Proposal for the development of a *"Multilateral Investment Reform Agreement"* to reform ISDS

Subsecretaría de Relaciones Económicas Internacionales
Gobierno de Chile

WP 182 (Chile, Israel, Japan, Mexico, Peru)

WP 182 - *Background*

- *Not all States face the same concerns*

- *Not all States need, want, or are in a position to implement the same solutions at the same time*

- *To attain the* ***widest possible participation of States*** *in reformed ISDS, we need to provide a* ***flexible framework to implement ripe solutions***

WP 182 – *General Principles*

- *Reform tools should be pursued independently from one another*

- *Reform tools should be implemented when they are ripe to allow early harvest of solutions achievable in the short term*

- *<u>All</u> reform tools identified, addressed and developed by the WG, can be incorporated in one instrument, a* ***Multilateral Investment Reform Agreement***

The Multilateral Investment Reform Agreement ("MIRA")

- *The MIRA will provide an implementation framework for all reform options*

- *The MIRA could contribute to achieve uniformity of the applicable procedural norms, and thus consistency and coherence of the investment regime as a whole*

- *The MIRA will enable countries to efficiently update their networks of older-style bilateral investment treaties*

WP 182
Commonality of Reform Tools

- *Broad agreement on nature of procedural tools*

- *WP182 Table highlights common approaches, with reference to a few recent treaties: CPTPP, EU-Mexico FTA, and USMCA*

REFORM MEASURE	CPTPP	EU-MEX FTA	USMCA
Concerns pertaining to arbitrators and decision makers			
Code of conduct/ethics rules	X	X	X
Rules limiting/prohibiting double-hatting		X	X
Special expertise requirements for arbitrators for certain claims (e.g., financial services)	X	X	X
Treaty-specific rules for arbitrator challenges		X	
Independent appointing authority (i.e., to appoint tribunal chair)	X		X
Disclosure of third-party funding		X	
Concerns pertaining to cost and duration			
Encouragement of mediation, conciliation, etc. to avoid formal disputes	X	X	X
Dismissal of frivolous claims	X	X	X
Expedited consideration of preliminary objections	X	X	X
Limitations periods/statute of limitations for bringing claims	X	X	X
Waiver of claims by parent/subsidiary under a different treaty once claims are submitted	X (sub)	X (sub)	X
Voluntary consolidation of similar claims brought under same treaty by different parties	X	X	X
Requirement to hold arbitration in a NY Convention state unless parties agree otherwise	X		X
Requirement for tribunals and parties to endeavour to act in a cost-effective and expeditious manner			X
Regulations on tribunal authority to order interim measures	X	X	X
Express permission for tribunal to award costs and attorneys' fees	X	X	X
Discontinuance of abandoned claims		X	X
Requirement that claimants name arbitrator when submitting a claim	X		X
Deadlines for the appointment of other arbitrators, including the chair	X		X
Concerns related to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals			
Waiver of pending or new claims in other dispute settlement forums once claims are submitted to arbitration	X	X	X
Waiver of claims by parent/subsidiary under a different treaty once claims are submitted	X (sub)	X (sub)	X
Voluntary consolidation of similar claims brought under same treaty by different parties	X	X	X
Special expertise requirements for arbitrators for certain claims (e.g., financial services)	X	X	X
Non-disputing Party submissions on treaty interpretation	X	X	X
Other third-party submissions (not limited to issues of treaty interpretation)	X	X	X
Binding joint interpretations by treaty Parties of treaty provisions	X	X	X
Tribunal-appointed experts	X	X	X
Publication of pleadings, awards, and other case documents related to treaty interpretation	X	X	X
Limitations on "treaty shopping"	X	X	X

WP 182 – MIRA
Implementation

- *Implementation could occur, among other approaches, through different treaty amendment processes, including:*
  - *Mauritius Convention on Transparency*
  - *MLI (Submission by the Government of Colombia)*

- *The UNCITRAL Secretariat and members of the Academic forum have published papers addressing the possible architecture of the instrument and the interaction of the multilateral instrument with the IIAs*

MIRA - Policy Considerations

- *Flexibility v. Uniformity*
    - *Feasibility of defining core provisions // minimum standards*

- *Opt-in v. Opt-out*

- *Convention with provisions **v.** Convention with protocols **v.** reservations **v.** declarations*

- *Phased entry into force could be challenging on a domestic level*

Thank you!