

## **Reform of Investor-State Dispute Settlement - UNCITRAL**

### **Shareholder claims and reflective loss**

*Webinar on 2 July 2020, 2-4 pm (CEST)*

The UNCITRAL Secretariat, the Organisation for Economic Co-operation and Development (OECD) and the ISDS Academic Forum are organizing a webinar on the topic of shareholder claims and reflective loss in the context of ISDS.

The webinar is open for participation to all delegations invited to UNCITRAL Working Group III and to the participants in the OECD inter-governmental Investment Roundtable that has addressed reflective loss claims in ISDS. Please contact the UNCITRAL Secretariat for the connection details at [uncitral@un.org](mailto:uncitral@un.org).

#### **Programme**

##### **Opening remarks (14:00-14:15)**

Anna Joubin-Bret (The Secretary, UNCITRAL)

Ana Novik (Head of the Investment Division, OECD)

Malcolm Langford (Academic Forum)

Shane Spelliscy (Chairperson, UNCITRAL Working Group III)

##### **Presentations (14:15-15:15)**

David Gaukrodger (OECD)

Julian Arato (Academic Forum and on behalf of other members, Kathleen Claussen, Jaemin Lee and Giovanni Zarra)

Sylvie Tabet (Canada)

Laura Antonella Marquez (Argentina)

##### **Discussion (15:15-15:55)**

Participants will be invited to make comments and ask questions.

##### **Concluding remarks (15:55-16:00)**

Ana Novik (Head of the Investment Division, OECD)

## **Annex 1: Note from the Chair of Working Group III (Shane Spelliscy)**

Distinguished Delegates,

I am pleased to introduce to you a webinar that is being jointly organized by the UNCITRAL Secretariat and the OECD. In this webinar, we will examine the issues of reflective loss and shareholder claims — subjects which we have yet to address in depth in our Working Group sessions. Further detailed information on these topics is available in two papers prepared by the Secretariat: WP 170 (Shareholder Claims and Reflective Loss) and WP 193 (Multiple Proceedings and Counterclaims). In addition, distinguished delegates will also find, on the Online Resources page of the UNCITRAL Working Group III website under the Selected Research Materials heading, a number of extensive and detailed papers and presentations prepared by the OECD on these issues.

As the Secretariat explains in WP 170, a reflective loss is an indirect injury suffered by the shareholders of a company when the company itself suffers an injury. Generally, in domestic corporate laws, as well as other systems of law, such claims are barred. However, they have often been permitted in ISDS – making the situation in ISDS almost unique. The ability to bring claims for reflective loss in ISDS can lead to the possibility of multiple claims being brought related to the same investment, same measure and for the benefit of substantially the same interests.

As recalled in the Secretariat's WP 193, in the Working Group's discussions on coherence, consistency, predictability and correctness, it was said that conflicting outcomes were more acute in situations of multiple proceedings. Multiple proceedings were also said to contribute to instances of unjustifiable inconsistency, to increases in cost and duration, and to distortions in the balance of interests between various stakeholders. Indeed, as has been said in the Working Group, the ability to bring claims for reflective loss has an impact across a number of the concerns that we have identified as warranting ISDS reforms.

We have heard from some delegations about tools that have been developed in their more modern treaties to address concerns about reflective loss, including defining the terms investment and investor in certain ways, limiting the standing of investors to claim for only certain types of damages, waivers and stays of proceedings, consolidation, coordination and joinder, and provisions preventing abuse of process.

When we consider these tools and other possible reforms once we return to the Working Group, there will be a number of tensions for us to resolve and interests to balance. These include considering concerns about shareholder claims and reflective loss together with the protections afforded to shareholders in investment treaties, with the fact that different treaties with potentially different intended coverages are involved, with how certain tools might function in light of the need for consent to arbitrate, and with the impact of certain tools on issues relating to party autonomy.

I look forward to the discussions at this webinar and hope that they provide new and useful information for delegations so as to facilitate the effective and efficient functioning of the Working Group when we resume our deliberations.

## Annex 2: Background documents

### UNCITRAL

[A/CN.9/WG.III/WP.170](#): Note by the Secretariat on shareholder claims and reflective loss

### OECD

*Discussions, questions and reactions of governments to the analysis of reflective loss claims in ISDS at OECD inter-governmental investment Roundtables:*

- [18th Roundtable](#) (Mar. 2013) (pp. 4-8)
- [19th Roundtable](#) (Oct. 2013) (pp. 12-19)

#### *Analysis*

- David Gaukrodger, [Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency](#), OECD Working Papers on International Investment, 2013/03
- [Treaty Shopping and Tools for Reform](#) (2018) (pp. 11-15)
- [Presentation on claims for reflective loss under investment treaties](#), made at the UNCITRAL Working Group III side meeting in January 2020

### ACADEMIC FORUM

Julian Arato, Kathleen Claussen, Jaemin Lee, and Giovanni Zarra, "[Reforming Shareholder Claims in ISDS](#)," Academic Forum on ISDS Concept Paper 2019/9.

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