

University of St. Thomas Law Journal

Volume 17

Issue 2 *Innovative Strategies for Conflict Management: Improving Investor-State Relations to Propel Global Growth Symposium*

Article 12

April 2021

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Recommended Citation

Judith Knieper, *UNCITRAL's Working Group III Discussion on Dispute Prevention*, 17 U. ST. THOMAS L.J. 455 (2021).

Available at: <https://ir.stthomas.edu/ustlj/vol17/iss2/12>

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ARTICLE

UNCITRAL'S WORKING GROUP III DISCUSSION ON DISPUTE PREVENTION

JUDITH KNIEPER*

I. INTRODUCTION

Innovative strategies for conflict management, including dispute prevention, have become a very topical matter for States in the context of investor-State dispute settlement (ISDS). Indeed, dispute prevention is seen as a significant tool to reduce investor-State disputes and as a means to improve the business environment, to retain investments, and to resolve investors' grievances swiftly, thereby representing a cost-effective approach to ISDS reform. This contribution provides an insight in the context and the status quo of the ongoing discussion within UNCITRAL's Working Group III on ISDS reform.

UNCITRAL, the United Nations Commission on International Trade Law, is the core legal body of the United Nations mandated to harmonize and modernize international trade law. Since its creation by the United Nations General Assembly in 1966, UNCITRAL has provided a forum to find common solutions to a wide range of trade law issues.¹ Because trade is a factor in the promotion of friendly relations, it is thereby considered to be an element of peace and stability. To date, UNCITRAL has provided constructive and globally negotiated solutions to legal issues arising in the field of trade law, drafted numerous well-known instruments, and set internationally recognized standards in numerous fields, such as in the area of international dispute settlement, contract law, transport, procurement, and cross border insolvency.

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1. See Texts and Status, U.N. Comm'n on Int'l Trade L., <https://uncitral.un.org/en/texts> (last visited Nov. 28, 2020) (providing further information on the different topics).

II. BACKGROUND AND CONTEXT OF THE CURRENT ISDS REFORM DISCUSSION

A. *The UNCITRAL Transparency Standards*

UNCITRAL's work on dispute settlement dates back to its establishment. The instruments were usually drafted in a generic manner so that they could be used in a wide variety of circumstances covering a broad range of disputes, including arbitrations between private commercial parties as well as investor-State disputes.² While the Arbitration Rules from 1976 were under review, the responsible Working Group highlighted that in the investor-State arbitration context transparency was desirable while confidentiality was an essential feature in the purely private context.³ UNCITRAL therefore decided in 2010⁴ to take up a topic that was specific to investor-State disputes and drafted instruments that guaranteed a higher level of transparency in treaty-based investor-State dispute resolution called the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.⁵

These rules are a robust set of procedural guidelines that make arbitrations involving a State—initiated under an investment treaty—accessible to the public, as well as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014—the “Mauritius Convention on Transparency”), which is an efficient mechanism to make the Transparency Rules applicable to treaties concluded before the entry into force of the Transparency Rules on April 1, 2014.⁶ Indeed, the Convention introduced the substantive transparency standards into the fragmented

2. The UNCITRAL Arbitration Rules have been referenced in many investment treaties concluded by States as an option in the investor-State dispute settlement provision, so that investors could choose to have their dispute arbitrated using these Rules. *See* U.N. COMM'N ON INT'L TRADE L., Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V.4 (2008); *see also id.* at 1 n.2 (clarifying that “the term ‘commercial’ should be given a large interpretation [and] . . . should include but not be limited to . . . investment”).

3. *See* U.N. Comm'n on Int'l Trade L., Rep. of the Working Grp. on Arb. and Conciliation on the Work of Its Forty-Eighth Session, ¶ 57, U.N. A/CN.9/646 (Feb. 29, 2008); *see also id.* ¶¶ 58–61; *see also* the contribution from Canada urging the Commission to give a working group the mandate to enhance transparency in investor-State arbitration, failing which the Commission will “be seen as effectively supporting holding investor-State arbitrations behind closed doors, away from public participation and scrutiny.” U.N. Secretariat, Settlement of Commercial Disputes Revision of the UNCITRAL Arbitration Rules Observation by the Government of Canada, Note by the Secretariat, ¶ 5, U.N. Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/662 (June 12, 2008).

4. U.N. Comm'n on Int'l Trade L., Rep. of the Work of Its Forty-First Session, ¶ 314, U.N. Doc. A/63/17 (2008).

5. *See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)*, U.N. COMM'N ON INT'L TRADE L., <https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency> (last visited Nov. 28, 2020).

6. U.N. Comm'n on Int'l Trade L., Rep. of the Work of Its Forty-Sixth Session, ¶ 125, U.N. Doc. A/68/17 (2013).

treaty-by-treaty regime with a single multilateral instrument.⁷ The third element of the UNCITRAL Transparency Standards is the Transparency Registry, which is the repository for the publication of information and documents in treaty-based investor-State arbitration operated by the UNCITRAL Secretariat in Vienna.⁸

B. Working Group III and its Mandate on an ISDS Reform

After the completion of the work on the preparation of the Transparency Standards, the Commission agreed in 2013 that the topic of multiple, concurrent proceedings constituted a topic in the field of ISDS that warranted reform. The Commission requested the Secretariat to undertake further research on this issue.⁹ In addition, it was noted at the Commission session in 2015 that the generic application of UNCITRAL texts to different types of arbitration “posed a number of challenges and proposals for reforms that had been formulated by a number of organizations.”¹⁰ In that context, UNCITRAL took note of the preparation of a study prepared by the Geneva Centre for International Dispute Settlement (CIDS) on whether the Mauritius Convention on Transparency could provide a useful model for possible reforms in the field of investor-State arbitration (“CIDS report”).¹¹ The Government of Algeria submitted a proposal to work on a code of conduct, or the development of ethical standards for arbitrators acting in investor-State disputes, which triggered the Commission to request the Secretariat to conduct further research on this topic, too.¹²

7. The Convention entered into force on Oct. 18, 2017. See *Status: United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014) (the “Mauritius Convention on Transparency”)*, U.N. COMM’N ON INT’L TRADE L., <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> (last visited Nov. 28, 2020).

8. The Transparency Registry is operated thanks to donor funding from the European Union, the OPEC Fund for International Development (the OPEC Fund), and the German Federal Ministry for Economic Cooperation and Development (BMZ). The Registry already contains a number of cases where the disputing party fully or partly agreed to the application of the Transparency Rules. In addition, cases are published where the Arbitral Tribunal addressed transparency in specific provisions of a Procedural Order or in an Ad Hoc Protocol, establishing a transparency regime close to the one foreseen under the Rules on Transparency. The UNCITRAL Registry is publishing this information to make sure that the UNCITRAL Registry is a complete registry collecting all cases to which the Rules on Transparency do either fully or partly apply. See *Transparency Registry*, U.N. COMM’N ON INT’L TRADE L., <https://www.uncitral.org/transparency-registry/registry/index.aspx> (last visited Nov. 29, 2020).

9. U.N. Comm’n on Int’l Trade L., Rep. of the Work of Its Forty-Sixth Session, *supra* note 6, ¶ 131.

10. U.N. Comm’n on Int’l Trade L., Rep. of the Work of Its Forty-Eighth Session, ¶ 268, U.N. Doc. A/70/17 (2015).

11. See GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, CAN THE MAURITIUS CONVENTION SERVE AS A MODEL FOR THE REFORM OF INVESTOR-STATE ARBITRATION IN CONNECTION WITH THE INTRODUCTION OF A PERMANENT INVESTMENT TRIBUNAL OR AN APPEAL MECHANISM? (2016).

12. See U.N. Secretariat, Possible Future Work Proposal by the Government of Algeria: Possible Future Work in the Area of International Arbitration Between States and Investors—Code of Ethics for Arbitrators, Note by the Secretariat, U.N. Comm’n on Int’l Trade L., U.N. Doc. A/

In addition, the Commission requested the Secretariat to undertake comparative law research, which included reaching out to States via a questionnaire. In 2017, at its 50th session, the Secretariat consequently gave the Commission three notes on possible topics in the field of ISDS for its reference: multiple concurrent proceedings,¹³ ethics in international arbitration,¹⁴ and the question of whether the Mauritius Convention on Transparency could serve as a model for further reforms in the ISDS context¹⁵ as well as a number of comments by states.¹⁶ In response, UNCTRAL entrusted one of its working groups, Working Group III, with a broad mandate to work on the possible reform of ISDS. Working Group III's work was to be delivered in three phases: first to identify and consider concerns regarding ISDS, second to consider whether reform was desirable

CN.9/855 (May 27, 2015); *see also* U.N. Secretariat, Settlement of Commercial Disputes: Possible Future Work on Ethics in International Arbitration, U.N. Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/880 (Apr. 29, 2016).

13. *See* U.N. Secretariat, Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration, Note by the Secretariat, U.N. Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/915 (Mar. 24, 2017).

14. *See* U.N. Secretariat, Possible Future Work in the Field of Dispute Settlement: Ethics in International Arbitration, Note by the Secretariat, U.N. Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/916 (Apr. 13, 2017); *see also* U.N. Secretariat, Possible Future Work Proposal by the Government of Algeria: Possible Future Work in the Area of International Arbitration Between States and Investors—Code of Ethics for Arbitrators *supra* note 12.

15. *See* U.N. Secretariat, Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, U.N. Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/917 (Apr. 20, 2017) (this is based on the CIDS Report, which confirmed that the Mauritius Convention could provide a useful model to reform the current fragmented ISDS treaty regime).

16. U.N. Secretariat, Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Note by the Secretariat, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918 (Jan. 31, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 1 (Jan. 31, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 2 (Jan. 31, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 3 (Jan. 31, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 4 (Jan. 31, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 5 (Mar. 27, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 6 (Apr. 21, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 7 (June 12, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 8 (June 27, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 9 (July 13, 2017); Settlement of Commercial Disputes Investor-State Dispute Settlement Framework Compilation of Comments, Comm'n on Int'l Trade L., U.N. Doc. A/CN.9/918/Add. 10 (Mar. 26, 2018).

in light of any identified concerns, and third to develop solutions for those issues that warrant reform.¹⁷

The first two phases have been completed, and the Working Group¹⁸ moved into its third phase on its 38th session in October 2019, after identifying issues warranting reform.¹⁹ Preliminary consideration of some reform options has been undertaken²⁰ and the topic “dispute prevention and mitigation as well as other means of alternative dispute resolution”²¹ has already been scheduled for deliberations, which shows the timeliness of the symposium from an UNCITRAL perspective.

C. Concerns Identified during Phases 1 and 2²²

The Working Group identified a number of concerns and decided that it is desirable to address them in a reform. The first area of concerns pertained to the lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals.²³ The Working Group decided that

17. U.N. Comm’n on Int’l Trade L., Rep. of the Work of Its Fiftieth Session, ¶ 264, U.N. Doc. A/72/17 (2017).

18. All documents and audio-recording are published on the website of UNCITRAL. See *Working Group III: Investor-State Dispute Settlement*, U.N. COMM’N ON INT’L TRADE L., https://uncitral.un.org/en/working_groups/3/investor-state (last visited Nov. 29, 2020). In order to make sure that the discussions are as inclusive as possible, France, the German Federal Ministry for Economic Cooperation and Development (BMZ), the Swiss Agency for Development and Cooperation (SDC), and the European Union have provided financial assistance for delegates to attend the Working Group sessions. As a result, Working Group III has been very well-attended since the beginning of the discussions on ISDS reform, including by developing States and less developed States.

19. These issues were identified from its thirty-fourth session in November 2017 to its thirty-seventh session in April 2019.

20. At its thirty-eighth session in October 2019, the Working Group considered: (i) the establishment of an advisory center; (ii) a code of conduct for adjudicators; and (iii) the regulation of third-party funding. U.N. Comm’n on Int’l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Eighth Session, U.N. Doc. A/CN.9/1004 (Oct. 23, 2019). At its resumed thirty-eighth session, the Working Group considered: (i) the appellate and multilateral court mechanisms and related issues; and (ii) the selection and appointment of ISDS tribunal members. See U.N. Comm’n on Int’l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Thirty-Eighth Session, U.N. Doc. A/CN.9/1004/Add.1 (Jan. 28, 2020).

21. U.N. Comm’n on Int’l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session, *supra* note 20. At this session the following reform options were discussed: (i) treaty interpretation by States parties; (ii) security for costs; (iii) means to address frivolous claims; (iv) multiple proceedings including counterclaims; (v) reflective loss and shareholder claims; and (vi) multilateral instrument on ISDS reform.

22. For a comprehensive overview of the first two phases and the related deliberations, see Corinne Montineri, conference paper on the UNCITRAL reform process on ISDS prepared for the ten year anniversary of the International Investment Law Centre Cologne. *10 Year Anniversary of the International Investment Law Centre Cologne*, INT’L INV. L. CTR. COLOGNE (May 24, 2019), <https://iilcc.uni-koeln.de/veranstaltungen/10-year-anniversary-conference>.

23. U.N. Comm’n on Int’l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session, ¶ 25, U.N. Doc. A/CN.9/964 (Nov. 6, 2018).

the development of reforms by UNCITRAL was desirable to address concerns relating to:

- Unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals;²⁴
- The lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments, and agreements that provided access to ISDS mechanisms;²⁵ and
- The fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions.²⁶

The second area of concern dealt with issues pertaining to arbitrators and decision makers. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns relating to:

- The lack or apparent lack of independence and impartiality of decision makers in ISDS;²⁷
- The lack of adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules;²⁸
- The lack of appropriate diversity among decision makers in ISDS;²⁹ and
- The mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.³⁰

The third area dealt with concerns pertaining to cost and duration of ISDS cases and the Working Group decided that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to:

- Cost and duration of ISDS proceedings;³¹
- Allocation of costs by arbitral tribunals in ISDS;³²
- Security for cost;³³ and
- The definition and use or regulation of third-party funding in ISDS.³⁴

In addition, the Working Group identified possible additional concerns that were not already addressed in its deliberations. The additional concerns

24. *Id.* ¶ 40.

25. *Id.* ¶ 53.

26. *Id.* ¶ 63.

27. *Id.* ¶ 83.

28. *Id.* ¶ 90.

29. U.N. Comm'n on Int'l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session, *supra* note 23, ¶ 98.

30. *Id.* ¶ 108.

31. *Id.* ¶ 123.

32. *Id.* ¶ 127.

33. *Id.* ¶ 133.

34. U.N. Comm'n on Int'l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session, ¶ 25, U.N. Doc. A/CN.9/970 (Apr. 9, 2019).

are: (i) means other than arbitration to resolve investment disputes as well as dispute prevention methods, (ii) exhaustion of local remedies, (iii) third-party participation, (iv) counterclaims, (v) regulatory chill, and (vi) calculation of damages.³⁵

As there is a variety of possible reform options, some of which are more structural, and some of which are based on the improvement of the existing current system,³⁶ the Working Group agreed to discuss, elaborate, and develop multiple potential reform solutions simultaneously and started its deliberations based on a project schedule. The topic of dispute prevention and other means to resolve investor-State disputes was scheduled to be preliminarily discussed during the April 2020 session,³⁷ which was unfortunately cancelled due to the Coronavirus (COVID-19) situation. In preparing for that session, the Secretariat was tasked with preparing a note to guide the deliberations in the Working Group.³⁸

III. NOTE OF THE SECRETARIAT ON DISPUTE PREVENTION³⁹

The “Note by the Secretariat on Dispute prevention and mitigation - Means of alternative dispute resolution” (“the note”) is based on submissions by States, existing initiatives by other international governmental and non-governmental stakeholders as well as literature available.⁴⁰ Two aspects are key with regard to dispute prevention: the wish for States to avoid lengthy and costly ISDS cases, but foremost the retention of investment in the country and to possibly attract more investment from the very same investor.

35. *Id.* ¶¶ 29–38.

36. *See* U.N. Secretariat, Possible Reform of Investor-State Dispute Settlement, Note by the Secretariat, ¶ 9, U.N. Comm’n on Int’l Trade L., Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session, U.N. Doc. A/CN.9/WG.III/WP.166 (July 30, 2019) (outlining some of the reform proposals); *see also* U.N. Secretariat, Possible Reform of Investor-State Dispute Settlement, Note by the Secretariat, U.N. Comm’n on Int’l Trade L., Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session, U.N. Doc. A/CN.9/WG.III/WP.166/Add.1 (July 30, 2019) (the tabular presentation of reforms in document).

37. *See* U.N. Comm’n Int’l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session, ¶¶ 25, 27, U.N. Doc. A/CN.9/1004 (Oct. 23, 2019) (scheduling the following reform options: “(i) dispute prevention and mitigation as well as other means of alternative dispute resolution; (ii) treaty interpretation by States parties; (iii) security for costs; (iv) means to address frivolous claims; (v) multiple proceedings including counterclaims; . . . (vi) reflective loss and shareholder claims”; and “(vii) multilateral instrument on ISDS reform.”).

38. *Id.* ¶ 25.

39. *See* U.N. Secretariat, Possible Reform of Investor-State Dispute Settlement: Dispute Prevention and Mitigation - Means of Alternative Dispute Resolution, Note by the Secretariat, U.N. Comm’n on Int’l Trade L., Working Grp. III (Investor-State Dispute Settlement Reform), U.N. Doc. A/CN.9/WG.III/WP.190 (Jan. 15, 2020).

40. *Id.* at 2–3 nn.3–4.

A. *On a National Level*

The note outlines several steps States could possibly undertake at the national level. At the outset, clear communication channels between the investors and the State are crucial. Creating clear communication channels requires States to designate a specified procedure for the investors to signal their complaint, and a government entity responsible for receiving and administering investment complaints (including the tracking of all investments in the country). To enable the effective administration of complaints, possibly before a potentially actionable measure is adopted, this government entity should be granted the authority to investigate the circumstances behind the debate, represent the State in negotiations with the investor, and most importantly, bind the State in a potential settlement agreement.

Also important is the awareness of States to their treaty obligations. This requires the mapping of such treaty obligations as well as dispute patterns; prevention can only be achieved through the prediction of likely disputes. In turn, prediction of disputes can only be achieved when a State is fully aware of its treaty obligations, and of sectors which are more sensitive to disputes. States can gain insight from their dispute history by mapping their existing investment contracts and treaties on a platform, analyzing their responses to previous disputes, and observing tribunals' treatment of disputes involving similarly worded treaties.

Finally, capacity building is essential, and therefore downstream training on investment treaty obligations and the consequences of sub-governmental infringement actions should be put in place. Officials within sub-governmental entities may be taking measures which could infringe on investment rights. Downstream training on the State's investment obligations enables avoidance of inadvertent breaches, while training in the domestic structure of complaints handling empowers such officials to identify an investment-related inquiry and forward it to the lead government entity. In addition, before legislative changes, States should assess the potential consequences on investments. There are a number of States that already implement such mechanisms,⁴¹ enhancing the quality of public administration and reducing the risk of ISDS cases.

B. *On the Investment Treaty Level and International Level*

The note further outlines steps that could be undertaken at a bilateral or multilateral level. One important aspect is State-to-State cooperation in dispute prevention. This requires communication channels and an institutionalized dialogue between the parties to the investment treaties, such as via joint committees or commissions as a means to promote regular exchange of information to facilitate the investment and to implement a dis-

41. *Id.* ¶¶ 5–23.

pute settlement mechanism based on consultations, negotiations, and mediation. Such initiatives combining focal points and a joint committee or commissions of treaty parties have already been implemented in certain investment treaties.⁴²

On an international level, the lack of awareness, knowledge, and capacity-building could be tackled through technical assistance and capacity-building activities and through the establishment of comprehensive databases, training on investment and ISDS issues with a view to preventing disputes, and assistance in developing communication networks (including coordinated access to documents and document management) within the government and establishing a lead agency. It is now up to the Working Group to decide on how to proceed. There are a number of options that could be discussed, e.g., whether to provide more guidance on dispute prevention models developed at national levels; whether to develop model clauses on dispute prevention in investment treaties, including mechanisms to institutionalize the dialogue between the treaty parties; and how to tackle the question of coordination of available programs and initiatives on dispute prevention and mitigation at the international level.

C. *Linkage to Other Reform Options*

Working Group III may need to take into consideration that the question of dispute prevention and mitigation is closely connected to other reform options, such as the establishment of an advisory center which could be tasked with dispute prevention and capacity-building activities. Additionally, dispute prevention and mitigation are closely connected to the

42. U.N. Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, Note by the Secretariat, ¶ 9, U.N. Comm'n on Int'l Trade L., Working Grp. III (Investor-State Dispute Settlement Reform) U.N. Doc. A/CN.9/WG.III/WP.151 (Aug. 30, 2018). In addition, certain treaties foresee the holding of regular meetings between States, with the purpose of resolving disputes arising out of investments, and which take place at the request of either treaty party. *See, e.g.*, Agreement Between the Government of the People's Republic of China and the Government of the Republic of Latvia on the Promotion and Protection of Investments, China-Lat., Apr. 15, 2004; *see* Agreement Between the Government of Japan and the Government of Malaysia for an Economic Partnership, Japan-Malay., Dec. 13, 2005; Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., Sep. 2, 2007; The Treaty Between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments, With Protocol, U.S.-Morocco, July 22, 1985; *see also* the Free Trade Commission established under NAFTA, which supervised and implemented the Agreement, resolved disputes arising from the interpretation or application of the Agreement, and considered issues relevant to the operation of NAFTA. *North American Free Trade Agreement*, FOREIGN TRADE INFO. SYS., <http://www.sice.oas.org/trade/nafta/chap-201.asp> (last visited Nov. 29, 2020). The Commission has addressed operating procedures for handling notices; the necessary authorities for representing the State, e.g., authorization to hire external counsel; appropriate coordination capacity to evaluate the case and instruct outside counsel; resources to pay the costs; and the national institutional framework designed for preventing and facing investment disputes).

topic of treaty interpretation by States parties.⁴³ Disputes might indeed be prevented where investment treaties are coherently interpreted and administered⁴⁴ as coherent and streamlined interpretation can help in better understanding of how to implement investment treaties and provides certainty to government officials implementing investment treaty obligations.

D. Mediation

Finally, mediation, which is a way of resolving disputes, technically goes beyond dispute prevention. However, it is a tool to prevent disputes from emerging or from escalating to a formal investment arbitration and to decelerate dispute crystallisation. Like proper dispute prevention management, mediation might enable the parties to focus on their respective interests, preserving their relationship. Consequently, the Working Group scheduled its discussion on mediation and other alternative dispute settlement mechanisms together with dispute prevention.⁴⁵

There is a mediation framework already in place that is currently further developed.⁴⁶ Furthermore, many treaties foresee so-called “cooling-off” periods and some more recent treaties contain specific mediation clauses. However, anecdotal evidence suggests that mediation is not extensively used and that there are a number of challenges concerning the use of mediation in ISDS.⁴⁷ Challenges include a lack of accountability, fear of public criticism, fear of setting a precedent, difficulties regarding access to public funds to properly organize the defense, and difficulties regarding the intergovernmental coordination in a relatively short time which would need to be overcome first. Some of these challenges, such as organizing proper funding and coordination of the State authorities, relate to what is usually discussed on the level of dispute prevention. The newly adopted UNCITRAL Model Law on Mediation and the Singapore Convention on Mediation that entered into force on September 12, 2020 might help to upsurge the interest in mediation in the context of investor-State dispute settlement as a strong and viable means allowing for tailor-made solutions.

43. See U.N. Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS): Interpretation of Investment Treaties by Treaty Parties, Note by the Secretariat, U.N. Comm’n on Int’l Trade L., Working Grp. III (Investor-State Dispute Settlement Reform), U.N. Doc. A/CN.9/WG.III/WP.191 (Jan. 17, 2020).

44. Which is why transparency is important in ISDS. See U.N. COMM’N ON INT’L TRADE L., *supra* note 5.

45. U.N. Secretariat, *supra* note 39, ¶¶ 29–48.

46. E.g., the IBA Rules for Investor-State Mediation, the ICSID Conciliation Rules and the draft ICSID Mediation Rules, the Energy Charter Conference Guide to Investment Mediation and the UNCITRAL texts, consisting of the Conciliation Rules from 1980, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Model Law on Mediation) as well as United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention on Mediation); see U.N. Secretariat, *supra* note 39, ¶¶ 37–42.

47. U.N. Secretariat, *supra* note 39, ¶ 43.

E. Outlook

The Working Group had an initial discussion on dispute prevention and alternative dispute resolution in the context of a wider ISDS reform at its 39th session.⁴⁸ As already apparent from submissions made by governments regarding their suggestions for reforming ISDS, there is indeed appetite to enable and promote the use of such related tools, and the Working Group tasked the Secretariat to do further research so as to collect and compile relevant and readily available information on best practices and develop suggestions of possible means to implement them, such as via guidance or model texts to be developed and to also consider if an advisory center could be utilized as a forum to build capacities and exchange on best practices.⁴⁹

VI. CONCLUSION

In the frame of UNCITRAL's Working Group III on ISDS reform, dispute prevention is considered as part of the wider reform agenda. Governments agree that it is essential to focus on the pre-dispute phase so as to avoid ISDS cases altogether and thereby retain (and possibly attract further) investment. While numerous best practice examples are already implemented and successfully tested by a number of States, the discussion in Working Group III only started, however, with a clear view to be continued.⁵⁰ In that light, exchanges as organized by the University of St. Thomas School of Law are useful to explore the topic from various and diverse perspectives and to gather suggestions.

48. U.N. Comm'n on Int'l Trade L., Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Fifty-Fourth Session, ¶ 17, U.N. Doc. A/CN.9/1044 (Nov. 10, 2020).

49. *Id.* ¶ 26.

50. Noteworthy, for those interested in following the discussion, the UNCITRAL website provides information in a transparent manner on all formal deliberations (including complete audio-recording of the sessions). Further, as part of the efforts to adapt to the COVID-19 situation, the Secretariat uses informal online meetings so as to allow further brainstorming on the different topics and issues. Everyone interested should therefore consult the website on a regular basis, e.g., a webinar on the role of mediation in ISDS was already organized and is available under: *Webinar on the Role of Mediation in ISDS*, U.N. COMM'N ON INT'L TRADE L., <https://uncitral.un.org/en/mediationwebinar> (last visited Nov. 29, 2020).