

The Transformation of International Organizations—Specialization, New Initiatives, and Working Methods—Some Observations on the Work of UNCITRAL Working Group III

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ABSTRACT

International organizations are essential actors in the international legal system and play key roles in all aspects of international law, from its creation to its enforcement and implementation. As their work becomes progressively more significant and specialized, international organizations have also embarked on many new initiatives and have adopted new working methods. An interesting example of this development is the effort of United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII) to reform Investor–State Dispute Settlement (ISDS), a unique international dispute settlement mechanism that permits a foreign investor to bring a claim against a State on issues related to international investment law. At a time of declining international codification, UNCITRAL WGIII’s plan to reform ISDS stands out as remarkably ambitious. It is also responsive to identified vacuums and needs and is likely to lead, at least partially, to a degree of reform of ISDS. In this short contribution, I first introduce the codification of international economic law issues as distinct from other kinds of codification. I then introduce UNCITRAL and explore the work of UNCITRAL WGIII more specifically. In particular, I explain and assess the ISDS reform process as an example of an ongoing transformation of the work of international organizations and a new initiative on which they embarked using a specific methodology of selecting issues, developing draft texts, and serving as a place for drafting negotiations.

I. INTERNATIONAL CODIFICATION AND INVESTOR–STATE DISPUTE SETTLEMENT

Lacking a centralized codification body, such as a parliament, assembly, or congress which are generally present in domestic systems, the codification of international legal instruments has been a-systematic and conducted largely ad hoc.¹

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¹ The study of the development of international organizations is a rich and active subfield of international law (see, e.g., Jan Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, 26 *The European Journal of International*

Many of the most significant codification efforts, such as the Vienna Convention on the Law of the Sea, the Vienna Convention on Diplomatic and Consular Relations, and the Statute of the International Criminal Court, are the result of intense work by the International Law Commission (ILC), a subsidiary organ of the General Assembly (GA) created under Article 13 of the United Nations (UN) Charter to encourage ‘the progressive development of international law and its codification.’²

The record of the ILC is impressive, but its mandate is vast, and its resources are limited. Among the many important contributions to the development and progressive codification of international law, the ILC has focused little on international economic law and rather focused on other fields of international law.³

Similarly, the work of the ILC has not, so far, concentrated on issues related to Investor–State Dispute Settlement (ISDS).⁴ Instead, to fill the vacuum, other international organizations, such as the United Nations Commission on International Trade Law (UNCITRAL), the International Center for Settlement of Investment Disputes (ICSID), and the International Institute for the Unification of Private Law, have focused their work on the progressive codification of ISDS. They have done so by identifying issues for codification, developing and presenting drafts for consideration by States, and facilitating negotiation for the adoption of new international legal instruments. This development is not surprising as the scope of international law has evolved and increased, and no one forum can be responsible for the necessary codification. Because of its mandate, UNCITRAL has been most active in the ongoing process of ISDS reform.

II. THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL was established by a UN General Assembly (UNGA) Resolution 2205 (XXI) in 1966. In creating UNCITRAL, UNGA considered that international trade cooperation among States was an important factor in the promotion of friendly relations and thus also for the maintenance of peace and security. UNCITRAL’s objective is to promote ‘the progressive harmonization and unification of the law of international trade.’⁵

As a subsidiary body of UNGA, UNCITRAL’s members represent different legal traditions and levels of economic development. There are now 60 Member States: membership was increased twice from the original 29 members in 1966 to 36 members in 1973, and then again to 60 members in 2002. Consistent with other UN bodies, membership is also based on regional

Law 9–82 (2015) and Dennis Dijkzeul and Dirk Salomons, *International Organizations Revisited: Agency and Pathology in a Multipolar World* (Berghahn, 2022)). In this essay, I will only refer to UNCITRAL.

² UN Charter, Article 13. See generally UN, ‘70 Years of the International Law Commission’ (2020) https://legal.un.org/ilc/publications/pdfs/ilc_exhibit_book.pdf (visited 12 October 2022). For example, the GA took note of the articles on State Responsibility in Res. 56/83 of 12 December 2001 but they have not been presented for codification. See also United Nations, *The Work of the International Law Commission* (2017) <https://legal.un.org/ilc/reports/2017/> (visited 1 September 2022). For example, at its 74th session, the GA took note of the draft articles on prevention and punishment of crimes against humanity that were contained in the ILC Report and decided to include in the provisional agenda of its 75th session an item entitled ‘Crimes against Humanity’. UNGA then took note of the draft articles and decided to continue to examine the ILC recommendation and allocated the item to the Sixth Committee at its 76th session where many statements were made by delegations. UNGA then decided to continue to examine the ILC recommendation in its 77th session and, rather than using the draft for treaty codification, decided to create a sub-committee to continue its consideration. UNGA, ‘Sixth Committee (Legal)—77th Session, Crimes against Humanity’, (Agenda item 78) (13 October 2022) <https://www.un.org/en/ga/sixth/77/cah.shtml> (visited 13 October 2022).

³ Hajer Gueldich, ‘Challenges of Codification for the International Law Commission in a Changing Landscape of International Law’, in United Nations (ed), *Seventy Years of the International Law Commission* (Leiden: Brill | Nijhoff, 2020) 288–299.

⁴ See ‘70 Years of the International Law Commission’ above note 2, at 105. An ILC study group examined specific substantive issues, but the ILC has not addressed general dispute resolution frameworks. For example, it examined the role of the most-favored-nation (MFN) clause in international investment law from 2008 to 2015. MFN is a central feature in international trade law and is also relevant in ISDS. The ILC did not suggest new codification but produced a report with summary conclusions.

⁵ General Assembly Resolution 2205 (XXI), Establishment of the United Nations Commission on International Trade Law (UNCITRAL), of 17 December 1966, in UNCITRAL, ‘A Guide to UNCITRAL—Basic Facts about the United Nations Commission on International Trade Law’, (2013) Annex I, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> (visited 1 September 2022).

representation. Members of UNCITRAL include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States, and 14 Western European and other States. The UN GA elects UNCITRAL members for terms of six years, and elections occur every three years for half of the members so as to ensure both consistency and renewal.⁶

Strictly speaking, UNCITRAL's mandate focuses on furthering a progressive harmonization and modernization of international law, and specifically on trade law. To do so, it prepares and promotes the use and adoption of both legislative and non-legislative instruments. In response to an increasingly economically interdependent world, UNCITRAL's work mostly focuses on issues related to commercial law.⁷ Its mandate requires UNCITRAL to prepare 'the adoption of new international conventions, model laws and uniform laws' and promote 'the codification and wider acceptance of international trade terms, provisions, customs and practices.'⁸ These instruments are negotiated through an international process involving a variety of participants, including Member States of UNCITRAL, non-Member States, and some invited intergovernmental and non-governmental organizations, such as the European Union (EU), the African Union, and the International Law Association.

UNCITRAL's work is organized into three levels. First, the UNCITRAL Commission itself meets once a year in plenary sessions. Second, at the intergovernmental level, Working Groups agree to work on specific topics and work on the substantive aspects of UNCITRAL's work program.⁹ Third, a Secretariat assists the Commission and the Working Groups in the preparation and conduct of their work.¹⁰ Over the course of years, UNCITRAL has produced significant and diverse types of legislative texts, including conventions, model laws, legislative guides, and model provisions.

Importantly, in addition to its work on trade law, UNCITRAL has also focused its activities on other issues related to international economic law, including international arbitration. UNCITRAL Arbitration Rules are widely used in international arbitration, including ISDS.

UNCITRAL has also been central for the drafting, negotiation, and adoption of two recent and important international conventions related to ISDS: the UN Convention on Transparency in Treaty-based Investor-State Arbitration and the UN Convention on International Settlement Agreements Resulting from Mediation.¹¹ The Transparency Convention, also known as the 'Mauritius Convention on Transparency', was adopted in 2014 by a UNGA Resolution and entered into force in 2017. It provides a set of procedural rules to make information related to investor-State arbitration based on a treaty publicly available.¹² The Mauritius Convention addresses the important concern that ISDS proceedings lacked transparency and provides rules to ensure that information is provided to the public. The Mediation Convention, also known as the 'Singapore Convention on Mediation', was adopted by UNGA in 2018 and entered into force in 2020.¹³ The Convention applies to international settlement agreements that resulted

⁶ Ibid, at 5–6.

⁷ At its first session in 1968, the Commission adopted nine subject areas as the basis of its work program: international sale of goods, international commercial arbitration, transportation, insurance, international payments, intellectual property, elimination of discrimination in laws affecting international trade, agency, and legalization of documents. Not all of these issues were taken up by the Commission, and priority status was given to international sale of goods, international commercial arbitration, and international payments. Other topics have since been added, including trade financing contracts, transport, electronic commerce, procurement, international commercial conciliation, insolvency, security interests, online dispute resolution, and microfinance. See *ibid*, at 11.

⁸ General Assembly Resolution 2205 (XXI), section II, para 8, above note 5.

⁹ For a list of Working Groups and their Chairpersons, see UNCITRAL, *A Guide to UNCITRAL*, above note 5, at Annex IV.

¹⁰ *Ibid*, at 5–6.

¹¹ For a complete list, see UNCITRAL, 'Texts and Status', <https://uncitral.un.org/en/texts> (visited 12 October 2022).

¹² United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014) (the 'Mauritius Convention on Transparency') <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> (visited 4 January 2023).

¹³ United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the 'Singapore Convention on Mediation') https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (visited 4 January 2023).

from meditation and creates a legal framework for their enforcement in the domestic systems of signatory parties.

These two conventions tackle two important and novel issues that have developed parallel to and because of the increased use of international arbitration, and in particular ISDS. They are, as such, responsive to the need for UNCITRAL memberships to address concerns related to the public nature of ISDS, and they provide support for alternative dispute settlement instruments. While neither of these conventions has enjoyed wide ratification so far, both conventions are in force and provide important regulatory instruments. They also underline the role played by UNCITRAL in addressing emerging issues in ISDS.

It is also important to underline that UNCITRAL's mandate has evolved over time. Its members have increasingly interpreted its mandate as including not only specific issues of trade but also issues of international economic law more generally and including international arbitration and its reform more specifically.

This is not an uncommon phenomenon for international organizations: the sharpening and refocusing of an international organization's mandate is often part of its implementation over time.¹⁴ Indeed, clear case law and practice provide support to the fact that, absent clear language to the contrary, the mandate of international organizations can be clarified and evolved.¹⁵ In the case of UNCITRAL, it seems clear that its members have progressively mandated the Commission and the Secretariat to provide support for research and codification efforts in the field of international arbitration and ISDS.

More recently, UNCITRAL has embarked on a substantial project of ISDS reform; this is probably the most ambitious to date. UNCITRAL has approached this project very clearly: it tasked a Working Group to first identify issues for reform, then prepare drafts to address the issue, and organize sessions to negotiate and discuss the drafts and bring about reform.

III. UNCITRAL WGIII: ISDS REFORM

Unlike many other fields of international law, such as international criminal law, international trade law, and the law of the sea, ISDS lacks a common and overarching regulatory instrument. No multilateral treaty provides substantive guidance or creates a centralized dispute settlement mechanism.¹⁶ Rather, substantive provisions of international investment law are mostly negotiated bilaterally between States and are then incorporated in bilateral investment treaties. Dispute resolution procedures are codified separately, and ISDS generally relies on international arbitration, most often administered by an international arbitral institution, such as ICSID or the Permanent Court of Arbitration.

ISDS quickly gained momentum as a dispute resolution option and became the tool of choice to resolve certain international disputes between investors and States because of its innovative features and flexibility. At the same time, however, it also began to suffer backlash and criticism from those who observed and studied this mechanism. Parties, stakeholders, and civil society all raised concerns about the nature and process of ISDS. Critics pointed out the possible inequality between parties and the unbalanced nature of international legal obligations and argued that the methods used to select arbitrators could result in a lack of their independence and impartiality

¹⁴ See Jan Klabbbers, *An Introduction to International Organizations Law* (CUP, 2022). For example, in the context of crises, see the important study by Nicola Bonucci et al., 'IGOs' Initiatives as a Response to Crises and Unforeseen Needs', 1 *International Organizations Law Review* 1–60 (2022).

¹⁵ Supportive case law for the International Court of Justice (ICJ) includes *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 182 (international organizations are deemed to have the necessary powers essential to the performance of its duties) and *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 74 (international organizations have implied powers needed to fulfill their mandates). See also *Jurisdiction of the European Commission of the Danube* (Advisory Opinion) PCIJ Rep Series B No. 14.

¹⁶ See, for example, the International Criminal Court for international criminal law and the International Tribunal for law of the sea.

when deciding disputes. Critics also remarked on the increasingly public nature of many of the disputes and underlined that the obligations of Host States toward foreign investors could undermine and constrain the regulatory power of the States themselves, which would be especially concerning for issues related to environmental protection and health regulations.¹⁷

Against this background and in response to the call for reform, UNCITRAL, building on its prior work on international arbitration and dispute settlement, mandated WGIII in July 2017 to first identify and consider concerns regarding ISDS and then consider whether reform was desirable in light of any identified concerns. If the Working Group were to conclude that reform was desirable, it was also mandated to develop any relevant solutions to be recommended to the Commission.¹⁸

The Working Group requested UNCITRAL's Secretariat to prepare a list of the concerns about ISDS which had been raised during its prior sessions and to consider 'the provision of further information to assist States with respect to the scope of some its concerns regarding ISDS'.¹⁹ WGIII identified numerous concerns, and, in November 2018, issued a report that grouped concerns into three main categories:

- (i) Concerns pertaining to consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals.
- (ii) Concerns pertaining to cost and duration of ISDS cases, including concerns relating to length, cost recovery, and frivolous claims.
- (iii) Concerns pertaining to arbitrators and decision makers, including issues of gender and geographical diversity, lack of transparency, and lack of common ethical standards.²⁰

In the meeting, the group also concluded, by consensus, that the development of reform of ISDS was desirable. The Commission also agreed that the WGIII would have broad discretion in discharging its mandate and that the ongoing work of relevant international organizations will be considered when designing solutions. A reform process was initiated, and the process is now scheduled to continue until 2025.²¹

IV. THE WGIII ISDS REFORM PROJECT AND ITS WORKING METHOD

WGIII embarked on a substantial reform process and adopted a specific working methodology. It first identified issues for codification by calling for proposals from both States and other stakeholders. It is at present developing and presenting drafts for consideration by States. At the same, it is also facilitating negotiations for the adoption of new international legal instruments.

A. Identification of reform options

WGIII members have met formally twice a year for a week each time, alternatively in Vienna and in New York City, and have met informally in intersessional meetings also. During the COVID

¹⁷ See, for example, Michael Waibel et al., *Backlash Against Investment Arbitration—Perceptions and Reality* (Wolters Kluwer, 2010).

¹⁸ UNCITRAL, 'Working Group III, Investor-State Dispute Settlement Reform', https://uncitral.un.org/en/working_groups/3/investor-state (visited 1 October 2022).

¹⁹ UNCITRAL, Working Group III, 'Possible Reform of Investor-State Dispute Settlement—Note by the Secretariat' (18 October 2019) UN Doc A/CN.9/WG.III/WP.166, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/081/95/PDF/V1908195.pdf> (visited 12 October 2022). UNCITRAL, Working Group III, 'Possible Reform of Investor-State Dispute Settlement—Note by the Secretariat' (5 September 2018) UN Doc A/CN.9/WG.III/WP.0.149, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/064/96/PDF/V1806496.pdf?OpenElement> (visited 23 September 2022).

²⁰ UNCITRAL, UN Doc A/CN.9/WG.III/WP.0.149, *Ibid.*

²¹ UNCITRAL, Working Group III, 'Workplan to Implement Investor-State Dispute Settlement Reform and Resource Requirements, Note by the Secretariat' (30 July 2019) UN Doc A/CN.9/WG.III/WP.16643, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/016/72/PDF/V2101672.pdf?OpenElement> (visited 24 September 2022).

pandemic, the reform process continued, and meetings were moved online.²² As the process acquired momentum, WGIII has met three times yearly as of 2022 and is planning to continue to do so until the completion of the reform project.

The reform plan is ambitious, and a variety of options are being considered, including some that have the potential to completely transform the ISDS system. Others would only address very specific concerns.

The Working Group received a substantial number of submissions from many different governments. It collected and reviewed all the diverse proposals, and it decided to focus simultaneously on six kinds of possible reform options related to the procedural aspects of ISDS while taking note of the underlying substantive standards in investment agreements. Each of these reform options is by itself a substantial reform project with a variety of possible sub-options.²³

The six fields identified by the Working Group are as follows:

- (i) Reform of the adjudicative structure, including the creation of a standing multilateral investment tribunal with full-time judges, which may include both a first-instance court and an appellate body. The introduction of a separate appeal mechanism is also being studied, together with the creation of a multilateral advisory center.
- (ii) Reform of the method for appointing arbitrators and adjudicators and of their ethical obligations, including the selection of permanent ISDS tribunal members and the development of a code of conduct.
- (iii) Reform of control mechanisms on treaty interpretation and party involvement, with a focus on interpretative authorities and proactive use of interpretative tools.
- (iv) Reforms aimed at strengthening dispute prevention and mitigation and focusing on dispute settlement mechanisms other than arbitration (such as ombudsman or mediation), the exhaustion of local remedies, procedures to address frivolous claims, including summary dismissal and multiple proceedings, reflective loss, and counterclaims by respondent States.
- (v) Reform of cost management procedures, such as mechanisms for expedited review and principles/guidelines on allocation of cost and security for cost.
- (vi) Reform related to transparency of third-party funding of the ISDS process.²⁴

Because of the remarkable breadth and complexity of the potential reform, WGIII is also considering a unique multilateral instrument on ISDS reforms as a way to implement the different reform options. The multilateral instrument would act as an umbrella under which the reform alternatives could be hosted. Each Member State would have a kind of ‘menu of options’ and could, to a certain extent, decide which parts of the reform process they want to include in their own reform package.²⁵ At the same time, the issues identified for reform are so many and so complex, and they encompass so many aspects of ISDS that negotiating them simultaneously and in parallel is, by design, challenging. Additionally, should some of these proposal be logically considered before others? Is it possible to consider the establishment of both an appeal mechanism and a standing court, and at the same time the reform of arbitrators’ selection methods? It is still

²² For the schedule of meetings and the documents presented and discussed therein, see UNCITRAL, Working Group III, ‘Investor-State Dispute Settlement Reform’, https://uncitral.un.org/en/working_groups/3/investor-state (visited 13 October 2022).

²³ UNCITRAL, ‘Note from the Secretariat, Presentation of Reform Options’, A/CN.9/WG.III/WP.166, https://uncitral.un.org/en/working_groups/3/investor-state (visited 30 September 2022).

²⁴ See generally UNCITRAL, ‘Reform Options’, <https://uncitral.un.org/en/reformoptions> (visited 14 October 2022). For a tabular representation of the reform options, see UNCITRAL, ‘Note by the Secretariat—Possible Reform of Investor-State Dispute Settlement’, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/082/01/PDF/V1908201.pdf?OpenElement> (visited 18 December 2022).

²⁵ Ibid.

too early to make a definitive conclusion, but the decision to embark on the consideration of so many different options certainly makes the work of WGIII challenging and complex and its final outcomes uncertain.

Most of the reform proposals examined by WGIII suggest incremental and targeted changes to ISDS, while others propose more systemic changes.²⁶ Incremental options include, for example, party-controlled treaty interpretation, cost management procedures, and other reforms that would address specific concerns while leaving the overall ISDS system largely unchanged. They also include the introduction of the draft Code of Conduct for Adjudicators in ISDS, which aims at clarifying and identifying general applicable ethics standards. These are reform options that target and attempt to remedy specifically identified weaknesses of ISDS but that would not result in any major changes in the ISDS process itself. Conversely, systemic reforms comprise options that would lead to broad, systemic changes in ISDS, such as introducing a permanent multilateral investment court or creating an appellate body to review first-instance awards.²⁷ Systemic elements are highlighted in option (i) above. Incremental options are those enumerated in options (ii)–(vi).

While all the reform options under review at UNCITRAL are notable, systemic reform would be particularly consequential for the future of ISDS.

B. A systemic reform option: the creation of a permanent court for international investment disputes or an appeal mechanism

One of the most consequential reform proposals is the introduction of a permanent investment court or of an appeal mechanism, which would significantly alter ISDS as a dispute resolution mechanism.²⁸ The EU first proposed the establishment of a permanent international court, and indeed the EU has negotiated a permanent court in its most recent trade and investment treaties. The idea of a permanent investment court is now discussed more widely at UNCITRAL WGIII. It is worth noting that several existing international permanent courts, such as the International Court of Justice and the International Tribunal for the Law of Sea, find their origins in international arbitration. However, creating a permanent international court for investment disputes at this historical juncture would be momentous, as ISDS is already a fully developed system and superimposing a permanent court would change the system significantly.

As an alternative, some UNCITRAL members have proposed the creation of an appeal mechanism.²⁹ An appeal mechanism would be a permanent body with judges capable of reviewing awards to ensure consistency in the application and interpretation of international investment law. First-instance awards would be rendered by an arbitral tribunal appointed in line with the existing ISDS methods. These awards could then be appealed in a common mechanism by the parties.

Several discussions on the creation of these instruments have already taken place. Numerous initial drafts, notes, and reports have already been drafted by the UNCITRAL Secretariat and

²⁶ See Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration', 112 *American Journal of International Law* 410 (2018). Note that Roberts introduces three categories of reform: incremental, systemic, and paradigmatic. Paradigmatic reforms would replace ISDS with other international dispute resolution mechanisms such as domestic courts and state-to-state arbitration.

²⁷ For an excellent and compelling analysis of the different reform options, see Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law', 112 *American Journal of International Law* 361 (2018). See also Anthea Roberts and Tylor St John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty System', 116 *American Journal of International Law* 96 (2022).

²⁸ UNCITRAL, Note from the Secretariat—A/CN.9/WG.III/WP.213—Possible Reform of Investor-State Dispute Settlement (ISDS)—Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters (February 2022) https://uncitral.un.org/en/working_groups/3/investor-state (visited 13 October 2022).

²⁹ See, for example, the comments by China reported in Anthea Roberts and Taylor St John, 'UNCITRAL and ISDS Reform: Plausible Folk Theories', EJILTalk! (13 February 2020) <https://www.ejiltalk.org/uncitral-and-isds-reform-plausible-folk-theories/> (visited 13 October 2022).

have been discussed by WGIII. In Fall 2021, WGIII informally discussed issues related to the cost of establishing a standing multilateral tribunal and draft provisions for the selection and appointment of ISDS tribunal members.³⁰ Creating a permanent body would be truly groundbreaking for ISDS, which is now based on the international arbitral procedure and characterized by the selection by each party of ad hoc arbitrators who constitute tribunals that only exist for one specific case. At the same time, some critics say that it would undermine the very essence of ISDS, as parties often identify the ability to choose arbitrators as a key benefit of ISDS.

Thus, discussions on the potential establishment of a permanent court or an appeal mechanism allow for discussion of the very foundations of ISDS. Indeed, members of WGIII have considered core issues related to the very jurisdiction of arbitral tribunals and how to ensure that the term international investment is properly included and defined in the establishing instrument. Many other related topics have been considered, including the establishment and governance structure of the possible court, the selective representation of tribunal members and how this could impact the number of tribunal members, and the nomination, selection, and appointment processes, as well as more specific issues such as the terms of office, conditions of service, and assignment of cases.³¹

Similarly, a draft on the appeal mechanisms was discussed by WGIII, and numerous important comments were received on issues related to the scope and ground of appeal; the duration, effect, and timeline of appeal proceedings; and different options for the establishment of an appeal mechanism.³² Comments were submitted by a variety of stakeholders, including Canada, Russia, the UK, the EU, and Switzerland. As it is custom for WGIII, these comments were made public and indeed stakeholders' comments were solicited by WGIII and a specific deadline to present comments was given.

The establishment of a permanent court or/and the introduction of an appeal mechanism would be transformational for ISDS and for international legal systems generally. They would address several of the key concerns critics expressed in relation to ISDS. In particular, relying on a standing body would address issues of consistency and predictability of decisions, because decisions would be made by the same people (though separate and dissenting opinions would still be possible). A standing body would also address issues related to the independence and impartiality of decision makers, as permanent judges would not be allowed to engage in other professional activities and thus would have less potential for conflicts of interest. At the same, it is not clear how much support the creation of such permanent bodies has gathered. Critics are concerned that this may undermine the uniqueness of ISDS. Issues of feasibility and cost are also considered.

As a specialized international body, UNCITRAL has identified an important issue for reform and its WGIII has been working consistently and dutifully toward innovative solutions. The work on ISDS systemic reform is significant and potentially impactful. It is by no means an easy one, and future negotiations will show how and whether it is desirable, feasible, and supported by Member States.

³⁰ See the reports of the September and December 2021 informal meetings: UNCITRAL, 'Summary of the Chair and Rapporteur—Multilateral Permanent Investment Tribunal', https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/summary_informal_meetings_13_and_14_september_2021_en.pdf and 'UNCITRAL Working Group III (ISDS Reform)—Informal Online Meetings—6–10 December 2021', https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/summary_informal_meetings_6-10_december_final.pdf (visited 10 October 2022).

³¹ UNCITRAL, 'Short Summary of the Informal Meetings Held on 13–14 September 2021 on the Establishment of a Multilateral Permanent Investment Tribunal', https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/summary_informal_meetings_13_and_14_september_2021_en.pdf (visited 10 October 2022).

³² See, for example, UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate Mechanism', https://uncitral.un.org/en/working_groups/3/investor-state (visited 16 October 2022) and UNCITRAL, Note by the Secretariat: Possible Reform of Investor-State Dispute Settlement (ISDS)—Appellate Mechanism and Enforcement Issues, A/CN.9/WG.III/WP.202, <https://daccess-ods.un.org/tmp/8823093.17588806.html> (visited 14 October 2022).

C. An incremental reform option: the Code of Conduct for Adjudicators in ISDS

UNCITRAL WGIII is also focusing on another impactful reform option: the drafting of the Code of Conduct for Adjudicators in ISDS. This option is better understood as an incremental option that will have a significant impact on both the conduct of ISDS proceedings and the perception of ISDS by users and stakeholders.

The need for a code of ethics in ISDS is clear: as of now, there are no common applicable ethical provisions for arbitrators in ISDS. And while there is a general requirement that arbitrators are independent and impartial, there is no agreed definition of what that means. Arbitrators come from a variety of legal traditions and are bound and apply a variety of ethical norms, which may not be uniformly shared. This lack of clarity, consistency, and uniformity has resulted in confusion and misperception about what is the correct ethical behavior expected from arbitrators. It has also created mistrust between the parties, as one party might object to a certain behavior of an arbitrator in a case (e.g., on issues of disclosure or relations with other persons involved in a particular case), while the opposing party might not find it problematic. Several issues required clarifications, including how to define the essential principle of independence and impartiality in practice, the extent and content of the duty of disclosure in each specific case, whether to impose limits on how many cases an arbitrator could simultaneously be asked to adjudicate, and how and whether to regulate whether a person can act concurrently as a counsel and as an arbitrator in ISDS and other international cases (the so-called double-hatting).

Discussions at UNCITRAL WGIII highlighted a general consensus that some form of regulations of arbitrators' ethics is needed, and indeed the codification of applicable ethical rules seems ripe for elaboration. The WGIII reform process seems the natural place for the discussion to take place. A generally applicable code would provide a uniform approach to ethical requirements and elaborate concrete content to broad ethical notions and standards.

Importantly, and distinctively, in April 2019 WGIII requested both the UNCITRAL Secretariat and ICSID Secretariat, as major institutional players in ISDS, to assist in the drafting of a Code of Conduct for Arbitrators and Adjudicators in ISDS. The drafts of the Code and the preparatory commentary that have guided the work of WGIII have been prepared together by the two secretariats.³³

The drafting of the Code is at an advanced stage and has continued expeditiously despite the COVID pandemic, as numerous formal and informal meetings to discuss drafts have been organized by UNCITRAL WGIII.³⁴ Of the many incremental options considered by WGIII, the work on the Code is the most advanced. Version five of the Code, published in November 2022, addressed and resolved many of the core elements identified by WGIII as fundamental ethical issues. Many complex issues, however, remain. Specifically, WGIII members have failed to find an agreement on how to regulate the practice of double-hatting, that is, the practice of some arbitrators to also serve as counsel. Options that have been considered ranged from the complete banning of double-hatting to creating a simple duty of disclosure. WGIII members have agreed on a middle road, to regulate double-hatting, but how to do so is still unclear. Similarly, discussions on how to implement and enforce the Code once adopted continue, and there are no clear proposals on how to implement the Code uniformly among all potential users.

Given the current development in the drafting of the Code, it is expected that the Code will be presented to the UNCITRAL Commission for approval in 2023, a year after the initial—optimist—plan. This would be a major achievement in the ISDS reform process.

³³ For all the background documents and other commentaries and resources, see the excellent ICSID dedicated website: ICSID, 'Code of Conduct for Adjudicators in International Investment Disputes', <https://icsid.worldbank.org/resources/code-of-conduct> (visited 14 October 2022).

³⁴ For a complete list of materials, including reports, drafts, and notes by the UNCITRAL Secretariat, see UNCITRAL, 'Code of Conduct', <https://uncitral.un.org/en/codeofconduct> (visited 13 October 2022).

V. WGIII ISDS REFORM AS AN INCLUSIVE NEGOTIATION PROCESS

In addition to identifying issues for reform and developing draft texts for discussion, WGIII also provides a place where texts can be discussed, negotiated, and finalized. This working method may result in a significant transformation of ISDS.

Discussions at WGIII are remarkably inclusive. While the UNCITRAL Commission only has 60 members, all UN members can participate in the negotiations of ISDS reform options. Many actively do so and they are all granted the same privileges during the discussions. Additionally, observer organizations are also invited to participate.³⁵ Observer organizations include several academic institutions (such as universities and research centers), expert organizations (such as international legal associations), and representatives of corporate counsel and corporations.³⁶

The inclusiveness of the negotiation relates to both participation in formal and informal meetings and the possibility of submitting commentaries on proposed drafts. Indeed, WGIII routinely asks for comments from all participants within a specific time frame. These commentaries are collected, reviewed, and made public, and they serve as the backbone for further negotiations and the development of new drafts.³⁷

Multilateral negotiations are—obviously—multilateral, and though non-State stakeholders often participate in the negotiations, they often do so as members of a specific State's delegation and rarely are they able to speak with the same privileges as Member States. In WGIII, however, observers usually have the same ability to make oral interventions during formal meetings as States. They can also submit written comments on the same deadline. Given the sensitivity of the reform, this access to civil society is important. Such inclusiveness permits even non-State actors to fully express their views and for issues to be explored from a variety of angles. Eventually, it will, of course, be States that vote for the reform, but all stakeholders will have had the chance to inform the discussion and of being heard.

Additionally, UNCITRAL WGIII also works with other institutions. Importantly, UNCITRAL is working together with ICSID, another international organization, to develop the Code of Conduct. ICSID is a major actor in ISDS and its involvement is important. Collaborations between international organizations are rather unusual, and this is an additional demonstration of innovation. WGIII also collaborates with research institutes and organizations, such as the Academic Forum, to present new ideas.

The work of WGIII is also public. All the proposed drafts, reports, commentaries, and work programs are published on the UNCITRAL website and are easy to locate.³⁸ Indeed, WGIII meetings are often discussed in international law blog posts.³⁹

VI. CONCLUSIONS

WGIII ISDS reform project is an interesting example of how the work and mandate of international organizations continue to evolve. As new initiatives are taken on, international organizations become specialized and new working methods are developed. UNCITRAL has interpreted

³⁵ See the report on the negotiation in Anthea Roberts and Taylor St John, 'UNCITRAL and ISDS Reform: What to Expect When You're Expecting', EJILTalk! (5 October 2022) <https://www.ejiltalk.org/uncitral-and-isds-reform-what-to-expect-when-youre-expecting/> (visited 12 October 2022).

³⁶ On the presence of corporate counsel representatives (CGIAG) and American Corporations (USCIB), see Roberts and St John, above n 29.

³⁷ For example, for commentaries related to the draft Code, see ICSID, 'Code of Conduct for Adjudicators in International Investment Disputes—Code of Conduct Resources', <https://icsid.worldbank.org/resources/code-of-conduct> (visited 15 October 2022).

³⁸ See Working Group III: Investor-State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state (visited 17 October 2022).

³⁹ See, for example, the series by Anthea Roberts and Taylor St Johns on EJILTalk!, <https://www.ejiltalk.org> (visited 10 October 2022).

its mandate broadly and has become highly specialized on issues related to international economic law. More specifically, UNCITRAL has focused on ISDS, a highly specialized and novel field of international law.

As it embarks on a new and specialized initiative, UNCITRAL has adopted a specific work method characterized by the identification of an important field in need of reform. WGIII plays a pivotal role in ISDS reform as it provides and develops draft texts for discussion. WGIII also provides a place where the texts can be discussed, negotiated, and finalized that is inclusive and effective. This working method may result in a significant transformation of ISDS, which will also fill an important space in international dispute resolution.