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02/2023

The UNCITRAL Reform Process: Improving Procedural Efficiency through the Dismissal of Frivolous Claims and Investor-State Mediation

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Co-funded by the Erasmus+ Programme of the European Union

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ISSN: 2752-2512 (online)

Chair of Public Law, Public International Law, European Law and International Economic Law and Jean Monnet Chair of EU Constitutional Framework for International Dispute Settlement and Rule of Law

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Publications in the Series should be cited as:

AUTHOR, TITLE, JEAN MONNET PAPER NO./YEAR [URL]

Abstract

In the past five years, UNCITRAL's Working Group III has been discussing means to reform the current system of Investor-State Dispute Settlement. Among the many concerns identified by the Working Group are the costs and the duration of arbitral proceedings. This article focuses on procedures for early dismissal of frivolous claims as well as investor-State mediation as the two main tools that the Working Group is discussing to make proceedings less long and costly.

The contribution begins by introducing the newly presented draft provision on the early dismissal of clearly unmeritorious claims. It demonstrates why this provision constitutes a first step in the right direction while pointing out the open questions that remain. Subsequently, the article highlights the advantages of enhancing investor-State mediation before showing that this mechanism is facing certain challenges that are specific to the resolution of disputes between investors and States.

Key words

UNCITRAL Working Group III – ISDS Reform – Frivolous Claims – Investor-State Mediation – Procedural Efficiency – Dispute Prevention and Mitigation – Costs and Duration

Biography of the authors

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The UNCITRAL Reform Process: Improving Procedural Efficiency through the Dismissal of Frivolous Claims and Investor-State Mediation[1]

Bianca Böhme[*] and Johanna Braun[**]

A. Introduction

In the last two decades, Investor-State Dispute Settlement (ISDS) has received continuous criticism related to the legitimacy, transparency and efficiency of the current system.[2] Since 2017, different options of how to improve the system are discussed at the United Nations Commission on International Trade Law (UNCITRAL). One of the concerns identified by UNCITRAL Working Group III (WG III) – on which this contribution will focus – are the costs and duration of ISDS proceedings.[3] Among others, WG III proposed a number of reform options aimed at the prevention and mitigation of investment disputes to avoid lengthy and costly arbitral proceedings.[4]

WG III has discussed several solutions under the headline of dispute prevention. The solutions include institutions like an investment ombudsperson or a coordinator for dispute prevention,[5] both at a national level and at a bilateral or multilateral level.[6] In addition, the Working Group talked about creating joint committees to prevent disputes from arising or, in case a dispute has already arisen, organize methods of alternative dispute settlement.[7] These commissions 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. Even though some States have voiced their support,[8] it is currently unclear whether these committees will be implemented.

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1 This paper draws upon the authors' considerations made in the section on "Dispute Prevention and Alternative Dispute Resolution" in a previous contribution by the *EI-IILCC Study Group on ISDS Reform* in ZEuS 2022/1, p. 20–25.

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2 EI-IILCC Study Group on ISDS Reform, ZEuS 2022/1, p. 18.

3 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).

4 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).

5 See e.g. the Korean Office of the Foreign Investment Ombudsman, UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of the Republic of Korea (31 July 2019), A/CN.9/WG.III/WP.179 available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/082/56/PDF/V1908256.pdf?OpenElement (5/12/2022), p. 5.

6 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. 12 ff.

7 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. On this topic see also *van Aaken*, in: Kalicki/Joubin-Bret (eds.), p. 21 ff.

8 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of South Africa (17 July 2019), A/CN.9/WG.III/WP.176, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/072/51/PDF/V1907251.pdf?OpenElement (5/12/2022); UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Brazil (11 June 2019), A/CN.9/WG.III/WP.171, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/045/74/PDF/V1904574.pdf?OpenElement

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 good cooperation between 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.[9] 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 relationship between investors and host States.

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.

This contribution will take a closer look at the main tools discussed in WG III in the context of dispute prevention and mitigation: Procedures to dismiss frivolous claims (**B**) and investor-State mediation (**C**).

B. Procedures to Dismiss Frivolous Claims

At the moment, it seems as though the most promising solution to avoid lengthy investor-State disputes is to implement procedural rules to address frivolous claims. 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.[10] Early dismissal of clearly unmeritorious claims does not actually prevent disputes since it requires that a dispute has already arisen. However, this mechanism could help to prevent overly long and costly ISDS proceedings.

(5/12/2022); UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Morocco (4 March 2019), A/CN.9/WG.III/WP.161, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/012/95/PDF/V1901295.pdf?OpenElement (5/12/2022).

9 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).

10 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).

I. Discussions in UNCITRAL's Working Group III

Various stakeholders have expressed their support for introducing new procedures to address frivolous claims. This includes States such as South Africa,[11] Indonesia,[12] Costa Rica,[13] Morocco,[14] and Turkey[15] as well as groups like The International Bar Association[16]. The Academic Forum also encouraged States to provide more guidance on the conditions for the application of summary dismissal provisions.[17]

For its 43rd session in September of 2022, UNCITRAL's Secretariat prepared a draft provision on the early dismissal of frivolous claims.[18] The so-called draft provision A, which can be included in international investment agreements as well as in a multilateral instrument on ISDS reform,[19] especially relies on the newly amended Rule 41 of the 2022 Rules and Regulations of the International Centre for Settlement of Investment Disputes (ICSID).[20] However, other arbitration rules[21] and international investment agreements also contain rules on early dismissal.[22] Moreover,

11 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of South Africa (17 July 2019), A/CN.9/WG.III/WP.176, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/072/51/PDF/V1907251.pdf?OpenElement (5/12/2022) paras 71 f.

12 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.

13 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.

14 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Morocco (4 March 2019), A/CN.9/WG.III/WP.161, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/012/95/PDF/V1901295.pdf?OpenElement (5/12/2022) para. 9.

15 UNCITRAL WG III, Comments by the Government of Turkey (11 July 2019), A/CN.9/WG.III/WP.174, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/068/01/PDF/V1906801.pdf?OpenElement (5/12/2022), p.3.

16 IBA, Consistency, efficiency and transparency in investment treaty arbitration (November 2018), available at: https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf (5/12/2022), p. 41 f.

17 Academic Forum on ISDS, Excessive Costs & Insufficient Recoverability of Cost Awards (14 March 2019), available at: https://www.cids.ch/images/Documents/Academic-Forum/1_Costs_-_WG1.pdf (5/12/2022).

18 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform, Note by the Secretariat (11 July 2022), A/CN.9/WG.III/WP.219, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/043/2E/PDF/2210432E.pdf?OpenElement (8/12/2022) para. 12.

19 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform, Note by the Secretariat (11 July 2022), A/CN.9/WG.III/WP.219, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/043/2E/PDF/2210432E.pdf?OpenElement (8/12/2022), para. 9.

20 2022 ICSID Arbitration Rules, available at: https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/introductory-note (8/12/2022), esp. Rule 41.

21 See 2016 Investment Arbitration Rules of the Singapore International Arbitration Center (SIAC), available at: https://siac.org.sg/siac-rules-2016 (15/12/2022).

22 See eg Article 10.20 paras. 4 and 5 of the US-Panama FTA, Article 8.32 of the Comperehensive Trade and Economic Agreement between Canada and the European Union (CETA); Article 9.23 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

the provision takes into account the discussion at the fourth intersessional regional meeting on ISDS reform in September of 2021.[23]

In its paragraph 1, the provision provides that a tribunal can declare an investor's claim, a State's counterclaim, or a claim for the purposes of set-off to be manifestly without legal merit. The accompanying comment clarifies that this does not apply to a party's defence.[24] It also states that the provision only deals with early dismissal and not with other pleas or objections, arguing, for example, that a fact or law supporting a claim are manifestly without merit.[25]

Pursuant to paragraph 2, a disputing party shall make a request for early dismissal within a fixed time frame that is yet to be determined. The intersessional regional meeting had proposed a period of 45 or 60 days;[26] Rule 41 of the ICSID Arbitration Rules requires a party to file the request within 45 days after the constitution of the tribunal.

According to paragraph 3, this request shall "demonstrate that a decision by the arbitral tribunal will expedite the proceeding and be material to the outcome of the proceeding". Paragraphs 4 and 5 provide that the tribunal will first decide whether it will rule on the request and, if so, indicate when it will take the decision. The intersessional meeting had proposed a 15–30-day period for the tribunal's decision on when it would rule on the request;[27] Rue 41 of the ICSID Arbitration Rules provides that the tribunal decides within 60 days after the constitution of the tribunal or the last submission on the request, whichever is later.

Both parties to the dispute may express their views. According to paragraph 6, the decision can either take the form of an order of an award. Paragraph 7 clarifies that, even if the request is rejected, the requesting party may maintain that the claim lacks legal merit at a later stage of the proceeding.

II. Next Steps

Early dismissal of frivolous claims is a suitable instrument to prevent unnecessary investor-State disputes, which can result in overly long and costly arbitration proceedings and even regulatory chill.[28] In this regard, the Secretariat's draft provision provides a first step in the right direction.

At the same time, it has been shown in the past that comparable provisions do not always live up to the high expectations. For example, ICSID Arbitration Rule 41 has been raised 46 times since

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23 Summary of the inter-sessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea (12 January 2022), A/CN.9/WG.III/WP.214, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V22/002/28/PDF/V2200228.pdf?OpenElement (8/12/2022).

24 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform, Note by the Secretariat (11 July 2022), A/CN.9/WG.III/WP.219, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/043/2E/PDF/2210432E.pdf?OpenElement (8/12/2022), para. 13.

25 Ibid., para. 14.

26 Summary of the inter-sessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea (12 January 2022), A/CN.9/WG.III/WP.214, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V22/002/28/PDF/V2200228.pdf?OpenElement (8/12/2022) para. 13.

27 Ibid., para. 15.

28 *Cheng*, Contemp. Asia Arb. J. 2015, p. 63; *Polonskaya*, Asper Rev Int'l Bus & Trade L 2017, p. 14 ff.

its adoption in 2006 but was only fully successful in nine cases.[29] This goes to show that ICSID tribunals have set relatively high thresholds to find a frivolous case.

Furthermore, introducing early dismissal of frivolous claims does not automatically reduce costs. If the argument of a frivolous claim is rejected, the claim is, to a certain extent, reviewed twice, thereby increasing costs instead of reducing it.[30] On the other hand, this is only the case where the request for dismissal would be rejected. Immense costs and time can be saved in cases when the claim is dismissed early in comparison to a full arbitration proceeding, which can take up several years.[31]

So far, WG III has focused on the procedural rules in dealing with frivolous claims. However, apart from certain negative definitions, it still remains open what makes a claim "manifestly without legal merit". States should have an interest in giving arbitral tribunals some guidance on this question since a provision like the present one leaves it up to arbitrators or judges to define what constitutes a frivolous claim.[32] In the current ISDS system, tribunals are systematically incentivized to set a rather high threshold since their work is generated by the claimant-investors and their members are paid by the hour.[33]

One possibility could be to rely on something like the three-prong test applied by the tribunal in *RSM Production Corporation v. Grenada*, which required the objection (i) to "go either to jurisdiction or the merits" of the case", (ii) to "raise a legal impediment to a claim", as opposed to a factual one, and (iii) to "be established clearly and obviously, with relative ease and dispatch."[34] Nevertheless, it must be acknowledged that the term "manifestly without legal merit" will necessarily remain an open one, which will have to be decided on a case-by-case basis.[35] Thus, it will still be arbitrators or judges who decide whether a claim lacks manifestly lacks legal grounds.

The Secretariat has flagged some open questions itself: first, they propose discussions on whether the request for early dismissal should deal with jurisdictional objections or with questions of merits.[36] In this context, it should be noted that ICSID Arbitration Rule 41 uses the same language ("manifestly without legal merit"), which is generally understood as encompassing both objections.[37]

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29 ICSID, Decisions on Manifest Lack of Legal Merit, available at: https://icsid.worldbank.org/cases/content/tables-of-decisions/manifest-lack-of-legal-merit (15/12/2022).

30 Cf *Cheng*, Contemp. Asia Arb. J. 2015, p. 69.

31 *Markert*, Contemp. Asia Arb. J. 2011, p. 235 f.

32 *Polonskaya*, On the importance of defining "frivolous" claims in ISDS, available at: https://www.iisd.org/itn/en/2022/03/30/on-the-importance-of-defining-frivolous-claims-in-isds/#_ftnref5 (15/12/2022).

33 *Polonskaya*, Asper Rev Int'l Bus & Trade L 2017, p. 26 ff.; *Karabiyik,* Adalet Dergisi 2022, p. 500 f.

34 *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, para. 6.1.1, interpreting ICSID Arbitration Rule 41 para. 5. For an overview of other interpretations see also *Polonskaya*, Asper Rev Int'l Bus & Trade L 2017, p. 21 ff.

35 *Karabiyik,* Adalet Dergisi 2022, p. 488.

36 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform, Note by the Secretariat (11 July 2022), A/CN.9/WG.III/WP.219, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/043/2E/PDF/2210432E.pdf?OpenElement (8/12/2022), para. 14.

37 *Potestà/ Sobat*, JIDS 2012, p. 158 with further references.

Second, they would like to discuss the relationship between early dismissal and third-party funding, especially those that are not allowed.[38] The role of third-party funding in preventing or supporting frivolous claims remains, however, unclear. While some argue that third-party funding is an additional tool to prevent frivolous claims since the funders conduct a first legal analysis of the merits of a claim, other maintain that these firms happily support very risky claims in the hopes for high returns.[39] However, since this area remains unregulated to date, there is no real reliable evidence on the effect of third-party funding on frivolous claims. For now, it is therefore up to WG III to regulate this economic branch.

Third, the relationship between early dismissal and the allocation for costs is not clear, yet. One idea would be to allocate the cost from the request for early dismissal to requesting party if that request is denied. This could prevent a misuse of this mechanism by disputing parties.[40] One author goes further and discusses additional mechanisms such as the possibility to award punitive damages in cases of frivolous claims.[41] However, as the author maintains himself, this would risk harming the legitimacy of the whole ISDS system.

To conclude, there is still a multitude of open questions regarding the early dismissal of unmeritorious claims. While draft provision A provides a welcomed first step in the right direction, it becomes more and more clear that it will not resolve the problem of long and costly ISDS proceedings all by itself, but can only be one of several components of a procedural reform of ISDS.

C. Investor-State Mediation

Another option to reduce the high costs and duration of investor-State arbitration is by recourse to other ADR mechanisms, such as mediation. Mediation is "an interest-based dispute resolution method in which a third-party neutral assists the disputing parties to reach a mutually agreeable solution".[42] Mediation can be used before, during or after an arbitral proceeding. It can, thus, be used to mitigate or to prevent an investment dispute.

In April 2020, WG III noted a general interest among all stakeholders to pursue further work on ADR methods other than arbitration.[43] There is a large consensus among the stakeholders participating in the reform process that the increased use of other ADR methods would be less time and cost intensive than arbitration, thus adequately addressing the concern of high costs and duration in ISDS.[44] The main method discussed in this context is investor-State mediation.

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38 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform, Note by the Secretariat (11 July 2022), A/CN.9/WG.III/WP.219, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/043/2E/PDF/2210432E.pdf?OpenElement (8/12/2022), para. 17.

39 For an overview of this discussion, including further references, see *Karabiyik,* Adalet Dergisi 2022, p. 505 ff.

40 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Draft provisions on procedural reform, Note by the Secretariat (11 July 2022), A/CN.9/WG.III/WP.219, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/043/2E/PDF/2210432E.pdf?OpenElement (8/12/2022), para. 18.

41 *Cheng*, Contemp. Asia Arb. J. 2015, p. 75 f.

42 *De la Rasilla*, ICSID Review 2022, p. 5.

43 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 (19/12/2022).

44 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), p. 9.

International mediation carries a number of advantages, which convert it into an attractive alternative to arbitration in the ISDS context. Due to its voluntary nature, it allows the disputing parties to retain control over the outcome of the mediation process at all stages.[45] In addition, mediation is less formal and more flexible than most arbitral procedures,[46] which is particularly beneficial if the parties seek to preserve a long-term business relationship through mutual concessions that will satisfy both sides.[47] This is an important advantage considering that an investment relationship typically requires a significant commitment of capital and other resources.[48] Finally, mediation tends to be cheaper and faster than arbitration. It is often cheaper, because it involves lower party costs, being less pleading-intensive than arbitration.[49] Available data suggests that it is also often faster than arbitration. In fact, most ICSID investment mediations were completed in under two years.[50]

At the same time, mediation bears a few disadvantages, which should equally be mentioned. Due to its voluntary nature, it is possible that a mediation turns out to be a waste of resources and time, where no settlement can be reached between the parties.[51] And even if it comes to a settlement agreement, a party cannot be forced to comply with a settlement agreement in the same way as an arbitral award.[52] Arguably, the 2018 Singapore Mediation Convention[53] could change this landscape in the long term. However, at the time of writing, only 10 out of 55 signatories effectively ratified the Singapore Mediation Convention.[54] This is hardly comparable to the 171 contracting parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Moreover, mediation constitutes a non-adjudicative means of dispute settlement, which does not contribute to the development of the law.[55] In fact, practitioners have criticized that an excessive focus on mediation would foster a regressive de-legalization and de-judicialization of investor-State dispute settlement instead of providing a stable legal framework guaranteeing the rule of law.[56] Arguably, mediation cannot fully substitute arbitration in the ISDS context. A full substitution would, in fact, hinder the progressive development of the law, particularly considering that most mediations are conducted confidentially. Moreover, the investment relationship could be in such a dire state that the parties are not prepared to make any concessions or to even sit around the same table. In such cases, mediation is simply unworkable.[57]

Overall, it becomes clear that mediation cannot substitute arbitration but may constitute a more efficient alternative in certain cases. Where the parties' business relationship is not irreparably deteriorated, mediation may be suitable for those disputes that involve sensitive issues, which the

45 *Coe*, UC Davis Journal of International Law & Policy 2005/1, p. 15.

46 *Titi*, in: Titi/Fach Gomez (eds.), p. 21.

47 *Welsh/Schneider*, Harvard Negotiation Law Review 2013, p. 77.

48 *Salacuse*, Fordham International Law Journal 2007, p. 155.

49 *Coe*, UC Davis Journal of International Law & Policy 2005/1, p. 16.

50 *Titi*, in: Titi/Fach Gomez (eds.), p. 23.

51 *Coe*, UC Davis Journal of International Law & Policy 2005/1, 17.

52 *Titi*, in: Titi/Fach Gomez (eds.), p. 24.

53 United Nations Convention on International Settlement Agreements Resulting from Mediation.

54 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en (19/12/2022).

55 *Salacuse*, Fordham International Law Journal 2007, p. 179.

56 *De la Rasilla*, ICSID Review 2022, p. 18.

57 *Titi*, in: Titi/Fach Gomez (eds.), 24.

parties wish to protect in a mediation process. This allows them to retain full control over its outcome while saving costs and time.

WG III has noted the advantages of investor-State mediation discussed above.[58] While there is consensus among the stakeholders that its use should be further enhanced, the general discussions on investor-State mediation in the literature and elsewhere have shown that certain challenges must be overcome first. UNCITRAL has addressed many of these challenges by means of concrete reform options that have been articulated in the discussions in WG III.

I. Lack of Investor-State Mediation Rules

Most mediation rules, including the recent UNCITRAL Mediation Rules adopted in 2021, are of a generic nature. They can often be used for the investment context but were not specifically made for that purpose. This trend has changed in the last decade. By now, a number of investor-State mediation rules have been adopted, such as the 2012 IBA Rules for Investor-State Mediation[59] and, more recently, the 2022 ICSID Mediation Rules[60]. WG III equally considered developing a new set of investor-State mediation rules, but finally decided to focus on other reform options, because a new set of rules could end up being merely duplicative of those rules that are already in place.[61] In fact, rather than developing a new set of rules, the focus should be on bringing the existing rules to the attention of investors and host States, e.g. by including an explicit reference to those rules in investment treaties.

II. Lack of Specific Reference to Mediation in Investment Treaties

Another possible reason for the underutilisation of investor-State mediation is the lacking reference to this dispute settlement method in most investment treaties. Older treaties, in particular, often include a cooling-off period but without explicit mention of mediation.[62] In the newest generation of investment treaties, mediation (or conciliation) is often explicitly included, thus slowing getting attention through treaty language.[63] Today, the data provided by the UNCTAD policy hub show that 627 out of 2584 mapped treaties include a voluntary conciliation or mediation mechanism.[64]

To further enhance this trend, WG III is considering the development of model clauses to be included in future 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

58 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), p. 9.

59 See https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C (23/12/2022).

60 See https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf (23/12/2022).

61 UNCITRAL WG III, Mediation and other forms of alternative dispute resolution (ADR), Note by the Secretariat, p. 2.

62 *De la Rasilla*, ICSID Review 2022, p. 9.

63 *Joubin-Bret/Legum*, ICSID Review 2014, p. 18; *Kessedjian* et al, Journal of International Dispute Settlement 2022, p. 3.

64 See https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (19/12/2022).

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.

A model clause providing for mandatory mediation does not seem to be ideal considering that a mediation can only succeed if both parties are open to make mutual concessions. Therefore, mediation can be encouraged, but should not be made mandatory requiring the disputing parties to follow a full procedure.

III. Governance-Related Difficulties at the National Level

One of the main challenges to investor-State mediation is the absence of a national legal framework in many host States that would provide clear governance structures for the resolution of investment disputes.[65] It is often not clear, which State agency is responsible for the settlement, leading to coordination difficulties across various levels of domestic government.[66] In addition, those State officials dealing with the mediation need express authority to be able to make a decision to settle a dispute.[67] Overall, a mediation involving a State is more complex than one between two purely private parties. For States, it is often easier to justify spending public resources when mandated by a binding decision instead of risking being "portrayed as giving money out willingly after an obscure process"[68]. To release this tension, the Energy Charter Secretariat released its Model Instrument on Management of Investment Disputes[69] in 2018. The Model Instrument devotes great attention to the functions of a centralized responsible body to serve as focal point throughout the whole process with exclusive authority for the resolution of investment disputes.[70]

WG III is taking similar actions to improve the effective use of mediation, *inter alia* with regard to governance-related difficulties. To that purpose, it was suggested in October 2020 that guidelines should be developed to ensure consistency with good governance norms.[71] Besides other topics, the guidelines will cover "organizational aspects that may need to be considered at the national level to minimize structural or policy impediments".[72] To that purpose, the UNCITRAL Secretariat prepared a set of draft guidelines with the support of the ICSID Secretariat. These draft guidelines draw from the discussions that took place during the development of the UNCITRAL Mediation Rules and the ICSID Mediation Rules, considering the input by State delegates, experts, mediators, and other stakeholders.[73]

65 *De la Rasilla*, ICSID Review 2022, p. 11.

66 Ibid.

67 Ibid.

68 *Kessedjian* et al, Journal of International Dispute Settlement 2022, p. 3.

69 Energy Charter Secretariat, Model Instrument on Management of Investment Disputes, available at: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf (23/12/2022).

70 Ibid., p. 23.

71 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, para. 30 f.

72 UNCITRAL WG III, Draft guidelines on investment mediation, Note by the Secretariat (20 July 2022), A/CN.9/WG.III/WP.218, para. 2.

73 Ibid., para. 3.

The draft guidelines recognize that it will not always be possible to have a member from both parties' teams with authority to settle present throughout the entire mediation process. Both the host State's competent ministry or the corporate oversight body on the side of the investor might need to approve the settlement.[74] The draft guidelines point out that it would be desirable to have at least one team member with a clear line of communication to the person invested with settlement authority. In addition, the draft guidelines foresee that the parties are asked early in the mediation to share information regarding the settlement authority and applicable approval proceeding with the mediator.[75]

Finally, WG III noted that another reform option currently under discussion, namely the establishment of an advisory centre, is closely connected to the enhancement of the use of mediation and may help to solve governance-related difficulties.[76] Accordingly, the advisory centre may be tasked, *inter alia*, with alternative dispute settlement, becoming a platform for best practices and for services on the administration of ADR mechanisms.

IV. Confidentiality

Confidentiality has traditionally been considered a central tenet and precondition for mediation. Transparency could hinder efforts at mediation by exposing early stages of discussions to public scrutiny, thereby creating pressure that may lead to unproductive dialogue between the parties.[77] By contrast, confidentiality creates a sense of security for the parties. In addition, it may help the State to preserve its reputation of a positive investment climate and the investor to keep a good business reputation while safeguarding strategic trade and industry secrets.[78] What is problematic, though, is that confidentiality may nurture the impression of dealings behind closed doors, which may have been corrupt, thus reducing public confidence in the mediation process.[79] This is particularly concerning considering that investor-State mediation often deals with important public policy questions with far-reaching consequences for the host State's regulatory and fiscal responsibilities.[80]

The draft guidelines refer to the default position adopted by most mediation rules, i.e. that the documents and views exchanged throughout the mediation process will remain confidential.[81] At the same time, the draft guidelines recognize that national legislation may contain affirmative disclosure obligations to preserve the public interest.[82] In addition, WG III considers the usefulness

74 Ibid., para. 27.

75 Ibid.

76 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, para. 47.

77 *Shirlow*, Investor-State Arbitration Meets Mediation: Potential Problems?, Kluwer Arbitration Blog, 30 September 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/09/30/investor-state-arbitration-meets-mediation-potential-problems/ (24/12/2022).

78 *Lai/Suen*, Overcoming Challenges to the Use of Mediation in ISDS, UNCITRAL Working Group III on ISDS Reform, Virtual Pre-Intersessional Meeting on the Use of Mediation in ISDS, Asian Academy of International Law 2020, p. 39 f.

79 *De la Rasilla*, ICSID Review 2022, p. 14.

80 *Shirlow*, Investor-State Arbitration Meets Mediation: Potential Problems?, Kluwer Arbitration Blog, 30 September 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/09/30/investor-state-arbitration-meets-mediation-potential-problems/ (24/12/2022).

81 UNCITRAL WG III, Draft provisions on mediation, Note by the Secretariat (13 July 2022), A/CN.9/WG.III/WP.217, para. 49.

82 Ibid.

of a provision that allows the disputing parties to disclose the fact that a mediation is taking place. Such a provision could also allow the disputing parties to make the settlement agreement available to the public.[83] Finally, WG III also considers including a "without prejudice" provision in the guidelines, which would ensure the parties that the information shared during the mediation process will not prejudice their legal position in potential future (arbitral) proceedings.[84]

D. Conclusions

There is a consensus among all stakeholders that dispute prevention and ADR methods should be further enhanced. 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 ADR mechanisms other than arbitration, there is large consensus that the use of investor-State mediation should be enhanced. As this contribution has shown, mediation is not workable in all cases but may constitute a less time- and cost-intensive dispute settlement method in those cases where the disputing parties are prepared to make concessions to preserve their investment relationship. To that purpose, certain challenges that are specific to investor-State mediation must be overcome first. WG III is addressing these concerns through the provision of model clauses to be included in investment treaties and the development of guidelines for the effective use of investor-State mediation.

83 Ibid, para. 50.

84 UNCITRAL WG III, Draft provisions on mediation, Note by the Secretariat (13 July 2022), A/CN.9/WG.III/WP.217, para. 47 f.

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