Reform of Investor-State Dispute Settlement - UNCITRAL

Multilateral instrument on ISDS reform
Webinar on 14 May 2020, 2-4 pm (CEST)

The UNCITRAL Secretariat and the ISDS Academic Forum are organizing a follow-up webinar on the topic of a multilateral instrument on ISDS reform. This event will focus on the possible architecture of a multilateral instrument that would aim at providing the framework for the implementation of various reform options.

See attached:
- Note from the Chairperson of Working Group III (Annex 1)
- Chart on reform options (Annex 2)
- Background information (Annex 3)

The webinar is open for participation to all UNCITRAL Working Group III member and observer State delegations as well as inter-governmental and non-governmental organizations with observer status. Please contact the Secretariat for the connection details (uncitral@un.org) – then join on 14 May 2020, from 2-4 pm (CEST).

Programme

1. Opening of the session (2-2.20pm)
   Anna Joubin-Bret (The Secretary, UNCITRAL), Malcolm Langford (Academic Forum) and Shane Spelliscy (Chairperson of Working Group III)

2. Presentations by experts on possible models for a multilateral instrument (2.20-3.15 pm)
   Presenters:
   - Stephan Schill, Professor, Faculty of Law, University of Amsterdam
   - Anthea Roberts, Professor, School of Regulation and Global Governance (RegNet), Australian National University

3. Comments by participants (3:15-3:55 pm)
   Participants will be invited to make comments and raise questions.

4. Concluding remarks (3:55-4:00 pm)
   By Anna Joubin-Bret, The Secretary, UNCITRAL
An nex – Note from the Chairperson of Working Group III

Distinguished Delegates,

I take great pleasure in the news that we will shortly have a third webinar organized by UNCITRAL on the topic of ISDS reform. The previous webinars have been quite successful. We had hundreds of participants view both webinars – and in fact so many at the last one, that we had to rapidly switch to a larger “room.” Of course, we must recall that the purpose of these webinars is solely to facilitate the effective and efficient functioning of the Working Group, and that no decisions are taken in these meetings. Nevertheless, that fact does not in any way take away from the importance of these events, particularly during these difficult times. I take great pride in the fact that we are finding a way forward together while we must remain physically apart.

In our first webinar we discussed the possible creation of an international investment dispute advisory centre, and I understand that a follow up event on that discussion is already being planned. Our second webinar focused on an initial discussion of the possible creation of a new multilateral instrument for ISDS reform. It is to this latter topic that we turn again during out third webinar.

During our initial discussion of a possible multilateral instrument, there was a fair degree of complementarity in the presentations made. For example, those who spoke all seemed to say that any treaty that might be developed would have to address the issues created by both existing and future treaties. In this regard, they suggested that one of the challenges of the current system is its fragmentation, and they said that in order to avoid further fragmentation, any tool that might be developed should have a mechanism through which it could be applied to multiple parties with multiple past and future treaties.

There also seemed to be a recognition amongst speakers that if an instrument were to be developed, it would be useful to have a core set of obligations in order to achieve greater coherence. This mandatory core would then be supplemented with optional obligations governments could choose to accept or not. This flexibility in approach was said to be a way to ensure that any instrument would be an inclusive mechanism that would leave no State behind in our reform efforts.

However, while there was a great degree of complementarity in the presentations made, there were also clearly still some questions which will require further discussion as we move forward in our deliberations in the Working Group, when those deliberations resume. For example, there are architectural questions regarding any possible multilateral instrument. These include not just specific approaches or examples we might follow, but also design questions of a fundamental and basic nature, including questions concerning how the various choices governments might make in accepting certain options are to be interpreted, and who will interpret them in the case of disputes.

There are also further questions not just about architecture, but also about substance. What will be the core standards if any are to exist? While now is not the time to answer this in detail, some preliminary ideas were noted and it is clear that differences still exist.

In addition to these questions, there remain some further tensions that must be acknowledged. For example, the presenters during our initial discussion highlighted some tension between flexibility and coherence. If we choose to develop a multilateral
instrument, we could have ultimately flexibility by having no or limited core provisions, with everything else being an option. However, some speakers highlighted concerns and the need for balance because, it was said, such a highly flexible approach might exacerbate existing concerns with coherence and offer little in the way of needed system integration.

There was also tension identified by the speakers between the desire to have a single, unified instrument, and the ability to reap early harvests of reforms that ripen earlier than others. Again, those who spoke seemed to share a desire to avoid a fragmented series of investment reforms, preferring instead unification in an instrument, but at the same time, many recognized that certain reforms were easier fixes and others would require significantly more work. Speakers expressed a desire to have some of the benefits of the easy fixes while continuing work on the other reforms.

It is these tensions, and the hope to further understand them, that brings us to our third webinar. The two presenters today offer us some possible paths for our consideration that seek to reconcile these tensions and to turn them instead into opportunities for innovation. In this webinar, we will be provided further information on two possible mechanisms that were briefly raised and discussed in the first webinar. We will hear about the possible creation of a new international institution that could manage and centralize the administration of various reform tools and approaches, and about the possible negotiation of a framework agreement which would have docking stations that would allow for different reform tools to be implemented under a single, unifying, global agreement.

As I understand them, these approaches seek to offer for our future consideration tools that would allow for both flexibility and coherence; tools that could accommodate different reforms at different times; and tools that could encompass and integrate into one overarching structure or system, all of the reforms we are talking about in the Working Group.

I look forward to a “deeper dive” into these complex topics and to hearing your questions and comments as we learn more about these mechanisms and prepare for a future Working Group session.

Sincerely

Shane Spelliscy
Chair of Working Group III
Annex 2 - Chart on reform options

United Nations UNCITRAL

Treaty Interpretation Tools
State Control
Substantive Standards (ILC & others)

APPEAL
State-State Appeal
Standing Appellate Body/Appeal Mechanism
Appellate/2nd Instance Investment Court
ICSID Convention Mechanism

ADR
State-State Procedures
Investment Arbitration ICSID UNCITRAL
1st Instance Investment Court EU Proposal
Domestic Courts

Support to parties
Dispute Prevention Advisory Centre

Strengthen ADR; IS-Mediation; Ombudsman

The Multilateral ISDS Reform Agenda (MIRA)
The Multilateral ISDS Reform Agenda (MIRA)
Annex 3 - Background information

By way of background information, the first webinar on this topic, which took place on 12 April 2020, included presentations by delegations that made submissions on the possible means to implement the reform options. It also included presentations by experts on existing possible models (such as the UN Convention on Transparency in Treaty-Based Investor-State Arbitration (the Mauritius Convention) and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting). Further information and a recording of the first webinar are available at https://uncitral.un.org/en/multilateralinstrumentwebinar.

The following documents contain information on the history and current status of the discussion on a multilateral instrument in Working Group III and provide a basis for the discussions. Further material can be found on the UNCITRAL website (https://uncitral.un.org/en/working_groups/3/investor-state).

- Presentation annexed to this programme
- Document A/CN.9/WG.III/194, Note by the Secretariat on a multilateral instrument on ISDS Reform

