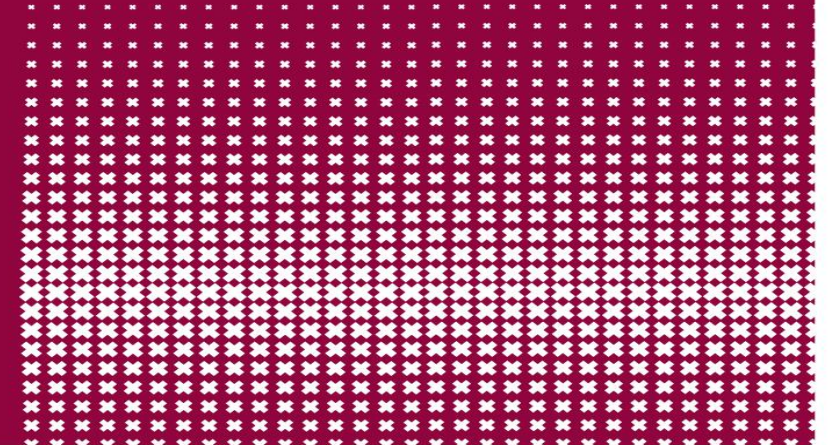




UNCITRAL – ISDS Academic Forum: Multilateral Instrument on ISDS Reform

14 May 2020



Multilateral Institution for Dispute Settlement on Investment: A Proposal for the UNCITRAL Process

Stephan Schill and Geraldo Vidigal

Structure of the Argument

- What Next at UNCITRAL?
- Consensus on Symptoms – Differences in Remedy
- Five Models for Investment Dispute Settlement
- Convergence and Divergence in these Models
- Proposal: Flexible Architecture under one Multilateral Institution (MIDSI)

The Problem

The Starting Point: The UNCITRAL Consensus

Reform is “desirable” to address concerns of

- (1) consistency, coherence, predictability, and correctness of arbitral rulings;
- (2) independence, impartiality, and diversity of decision-makers; and
- (3) costs and duration of proceedings.



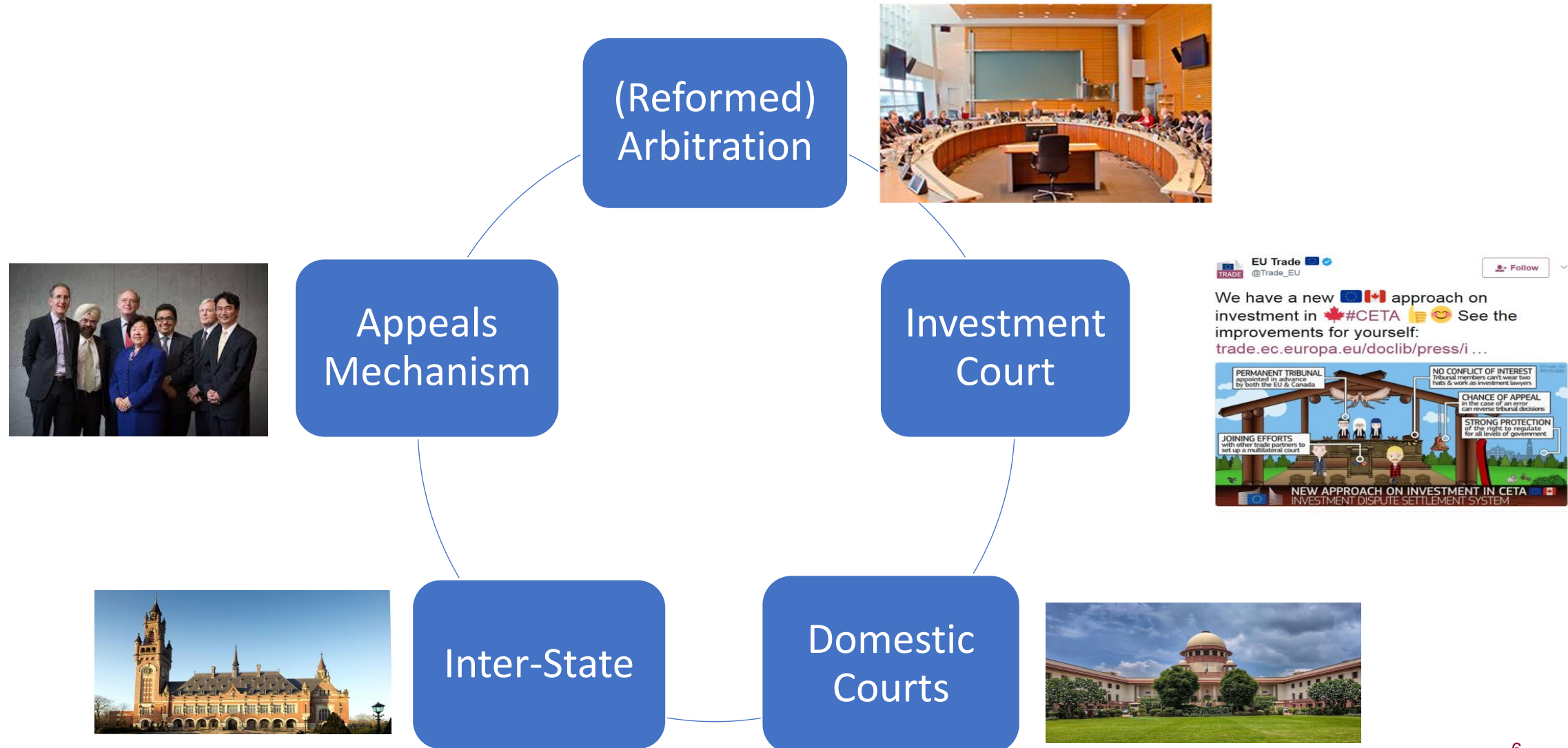
United Nations
UNCITRAL

➤ Need for a Multilateral Solution

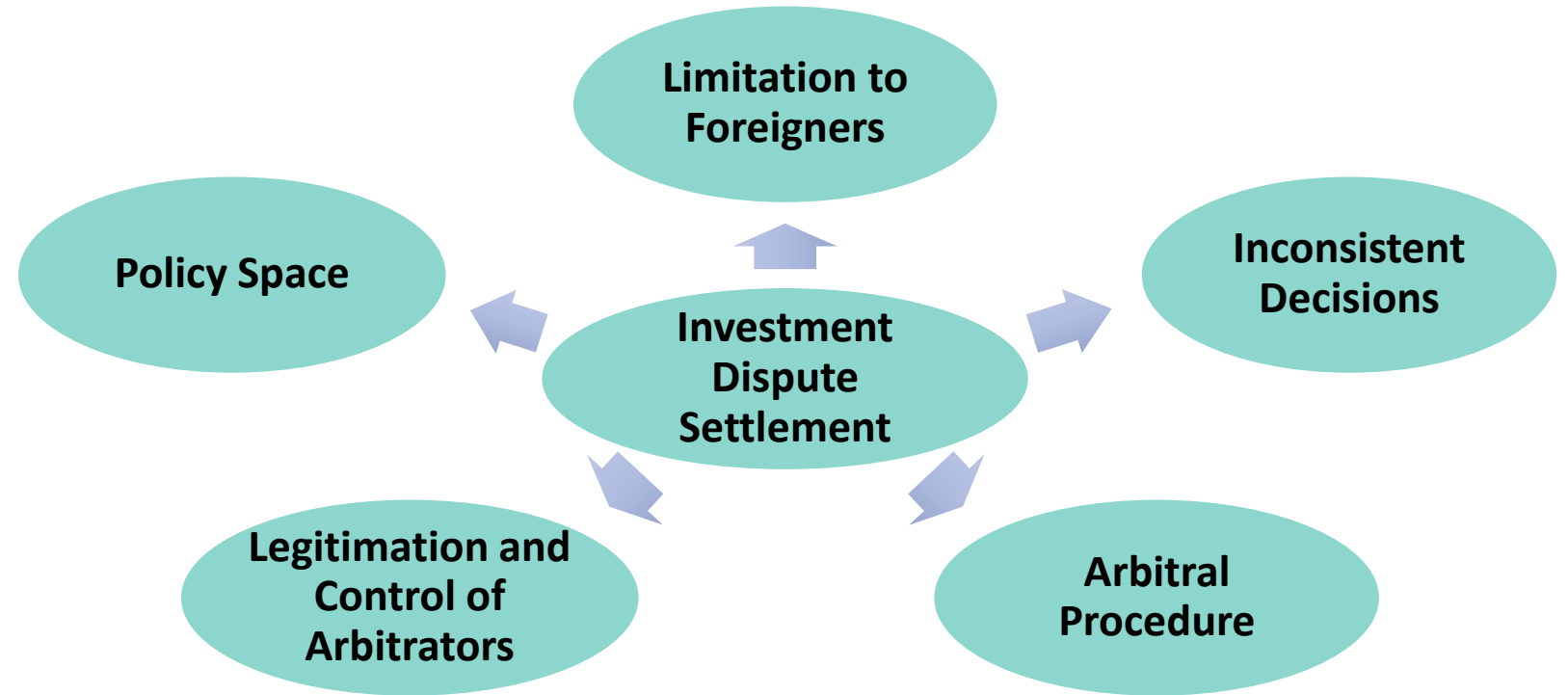
Elements of Convergence in ISDS Reform

1. Selective Judicialisation: Carve-Outs and Special Regimes
2. Dispute Prevention and Mediation
3. Joint Interpretations
4. Dispute Resolver Qualifications and Ethical Obligations
5. Transparency and *Amicus* Participation
6. Temporal Limitations for Claims
7. Early Dismissal of Frivolous Claims
8. Preventing Parallel, Overlapping, Subsequent Proceedings

The Problem: Competing Models for ISDS



Challenges



1. Rule of Law Accountability in ISDS
2. Democratic Accountability in ISDS

The Proposal

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The Multilateral Institution for Dispute
Settlement on Investment (MIDSI)

Underlying Method

Comparative Institutional Design Analysis

“analyzing the design features of other international dispute settlement mechanisms and bodies in order to draw inspiration for developing models for dispute settlement design”

- avoids working from scratch
- illustrates possible features of institutional design
- leaves evaluation of preferences with States

The Solution: Dispute Settlement à la Carte

Multilateral Institution for Dispute Settlement on Investment (MIDSI)

Administers

Multilateral
Investment
Court

Investor-State
Arbitration

Inter-State
Arbitration

State's Decision

Modes of Consent

'Optional Clause' (reciprocal/unconditional)

Bilateral Agreements

Unilateral Offer / Contract

UNCLOS Model (Options/Default)

Centripetal Force: The Multilateral Investment Court (MIC)

Dispute
Settlement
Functions

Procedural
Functions

Systemic
Functions

MIC - Dispute Settlement Functions

Court (First &
Last Instance)

Appeals from
Awards

Annulment of
Awards

Consent-based

MIC – Procedural Functions

Challenges to
Arbitrators

Provisional
Measures

MIC - Systemic Function

(Advisory)
Opinions

Preliminary
Ruling

MIDSI – The Organization

Elects/Checks
the Court

Technical
Assistance

Forum for
Negotiations

Law/Politics Balance

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- Stephan W. Schill and Geraldo Vidigal, 'Cutting the Gordian Knot: Investment Dispute Settlement à la Carte' (2018) (RTA Exchange) <https://www.ictsd.org/sites/default/files/research/rta_exchange_-_investment_dispute_settlement_-_schill_and_vidigal.pdf>
- Stephan W. Schill and Geraldo Vidigal, 'Designing Investment Dispute Settlement à la carte: Insights from Comparative Institutional Design Analysis (Jan. 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519259>