in IIAs or the relationship between investment law and other fields of public international law.[100] A concrete reform option would be to develop a multilateral interpretive instrument which may take the form of soft or hard law. A multilateral investment tribunal, if it is formed, may also aid in the process of treaty interpretation.[101]
- Specific investment treaty interpretative tools:[102] Autonomous interpretation rules may be developed for specific purposes considering that a vast majority of

94 Ibid., para. 45.
95 Ibid., para. 41.
96 Ibid., para. 39 f.
97 Ibid., para. 46–48. See also below Section I on implementation.
98 Ibid., para. 43.
99 Ibid., para. 40, 49–52.
100 Ibid., para. 11 and 55.
101 UNCITRAL WG III, Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters- Note by the Secretariat, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/standing_multilateral_mechanism_-_selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf (1/2/2022).
102 UNCITRAL WG III, Interpretation of investment treaties by treaty Parties- Note by the Secretariat (17 January 2020), A/CN.9/WG.III/WP.191, para. 57.

investment treaties do not contain guidance on government interpretative action. These tools need to be in line with the established general principles of treaty interpretation, with the presence of a procedure for harmonious coexistence of these tools in international law.

III. Stakeholders and their Position

The key stakeholders in the process of ensuring consistency in the interpretation of treaties are the State parties to the treaties. States have agreed that there are indeed divergent interpretations which are unacceptable.[103] The key ideas which have been expressed by the delegations for resolving these problems are the following:

- Developing means for the issuance of binding joint interpretations of treaties,[104] and a path to determine the law or principles of interpretation,[105]
- Establishing a mechanism which allows arbitral tribunals to consult with State authorities about treaty interpretation,[106] and also an opportunity for non-disputing parties to present their views,[107]
- Establishing standing mechanisms for treaty interpretation,[108] including a possibility for a multilateral standing mechanism.[109]

State parties have also suggested a mechanism for State-to-State preliminary consideration of interpretation issues.[110] A few delegations are skeptical of reforms given

103 UNCITRAL WG III, Report of Working Group III on the work of its thirty-sixth session (6 November 2018), A/CN.9/964, para. 40.

104 UNCITRAL WG III, Submissions from the Government of Costa Rica (22 March 2019), A/CN.9/WG.III/WP.164, available at: https://undocs.org/en/A/CN.9/WG.III/WP.164 (1/2/2022) and A/CN.9/WG.III/WP.178, available at: https://undocs.org/en/A/CN.9/WG.III/WP.178 (1/2/2022); UNCITRAL WG III, Submission from the Governments of Chile, Israel, Japan, Mexico, Peru (2 October 2019), A/CN.9/WG.III/WP.182, available at: https://undocs.org/en/A/CN.9/WG.III/WP.182 (1/2/2022).

105 UNCITRAL WG III, Submission from the Government of Thailand (8 March 2019), A/CN.9/WG.III/WP.162, available at: https://undocs.org/en/A/CN.9/WG.III/WP.162 (1/2/2022).

106 UNCITRAL WG III, Submission from the European Union and its Member States (24 January 2019), A/CN.9/WG.III/WP.159/Add.1, available at: https://undocs.org/en/A/CN.9/WG.III/WP.159 (1/2/2022); UNCITRAL WG III, Submission from the Government of Ecuador, A/CN.9/WG.III/WP.175, available at: https://undocs.org/en/A/CN.9/WG.III/WP.175 (1/2/2022), para. 26; UNCITRAL WG III, Submission from the Governments of Chile, Israel, Japan, Mexico, Peru, A/CN.9/WG.III/WP.182.

107 UNCITRAL WG III, Submission from the Government of Costa Rica, A/CN.9/WG.III/WP.164, Annex II.

108 UNCITRAL WG III, Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1.

109 Ibid.

110 UNCITRAL WG III, Interpretation of investment treaties by treaty Parties, Note by the Secretariat (17 January 2020), A/CN.9/WG.III/WP.191, paras. 6–12; UNCITRAL WG III, Interpretation of investment treaties by treaty Parties, Note by the Secretariat (30 July 2019), A/CN.9/WG.III/WP.166/Add.1, p. 6 f.

the already existing possibilities under public international law for treaty parties to control the interpretation and application of their treaties.[111]

IV. Next Steps

As a compromise regarding the way forward, WG III tasked the Secretariat during its 39th session in October 2020 to conduct further studies.[112]

Questions which may be addressed by the Secretariat encompass *inter alia*:

- What kind of interpretive tools are already contained in IIAs? How do they address the question of treaty parties' control over the interpretation of provisions of their treaties? How have these tools been applied by ISDS tribunals?
- Why have IIA parties so far not made effective use of their possibilities under public international law to ensure a correct and consistent interpretation of their treaties? How could the numerous tools be effectively used in the future?

V. Interim Conclusions

The current status of negotiations and the options before WG III reveal that a number of views are on the table. Most of these options have already been utilized by different State parties by either including them in their investment agreements, or by utilizing them in practice. State parties have diverging views with respect to available options and their status in international law. A common ground needs to be reached to move ahead. This will need to be followed by an inclusion of the chosen options in existing and future investment treaties.

G. Counterclaims by Host States in ISDS[113]

The instrument of counterclaims exists both in national legal systems and in international law. Although there is no globally accepted definition of counterclaims, there are three common features across the board: *First*, they are substantive claims of the respondent, thus, they seek relief beyond the mere dismissal of the claimant's claims. *Second*, their purpose is to achieve procedural/judicial economy, thus, they are connected, albeit independent, to the main claim. *Third*, the adjudicator must have (express or implied) jurisdiction to decide on the counterclaim. In the realm of ISDS, counterclaims usually refer to the possibility for the respondent host State to submit a claim against the claimant investor. Admittedly, this has so far occurred only in a handful of cases and, in the majority of them, the arbitral tribunals have

111 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty fourth session (10 November 2020), A/CN.9/1044, available at: https://undocs.org/en/A/CN.9/1044 (1/2/2022), para. 90 ff.

112 Ibid., para. 100 f.

113 The author of this section is Andrés Alvarado.

rejected the counterclaims either on jurisdictional grounds,[114] or ultimately on the merits.[115]

WG III has considered counterclaims as a possible tool to rebalance the ISDS system, to foster procedural efficiency, fairness and the rule of law.[116] Some delegations such as the Government of Morocco[117] and the Government of South Africa[118] have suggested that a comprehensive ISDS reform should, among other things, enable host States to bring counterclaims against the claimant investors. Yet, the WG III has not embarked upon a detailed analysis on the subject. Perhaps this is so because a counterclaim, in the context of ISDS, touches upon the substantive obligations of investors, an issue that has been consistently considered to fall outside of the scope of the Working Group's mandate.[119] Against this backdrop, this section aims at presenting the major obstacles to counterclaims in the current system and the possible reforms options for their inclusion in ISDS.

I. Counterclaims in the current ISDS System

Counterclaims in ISDS have encountered some obstacles to succeed: *first*, the restrictive scope of the dispute settlement provisions in international investment agreements (IIAs), and *second*, the legal basis for, or applicable law to, the merits of the counterclaim.

1. Dispute Settlement Provisions and Counterclaims

Most arbitral tribunals are reluctant to entertain a counterclaim when the underlying treaty contains a "narrow" dispute resolution clause. This means, should the pertinent treaty provision contemplate international arbitration exclusively at the foreign investor's behest, the arbitral tribunal might conclude that there is no con-

114 See for instance, *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (18 January 2019).

115 Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award (8 December 2016).

116 UNCITRAL WG III, Multiple proceedings and counterclaims, Note by the Secretariat (22 January 2020), A/CN.9/WG.III/WP.193, available at: https://undocs.org/en/A/CN.9/WG.III/WP.193 (1/2/2022), para. 38.

117 UNCITRAL WG III, Submission from the Government of Morocco (4 March 2019), A/CN.9/WG.III/WP.161, available at: https://undocs.org/en/A/CN.9/WG.III/WP.161 (1/2/2022), para. 9.

118 UNCITRAL WG III, Submission from the Government of South Africa (17 July 2019) A/CN.9/WG.III/WP.176, available at: https://undocs.org/en/A/CN.9/WG.III/WP.176 (1/2/2022), para. 64.

119 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (26 February 2018), A/CN.9/930/Add.1/Rev.1, available at: https://undocs.org/en/A/CN.9/930/Rev.1 (1/2/2022), para. 20; UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (9 April 2019), A/CN.9/970, available at: https://undocs.org/en/A/CN.9/970 (1/2/2022), para. 27.

sent between the disputing parties allowing the host State to bring a substantive claim against the investor.[120] Consequently, tribunals usually rule that the host State cannot circumvent such a restriction by means of a counterclaim.

2. Legal Basis for (Applicable Law to) the Merits of a Counterclaim

The legal basis for, or applicable law to, the merits of the counterclaim has been also construed as an obstacle, particularly in two scenarios. A first scenario concerns narrow treaty clauses on applicable law for investment disputes. For instance, should those provisions contemplate exclusively international law as the applicable law, most tribunals might be tempted to reject counterclaims based on, for example, the domestic law of the host State.[121] In a second scenario, the IIA does not provide for an applicable law clause. In this situation, the discussion is not whether the legal source of the investors' obligations is referred to in the IIA but rather whether such legal source is suitable to be heard altogether with the main claim.[122]

II. Possible Prospects for Counterclaims in ISDS Reform

Currently, there are two possible prospects for counterclaims in the discussions of ISDS reform: either through modifications within the existing system of ISDS or in an MIC designed to solve international investment disputes.

1. Modifications within the existing System of ISDS

a) Overcoming Restrictive Wording in Dispute Settlement Clauses

The main problem for counterclaims has been the narrowly drafted dispute resolution clauses in IIAs. An effective solution in this regard would require new treaty drafting for future IIAs and treaty modification for most existing IIAs. With regard to future IIAs, WG III could work on a new model dispute settlement clause for

120 For instance, *Oxus Gold v Republic of Uzbekistan*, UNCITRAL, Award (17 December 2015) para. 948. Similarly, if the dispute resolution clause limits the sort of disputes to be settled through arbitration, *e.g.* the alleged breach of the substantive standards of protection by the State, arbitral tribunals have also construed such formulations restrictively, see *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), para. 353.

121 Examples: *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1 Award (07 December 2011) paras. 869-872; *Sergei Paushok and others v Mongolia*, UNCITRAL, Award (28 April 2011), paras. 694–697.

122 The *Amco* tribunal distinguished "between rights and obligations applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and the rights and obligations applicable to an investor as consequence of an investment agreement entered into with the host state". Only the latter would be within a tribunal's jurisdiction. See *Amco Asia v Republic of Indonesia (Resubmitted Case)*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (10 May 1988), paras. 125 f.

IIAs that States could use as a template when concluding their own treaties. A suggestion is found in Table 1.

Table 1
(X) All disputes between one Contracting Party and an investor of the other Contracting Party concerning a protected investment of the latter may be referred to arbitration in accordance with: (…)
(X) The arbitral tribunal constituted thereunder shall have jurisdiction to decide counterclaims arising directly out of the subject-matter of the dispute.

With regard to existing IIAs, the respective contracting parties would need to enter into a process of treaty modification. In this scenario, there are two possible options: either modifying each particular IIA one-by-one or modifying several IIAs by means of a multilateral/plurilateral treaty. The latter option could be realised by means of an opt-in convention similar to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) or the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention).[123]

Tribunals, based upon IIAs with the proposed model clause, might be more receptive to the admission of counterclaims. Thus, the prospective claimant investor would be aware that, by initiating arbitration pursuant to such model clause, it would be consenting to the possibility of counterclaims.

b) Substantive Reform Needed?

The problem of the legal basis for, or applicable law to, the merits of the counterclaim lies on the source of the investor's obligations. Here, there are two options of treaty drafting that could solve the problem: *first*, allowing explicitly that counterclaims against investors could be based on the domestic law of the host State; *second*, including specific investors' obligations in IIAs. Nevertheless, both options might not be recommended.

1) Permitting the Domestic Law of the Host State as the Source of the Investor's Obligations

Such a provision might become inoperative if the claimant investor is not subject to the domestic law of the host State, for instance, because it has operated through subsidiaries, with different legal personalities, in the host State. In those cases, the violation of the domestic law of that State will be attributable to the subsidiary but not to the claimant investor. This was precisely one of the reasons for the *Paushok* tribunal to reject a counterclaim for unpaid taxes.[124]

123 For a discussion on the means of implementation of ISDS reform options see Section I.
124 *Sergei Paushok and others v Mongolia*, UNCITRAL, Award (28 April 2011) para. 695.

Importantly, the European Union (EU) and its Member States might reject a reform proposal suggesting that an arbitral tribunal would be entitled to interpret and to apply domestic law of the Member States. According to the CJEU, given the characteristics of EU Law, that law must be considered as being part of the law in force in every EU Member State.[125] Therefore, pursuant to Article 344 of the Treaty on the Functioning of the European Union (TFEU),[126] any reform in ISDS allowing arbitral tribunals to interpret domestic law of the EU Member States, including EU Law, will be rejected. This position was confirmed recently in the *CETA Opinion* by the CJEU, where it stated that domestic law of the EU Member States can only be considered by a CETA Tribunal as a matter of fact.[127]

2) Including Investors' Obligations in IIAs

This option would require detailed obligations on a substantive level in a variety of subjects such as human rights, the protection of the environment, corruption, among others.[128] Formulating substantive provisions not only goes beyond the Working Group's mandate of focusing on procedural reforms,[129] but also implies lengthy negotiations, which might derail the progress achieved so far.

2. A Multilateral Investment Court and Counterclaims

In the case of a yet-to-be created MIC for the settlement of investment disputes, it would be possible to design such a court with the power to entertain counterclaims. In this regard, both aspects previously analysed would need to be addressed: *first,* the wording of the dispute settlement provision referring to an MIC; *second,* the legal basis for the merits of a counterclaim.

On the one hand, the instrument creating an MIC must expressly include the possibility of submitting counterclaims, and the corresponding power of the court to decide those counterclaims. Thus, it is suggested that the provision establishing the scope of jurisdiction of the court could include a paragraph as in Table 2.

125 ECJ, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, paras. 40-43.
126 Article 344 TFEU: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".
127 ECJ, Opinion 1/17, *CETA Opinion,* ECLI:EU:C:2019:341, paras. 130 f.
128 UNCITRAL WG III, Multiple proceedings and counterclaims, Note by the Secretariat (22 January 2020), A/CN.9/WG.III/WP.193, para. 41.
129 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (26 February 2018), A/CN.9/930/Add.1/Rev.1, para. 20.

Table 2
Article XX (Scope of Jurisdiction of the MIC)
[…]
(X) The Court constituted thereunder shall have jurisdiction to decide counterclaims arising directly out of the subject-matter of the dispute.

On the other hand, regarding the legal basis for the merits of a counterclaim, one would reach similar conclusions as in the current system of ISDS. This means, in the first place, that recourse to the domestic law of the host State may become inoperative in certain cases. Second, some prominent actors such as the EU and its Member States might be reluctant to accept that an international court adjudge counterclaims based on domestic law. Finally, introducing detailed investors' obligations in the main instrument establishing the MIC or even in a separate international treaty might stall the negotiations.

III. Interim Conclusions

The procedural instrument of counterclaims has certainly varying requirements throughout the different forms of international dispute resolution, but there are some underlying common features. In the particular case of ISDS, arbitral tribunals have been reluctant to hear counterclaims mostly on two grounds: *First*, the narrow dispute resolutions provision in IIAs; and *second*, the legal basis for, or applicable law to, the merits of a counterclaim. Theoretically, including counterclaims within the scope of jurisdiction of an arbitral tribunal or an MIC is feasible by the agreement of the contracting States. However, modifications on the legal basis for the merits of a counterclaim entail the risk of forestalling negotiations, or possibly receiving a plain negative from some actors such as the EU and its Member States. In these terms, the inclusion of counterclaims in the context of the ongoing ISDS reform does not seem viable.

H. Advisory Centre on International Investment Law[130]

One of the main criticisms against the current system relates to the cost of ISDS procedures. High costs may create an encumbrance to access to justice for certain groups of disputants, in particular low-income countries that cannot afford the involvement in investment arbitration – especially in view of the cost of quality legal representation. This challenge is also true for micro, small, or medium-sized enterprises (MSME) having no financial power to protect their investment interests through ISDS against a hostile State action. Importantly, "equality of arms" is a fundamental rule of law requirement that must be present in every fair and effective justice system. While not expected that all parties in ISDS should have equal finan-

130 The authors of this section are Afolabi Adekemi and Johanna Braun.

cial means, it is yet imperative that effective access to the ISDS system should not be dependent upon the economic status of a party.

Although today a number of available options exist that parties use in addressing cost issues in ISDS, including appointing counsels through tender proceedings, third party funding or adopting a cost-saving procedural timeline. Nevertheless, it is acknowledged by the stakeholders that further work is needed to promote a level playing field for all parties in ISDS. As a result, a potential solution now under consideration in WG III is the establishment of an Advisory Centre on International Investment Law (ACIL) similar to the Advisory Centre on WTO Law (ACWL). The ACIL is widely considered by States as a desirable tool best to address the concerns about the unequal playing field in ISDS.

I. Aspects of the ACIL Currently Discussed at UNCITRAL

WG III has expressed its general support to undertake preparatory work on the establishment of an ACIL. Upon request of WG III, UNCITRAL's Secretariat has prepared draft provisions. They deal with a wide range of topics, including the services offered by an ACIL and its beneficiaries[131] as well as its legal structure and budget questions.[132]

1. Services

The draft provisions envisage a two-pillar structure for the services provided by the ACIL, consisting of an assistance mechanism and a forum to exchange information and discuss ISDS policies.[133] The first pillar would provide representation and assistance services related to alternative dispute resolution (ADR) as well as investor-State arbitration. The Centre could thus analyse the strengths and weaknesses of a given case, advise beneficiaries on the appropriate dispute resolution method, and provide representation and assistance in ADR proceedings.

Representation of States in ISDS proceedings could entail different kinds of "service models": (i) facilitation for States that primarily rely on inhouse-counsel or external counsel, i.e. advice on specific disputes; (ii) support services to complement the existing in-house counsel or external counsel on more aspects of the proceedings; and (iii) full representation services for those States that lack in-house capacity and funds for experienced outside counsel or States that have little to no experience in ISDS.

The assistance services regarding ISDS proceedings partially overlap with the representation service. They include early risk assessment and the identification of a

131 UNCITRAL WG III, Advisory Centre, Note by the Secretariat (3 December 2021), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_212_advisory_centre_final_for_submission.pdf (1/2/2022).

132 Ibid.

133 Ibid., p. 6 (Draft provision 5 – Assistance Mechanism and Forum).

litigation strategy, the determination of a budget, assistance with arbitrator selection and appointment, the preparation of written statements and documentary evidence, and technical support on substantial and procedural conduct.[134]

According to WG III, representation and assistance should mainly be offered to developing States and least developed countries (LDCs). An additional goal of the representation and assistance services would be to build capacities within these States to lead and manage ISDS cases autonomously.

The second pillar envisaged by WG III would introduce a forum to share best practices and capacity building on a number of issues.[135] First, the ACIL could offer different services connected to dispute avoidance, including assistance with conflict management systems and with the creation of lead agencies that deal with potential disputes. Second, the forum could provide information on ADR methods as well as fostering the exchange of information in this field.

Third, the forum could provide legal and policy advice services. They would involve the review of and the potential amendment to States' international investment agreements but also the assessment whether a (contemplated) State measure complies with the relevant State's treaty obligations.

In addition or as an alternative to the three areas of services presented above, the ACIL could create knowledge-sharing mechanisms, data collections, and centralised repositories on arbitrators, mediators, and ISDS experts. Relatedly, the forum could promote regular exchange of information between all stakeholders and could assist with the development of investment law guidelines. Finally, the ACIL could offer capacity-building services. In this context, the Centre would create trainee or secondment programmes to train State representatives in skills like treaty negotiation and interpretation as well as the management of ISDS cases.

2. Beneficiaries

WG III would prefer to offer the ACIL's services only to States, ideally only to LDCs and States with limited experience in ISDS. However, there is some disagreement within WG III regarding MSMEs as beneficiaries. It is doubted whether it would be possible to determine standardised requirements of an MSME as the requirements will depend on the respective home State's economy. Another problem concerns the risk of conflicts of interest, at least regarding services like legal representation.

WG III discusses the use of a "sliding scale" of beneficiaries, granting developed countries and MSMEs only access to the second pillar of services, the forum to exchange information, while developing countries and LDCs would have unlimited access to both pillars of the ACIL's services.

134 Ibid., p. 7 (Draft provision 6 – Services under the Assistance Mechanism).
135 Ibid., p. 10 (Draft provision 7 – Technical Assistance Services and Capacity Building Activities under the Forum).

3. Legal Structure

The draft provisions do not set out a clear legal structure. WG III seems to prefer a legally independent intergovernmental body as this body could define the nature, scope, and prioritisation of its activities and avoid conflicts of interests. On the other hand, if the ACIL was attached to any existing international organisation, to a standing multilateral tribunal, or to an arbitral institution, it could create synergies and could benefit from existing institutional resources.

Moreover, WG III suggests setting up an independent governing board with representatives from all beneficiaries. Alternatively or additionally, an advisory board representing MSMEs and other non-State actors could be established. However, the details of both these boards, including their exact roles, the rules governing their work, and issues of independence and impartiality still have to be figured out.

4. Financing

The proposed financing of the ACIL is based on a study conducted by different organisations together with UNCITRAL's Secretariat. It began by assessing an ACIL's workload and the connected costs. Depending on the number of staff, the yearly costs amount up to 4.3 million USD. This would require a funding of up to 16 million USD.

It is suggested to charge States on a sliding scale, using the World Bank classification of high-income developing countries, upper-middle-income developing countries, and lower-middle-income developing countries. The financing would consist of a one-time membership fee of 486,000 USD, 162,000 USD, and 81,000 USD, respectively. LDCs would not be charged a fee. Possible gaps could be filled with voluntary contributions by private donors, official development assistance organisations, and States.

Moreover, the Centre could charge fees for its services. LDCs and lower-middle-income developing countries could pay at a nominal rate while high-income and upper-middle-income developing countries could be charged at the market rate or a discounted rate. Costs could also be recovered in case the beneficiary State prevails. An endowment fund comparable to the ACWL's endowment fund could guarantee additional stability in funding the operations of the ACIL. Developing and developed countries could contribute according to their economic situation.

II. Stakeholders and their Positions

Following the draft provisions on an ACIL prepared by the UNCITRAL Secretariat at the request of WG III, comments have been received from States expressing

their respective positions on the initial draft, especially with regards to the main elements such as the scope of services, beneficiaries, legal structure, and financing.[136]

1. Services

The initial draft released by the UNCITRAL Secretariat contemplates a broad range of services for the Member States' consideration. Notably, the States' comments indicate general support for the ACIL mandate to cover legal services to beneficiary States in ISDS proceedings, including capacity building services. However, States like Canada, Chile, Colombia, Mexico, Korea and Switzerland have opposed full legal representation contemplated in the initial draft. This opposition is premised on the view that full-legal representation may be counterproductive to the capacity-building agenda of the ACIL to make the beneficiary States more self-reliant in the management of future ISDS proceedings. The EU and its Member States on the other hand do not oppose full-legal representation so far it is conducted in parallel with significant involvement of the beneficiary State.

Further, considering the likelihood of operating on a limited budget, there is a concern shared by States including Indonesia, Panama, and Switzerland that an ACIL with a broad scope of services may end up inefficient to serve its main purpose, therefore the need to narrow down its scope of services. For instance, the possibility of an ACIL to serve as a mediation centre, as part of its ADR services, is one considered not to fall within its core purpose and therefore should be excluded.

2. Beneficiaries

Discussions at WG III so far suggest a political consensus amongst States that developing and least developed countries should be the primary beneficiaries of the ACIL services, with LDCs having priority status. What remains unsettled though is whether the beneficiary coverage should extend to developed countries and MSMEs. In this regard, there are divergent positions.

Some countries have argued against the inclusion of MSMEs as beneficiaries, for example Chile, Colombia, and Mexico, fall into this category. By offering capacity-building services to States on the management of their investment regime, it is argued that MSMEs' protection is also indirectly secured. As for Indonesia, extending ACIL coverage to MSMEs will amount to States funding claims against themselves which is not the goal of the Centre. Costa Rica and Vietnam have also opposed the inclusion of MSMEs under the ACIL beneficiary coverage.

However, other States have expressed support for the coverage of MSMEs including developed countries, although with limited access to the services of the Centre. For example, Canada supports access to capacity building for both MSMEs and de-

136 UNCITRAL WG III, Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, available at: https://uncitral.un.org/sites/uncitral.un.org/ (1/2/2022).

veloped countries. MSMEs, in particular, should be granted access to databases, research tools, and workshop resources. Panama also supports granting capacity-building services to all, including developed countries and MSMEs. The EU and its Member States even adopt a much broader position by preferring that not only MSMEs should be beneficiaries of the ACIL but also other individual and vulnerable investors. The precise meaning of MSMEs, individual or vulnerable investors is undefined at this point, but the EU and its Member States offer to explore options for a duly defined non-state beneficiaries to the ACIL, provided the services of the Centre are offered as part of a broader institutional reform of ISDS, encompassing the creation of a permanent multilateral investment court (MIC).[137]

The issue regarding beneficiaries of the ACIL, especially whether MSMEs will be covered remains a possible deal-breaker for the parties in WG III. Particularly from an EU perspective, equitable access to an effective ISDS system for MSMEs is fundamental for the legitimacy of ISDS. It remains unclear how the differences in position on beneficiaries will be addressed to reach a satisfactory result for all States, especially since WG III has the mandate to deliver a consensus-based result.

3. Legal Structure

Unlike the issue regarding beneficiaries, WG III might have less trouble reaching a consensus on the legal structure of the ACIL. So far it appears the States are in favour of an independent impartial and non-political intergovernmental advisory centre modelled in one form or another after the ACWL. This is the position expressed by most States that have commented on the initial draft provisions, including Canada, Korea, and Switzerland.

While it is conceivable that the ACWL can provide a valuable model for the ACIL, it is also important to note the distinction between the WTO and the ISDS regime. As rightly noted by the government of Indonesia, the former is based on a single multilateral agreement with a centralised dispute resolution system and procedural rules, while the latter is the direct opposite – based on over three thousand bilateral investment treaties without a centralised dispute resolution system or procedural rules. Also, unlike the ISDS system, the WTO system provides no private individual access to dispute settlement. This distinction, *inter alia*, counters the appropriateness of the WTO ACWL as an effective model for an ACIL. Rather, stakeholders must dig deeper to establish an ACIL compatible with the particular characteristics of ISDS.

Another notable area of States' difference arises from the issue of whether an ACIL should be linked to a permanent MIC. Chile, Colombia, and Mexico share the view that while an ACIL could follow international models like the ACWL, it should be completely independent and not linked to a permanent court. In contrast, as earlier noted, the EU and its Member States favour the creation of the ACIL as

137 Ibid., pp. 18 f.

an independent body yet linked to a permanent MIC set up for the adjudication of investment disputes.

4. Financing

Regarding finance, the emerging consensus is that all member States of the ACIL should contribute to the Centre's finance according to their level of development. In any case, the funding plan should exclude any financial burden on developing and least developed countries. Further, States – including Korea, Indonesia, and Panama – have expressed support for multiple sources of income for the ACIL beyond its members, for example, allowing year-round voluntary contributions to the Centre, including private donors, and ISDS user fees.

III. Next Steps

A number of questions still need to be addressed. With regards to the services provided, WG III has advocated for a flexible approach according to the requests that the ACIL would receive. In addition, the ACIL should avoid duplicating services that are already provided by other organisations. In this regard, WG III refers to a "Scoping Study", which has shown that no organisation currently offers full legal representation in ISDS proceedings.[138] Neither has the Scoping Study found a focal point for information on the available support. This raises, once again, the question which of the services envisaged should actually be offered or whether the ACIL should rather provide a platform to share best practices and information on the relevant questions.

Regarding the beneficiaries, the Working Group should determine a methodology to assess whether a State is developing. In addition, giving MSMEs access to the ACIL's services involves a market intervention, which could be considered similar to a subsidy.

Moreover, if MSMEs benefit from the ACIL's services, conflicts of interest could arise. Based on the Scoping Study, WG III considers that ombudspersons, technical assistance, capacity-building, or legal representation would especially serve MSMEs with limited access to ISDS.[139] However, if States bar the ACIL from providing these services, it remains unclear whether and which institution would remedy these issues. The ACIL should also develop rules to deal with capacity problems. Rules should also be created for potential conflicts of interest, where the ACIL provides guidance in treaty formulation, interpretation, *and* defence.

138 UNCITRAL WG III, Advisory Centre, Note by the Secretariat (3 December 2021), p. 13. The Working Group relied on a "Scoping Study" prepared by the Columbia Centre for Sustainable Investment (CCSI) on behalf of the Government of the Netherlands.

139 See UNCITRAL WG III, Advisory Centre, Note by the Secretariat (3 December 2021), p. 16.

The staffing of the ACIL still remains unclear. It should be decided whether to opt for permanent staff and/or for a mix of consultants such as academics and practitioners as well as member-government secondees. It should be noted that staffing could impact the Centre's independence and impartiality. The Working Group should also consider the staff's diversity, regarding their expertise and experience but also their legal, social, and political backgrounds.

Finally, the ACIL's location is not yet determined. It depends on various factors, including its legal form, its mandate, the identity and preference of beneficiaries and donors, and its budget. The Centre could also maintain different regional offices or virtual centres in the form of dedicated desks, for example in regional development banks.

IV. Interim Conclusions

As the debate for the creation of an ACIL advances at UNCITRAL Working Group III, it can be observed that States generally welcome the establishment of an ACIL as one tool to create a level playing field for all actors in ISDS. However, important questions remain open. Disagreements regarding MSMEs as potential beneficiaries of the ACIL's services could spark further debates within the Working Group. In addition, the ACIL's budget will require further discussions regarding not only the Centre's financing but also related questions pertaining to its legal structure as well as the services it will provide. Yet, despite these differences and open questions, possibly the motive behind this reform option may inspire the political will necessary to cross the divide and derive the consensus to bring the ACIL into reality.

I. Implementation of Reform Options[140]

This section is about the possible implementation of reforms into the given system of international investment law. It explores whether to develop for this purpose a multilateral treaty, the so-called *Multilateral Instrument on ISDS Reform* (Multilateral Reform Instrument, MRI). Like the discussion of this topic within WG III, this section is not about any reform options themselves.[141]

140 The authors of this section are Andrés Alvarado and Leonard Funk.

141 See UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), A/CN.9/WG.III/WP.194, available at: https://undocs.org/en/A/CN.9/WG.III/WP.194 (1/2/2022), para. 3; UNCITRAL WG III, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session (10 November 2020), A/CN.9/1044, available at: https://undocs.org/en/A/CN.9/1044 (1/2/2022), para. 103.

I. Why Implementing Reforms into the Given System?

There exist roughly 3.000 international investment agreements (IIAs), mostly of a bilateral nature, constituting the legal basis for investor-State dispute settlement (ISDS). While IIAs are structurally similar to each other, they are also independent treaties which may differ widely from each other in detail. As a matter of political realities, a replacement of the fragmented treaty foundations of the ISDS system through a single cohesive multilateral agreement is unrealistic. Past experiences as well as the ongoing reform discussions within WG III demonstrate that States have very different attitudes regarding substantive investment protection as well as ISDS. To accommodate these differences, States prefer the conclusion of bilateral or regional treaties over truly multilateral solutions. Hence, investor-State disputes arise and will continue to arise under a fragmented network of IIAs. Consequently, if States wish to multilaterally reform ISDS – as currently being discussed within WG III –, they need to implement the envisaged changes within the given (self-imposed) systemic constraints. This is what the core difficulty of the implementation issue is about. Considerations about the means of implementation of reform options will become relevant at some time, no matter what the outcome of the UNCITRAL reform process will be.

II. Reform Option Discussed at UNCITRAL

In their IIAs, States consent to the settlement of investor-State disputes under specific procedural rules. It follows that two ways of implementing reforms are conceivable in principle: the incorporation of reforms at treaty level and/or at the level of applicable institutional or procedural rules.

1. Incorporation at Treaty Level

The terms of the IIA, under which a dispute arises, primarily govern the modalities of the respective ISDS proceedings. Hence, to implement ISDS reforms, treaty provisions governing reform options may be incorporated in IIAs. It can be distinguished between an incorporation on a treaty-by-treaty and a multilateral basis.

a) Treaty-by-Treaty Approach

States may incorporate reforms treaty-by-treaty by renegotiating existing IIAs and concluding new IIAs. If this route to implementation is followed, reform options discussed at UNCITRAL could take the form of model treaty provisions, which would become binding once States adopt them as part of their future or existing

IIAs.[142] The severe disadvantage of this approach, however, is its inefficiency. Considering the fragmentation of the IIA network, it is not suitable to quickly (if at all) achieve a widespread and uniform application of any reform option.

b) Multilateral Reform Instrument (MRI)

Given this, discussions at UNCITRAL are focused on whether to develop an MRI aimed at the incorporation of reform options into IIAs.[143] The MRI would be an opt-in convention. Its scope may encompass future, existing, or future and existing IIAs. In terms of content, the substantive provisions of the MRI would govern the reform options. An MRI could also set-up a new multilateral umbrella institution for the administration of reformed ISDS.

The MRI would be an opt-in convention. By binding themselves to the MRI, States would consent (i.e. opt in) to apply reform options provided for by the MRI to disputes arising under their IIAs. This mechanism permits to extend the application of reform options not only to future, but also existing treaties. It was utilized, for instance, with regards to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (UNCITRAL Transparency Rules)[144] where *first*, the UNCITRAL Transparency Rules were developed and *second*, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)[145] was concluded to ensure their application to existing IIAs.[146] Another example is the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). The MLI modifies existing double taxation treaties to implement measures that were developed during the course of the OECD's Base Erosion and Profit Shifting (BEPS) Project.

The legal effect of the MRI as an opt-in convention would be that IIA treaty relationships between the parties to the MRI are altered according to the terms of the MRI. An MRI would coexist with the IIA network and hence would not change that IIAs would still be concluded on a bilateral or regional basis. Nonetheless, it

142 By way of an example, this approach is discussed at UNCITRAL with respect to the implementation of a code of conduct, see UNCITRAL WG III, Draft code of conduct: Means of implementation and enforcement, Note by the Secretariat (2 September 2021), A/CN.9/WG.III/WP.208, available at: https://undocs.org/en/A/CN.9/WG.III/WP.208 (1/2/2022), paras. 8–10.

143 See UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), A/CN.9/WG.III/WP.194, para. 24; UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (23 October 2019), A/CN.9/1004, available at: https://undocs.org/en/A/CN.9/1004/Add.1 (1/2/2022), paras. 101–104.

144 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (UNCITRAL Transparency Rules) (2013) 52 ILM 1303.

145 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) (2014) 54 ILM 751.

146 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat (16 January 2020), A/CN.9/WG.III/WP.194, paras. 26–28.

would allow for a swift implementation of reforms, as there would be no necessity for an individual renegotiation of IIAs.[147] Furthermore, the MRI would be a single and coherent treaty which would determine the conditions and modalities of the incorporation of reforms into a potentially large number of IIAs. Hence, while necessarily having to give its Parties a considerable degree of flexibility concerning their individual treaty commitments to achieve a wide participation, it allows for a harmonised implementation of reforms into IIAs. As IIA treaty relationships are altered only between Parties to the MRI, the effect of the MRI to disputes arising under IIAs depends on whether both host and home State, only the host State, only the home State or neither host nor home State have bound themselves to the MRI.

If both host and home State have bound themselves to the MRI, their treaty relationship is consensually modified according to the terms of the MRI.[148] For this scenario, the MRI could stipulate that reformed ISDS either supplements or replaces the dispute settlement options under the IIA. Equally, the MRI could determine to what extent the investor may choose between original and reformed modes of ISDS.

If only the host State is a party to the MRI, the treaty relationship between host and home State remains unaffected by the MRI.[149] Nonetheless, reform options could be made applicable to disputes arising under IIAs on the basis of a unilateral offer for reformed modes of ISDS contained in the MRI.[150] This offer would merely supplement the original dispute settlement options and would be dependant from investor acceptance.[151]

If only the home State is a party to the MRI, the treaty relationship between host and home State remains unaffected by the MRI, too.[152] Reform options could, however, be made applicable to disputes arising under IIAs on the basis of an *ad hoc* consent between the investor and the host State.[153] The same applies, if neither the host nor the home State are parties to the MRI.[154]

The reform options provided in the MRI could principally apply to investor-State disputes arising under future, existing, or future and existing IIAs.[155] In the near and mid-term future, most investor-State disputes will arise under existing IIAs. Hence, if the MRI would cover future IIAs only, its relevance would be limited.

The MRI's content could be limited to a specific reform option (e.g. an MIC), but it could also encompass several or even all reform options discussed at UNCITRAL

147 Ibid., para. 24.
148 Ibid., para. 33.
149 Ibid., para. 35.
150 Ibid., paras. 34–35.
151 Ibid., para. 35.
152 Ibid., para. 36.
153 Ibid.
154 Ibid., para. 37.
155 Ibid., para. 23. See also UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thrity-ninth session (19 November 2020), A/CN.9/1044, para. 109.

simultaneously.[156] The reform options could be governed in the MRI itself in specific clauses or annexes[157] or outside the MRI in other treaty or soft law instruments.

The success of an MRI in altering the IIA network would depend on the number of States binding themselves to the MRI. Hence, considering the differing policies States have regarding ISDS, the MRI would have to foresee that its Parties may flexibly adopt their individual commitments to a significant degree.[158] The MRI could, for example, allow States to choose (i) to which of their IIAs the reform option(s) provided apply, (ii) which reform options apply to their IIAs (if more than one reform option is provided), and (iii) whether the reform options apply only in case of reciprocal consent by host and home State.[159] As a result, the substantive content of the MRI would amount to an *à la carte* menu, which technically may be achieved by using opt-in or opt-out provisions.

Certainly, an MRI completely *à la carte* and the pursuance of individualised reform options would not greatly differ, unless States find it desirable that certain core elements or minimum standards need to be implemented by all participating States to the MRI.[160] A useful model to consider is the MLI which in general allows its Parties to exclude the application of BEPS measures by way of a reservation unless a specific BEPS measure constitutes a minimum standard.[161]

Finally, the MRI could establish a new institutional framework to administer the reformed modes of ISDS, including a possible multilateral investment court.[162] The idea is that a new institution striving for universal membership may further enhance coherence and consistency of ISDS despite its fragmented treaty basis, and irrespective of States choosing different reform options to adhere to.

2. Incorporation in Procedural Rules

Reforms may also be implemented by incorporating them into procedural rules. This possibility is considered at UNCITRAL with respect to a range of reform options. However, standing bodies such as an MIC or MIAM cannot be created through procedural rules. For those reforms that could be implemented via proce-

156 Ibid., para. 105; UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat (16 January 2020), A/CN.9/WG.III/WP.194, para. 13.
157 Ibid., para. 14.
158 See UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (19 November 2020), A/CN.9/1044, paras. 106–108; UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat (16 January 2020), A/CN.9/WG.III/WP.194, paras. 15–22.
159 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat (16 January 2020), A/CN.9/WG.III/WP.194, para. 19.
160 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (19 November 2020), A/CN.9/1044, para. 107.
161 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat (16 January 2020), A/CN.9/WG.III/WP.194, para. 30.
162 Ibid., paras. 14 and 40.

dural rules (for example a code of conduct), this may take two forms. *First*, a novel set of procedural rules may be developed. *Second*, an existing set of procedural rules may be amended.

Importantly and regardless of whether a novel set of procedural rules or an amended version of existing procedural rules is concerned, the disputing parties' consent is always required for their applicability. Therefore, in disputes under existing IIAs, the respective procedural rules when the IIA was originally concluded apply, unless the treaty language indicates otherwise (i.e. a reference to the most recent version of procedural rules). Empirical studies indicate that this is rarely the case. An option to overcome this limitation would be to conclude an opt-in convention to extend the application of new procedural rules to existing IIAs (see above).

III. Stakeholders and their Position

In principle, there is a disagreement among delegations to WG III regarding the appropriate time for the discussion on the means of implementation of any reform option. While some delegations find the deliberations on the means of implementation premature, others consider them pertinent as they could influence or impact the formulation of the reform options.[163] Irrespectively, the UNCITRAL Secretariat prepared a working paper on an MRI for the discussion of all delegations.[164] The paper highlights the delegations' goal of guaranteeing coherence and flexibility on the overall reform process.[165] Furthermore, there are some issues for consideration, which have already received attention from the delegates during the meetings of 5–9 October 2020, as explained below.

1. Core Provisions or Minimum Standards

With respect to the content of the instrument, some delegations suggested that some core elements, upon which all parties ought to agree should be devised. However, other delegations have considered that this would be neither necessary nor feasible or that in any case it was premature to determine what could constitute those core elements, as no agreement on reform options has been reached.[166]

163 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (19 November 2020), A/CN.9/1044, paras. 103 f.

164 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat (16 January 2020), A/CN.9/WG.III/WP.194.

165 Ibid., para. 6.

166 UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (19 November 2020), A/CN.9/1044, para. 107.

2. Application to Existing and Future Treaties

With respect to the temporal scope of application, delegations seem to prefer the application to both existing and future treaties as the entire purpose of an MRI was to render some or all reform options available for existing treaties. A minor disagreement nevertheless exists as to the inclusion of State-to-State mechanism within an MRI.[167]

3. Underlying Purpose of an MRI

The underlying purpose of an MRI would be the promotion of legal certainty in ISDS by responding to the concerns on consistency and coherence. Further, an MRI should clearly set out the objective of achieving sustainable development through international investment.[168]

4. Opt-In Elements and Combination of Reform Options

Flexibility was praised as a core feature of an MRI: it should permit States to choose the reform options they find suitable and the possibility of joining the instrument at later stage.[169] With respect to the possibility of including optional elements that the participating States could opt in or out, some doubts were raised considering that such optional elements would contribute to further fragmentation in investment law and possibly to forum shopping.[170] However, no discussion on the possibility of combining different reform options has been fully held.

5. Form of an MRI

The form of an MRI has not been fully discussed, albeit being considered of utmost importance in order to preserve the desired flexibility in implementation. Interested delegations continue working on an MRI through intersessional activities.[171]

IV. Next Steps

WG III is continuing its work on possible reforms to be implemented. This may evince the existence of any common ground that could be used as a core minimum standard to which all interested States could agree upon. Thereafter, the possibility to group all reform options within an MRI could be assessed, which would permit to move the discussions to the issue of the form of such instrument.

167 Ibid., para. 109.
168 Ibid., para. 106.
169 Ibid.
170 Ibid., para. 108.
171 Ibid., para. 111.

V. Interim Conclusions

The means of implementation are decisive with regards to the effectiveness of any reform. Considering the diverging points of view of the various delegates as to the crucial changes to be made, the cornerstone of an MRI should be the flexibility to choose the options for reform each State considers appropriate. As such, given that the delegations continue discussing the substance of the reform options, it is perhaps premature to design the ultimate MRI. However, from the outset, the idea of implementing reforms through a single and cohesive multilateral treaty might be the most promising option to ensure both flexibility and less fragmentation.

J. Conclusions

The international investment law regime is going to change. The open question is which of the manifold reform projects will actually be implemented. This article's stocktaking of the *status quo* at UNCITRAL provides a first insight in which areas systemic changes seem possible.

Consistency and quality of decision-making have been identified among the main concerns with regard to ISDS. Given how far the debates have already gone, it seems likely that some kind of appeal mechanism will see the light of day. It remains to be seen whether States will opt for a MIAM or an integrated two-tiered MIC. For more reluctant States, the appeal of introducing a MIAM lays in its compatibility with the current system. For those actors following a more ambitious reform agenda such as the EU, anything else than a two-tiered MIC will most likely be considered as a mere interim solution.

In the context of creating a permanent ISDS body, the enforceability of decisions is of high practical relevance. To avoid the legal insecurity identified in relation to the applicability of the ICSID Convention or NYC, an integrated enforcement mechanism (modelled after Article 54 of the ICSID Convention) would be the best solution. This, however, would not bind third States. Consequently, the project of creating a permanent ISDS body requires the support of a large group of States if the new institution is supposed to play a significant role in practice.

Another aim of reforming ISDS is to reduce potential for doubts on the tribunal's impartiality and independence to a minimum. Concerns are mainly based on potential conflicts of interests resulting from the *ad hoc* nature of the appointment. It is debatable whether new rules such as codes of conduct or revised appointment procedures can solve the perceived legitimacy crisis of investment arbitration. Should States opt for the establishment of a permanent body composed of full-time adjudicators, potential conflicts of interests would be reduced significantly. In addition to enhancing consistency of ISDS decision-making, the creation of a permanent body would address two main concerns at a time.

However, the creation of a permanent body would not be without challenges and raising new questions. If all adjudicators were permanently appointed by States, the circle of decision-makers would become even smaller than it is today. Consequently,

if a permanent ISDS body is established, States must also assume responsibility for selecting, screening, and appointing adjudicators. The panel of adjudicators must be objectively competent, neutral, and reflect the demands for more diversity in international dispute settlement.

With respect to levelling the playing field, the establishment of an Advisory Centre is not controversial among States. Thus, its actual creation seems likely. However, the crucial question is whether States can define services in a way that meets the needs of beneficiaries, and at the same time ensure an adequate budget. The reduction of costs will continue to play an important role in assessing reform options. Accordingly, there is a consensus that dispute prevention and ADR methods should be further enhanced. However, the relevant tools and mechanisms such as investor-State mediation services already exist but remain underutilised. Against this background, one should not expect too much from the introduction of additional ADR procedures. But if the arbitration process is changed significantly, e.g. through the introduction of an appeal mechanism, such reforms may indeed effect States and investors to use dispute prevention mechanisms more often.

With respect to counterclaims of host States, it seems feasible to introduce procedural requirements by the agreement of the contracting States. However, States would also need to create a legal basis for the merits of a counterclaim. In view of the procedural nature of UNCITRAL's mandate, the inclusion of counterclaims in the context of the ongoing ISDS reform does not seem viable.

Even though concrete reform options are still subject to discussion, implementing changes into existing and future investment treaties seems possible. A single multilateral treaty would be an effective option that would ensure the needed degree of flexibility. In view of the complexity of the issues and the diversity of interests involved, a one-fits-all solution does not seem to exist. It is therefore highly unlikely that all States involved will unanimously agree on the same reform projects. In this sense, fragmentation will continue to characterise the international investment law regime. Thus, even if a permanent ISDS body is created, the MIAM or MIC would not abruptly replace the entire system of *ad hoc* investment arbitration. Instead, it seems likely that investors would operate within two parallel ISDS frameworks. One being an updated version of investment arbitration whereas the other would reflect the outcome of systemic reforms. At this stage, it seems already fair to conclude that the UNCITRAL reform process will – regardless of its concrete outcome – significantly shape the future of ISDS.

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