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.

➢ 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

- (Reformed) Arbitration
- Investment Court
- Appeals Mechanism
- Inter-State
- Domestic Courts
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
Stephan SCHILL
s.w.b.schill@uva.nl

Geraldo VIDIGAL
g.vidigal@uva.nl
