

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

Annex 1 – 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 our 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.

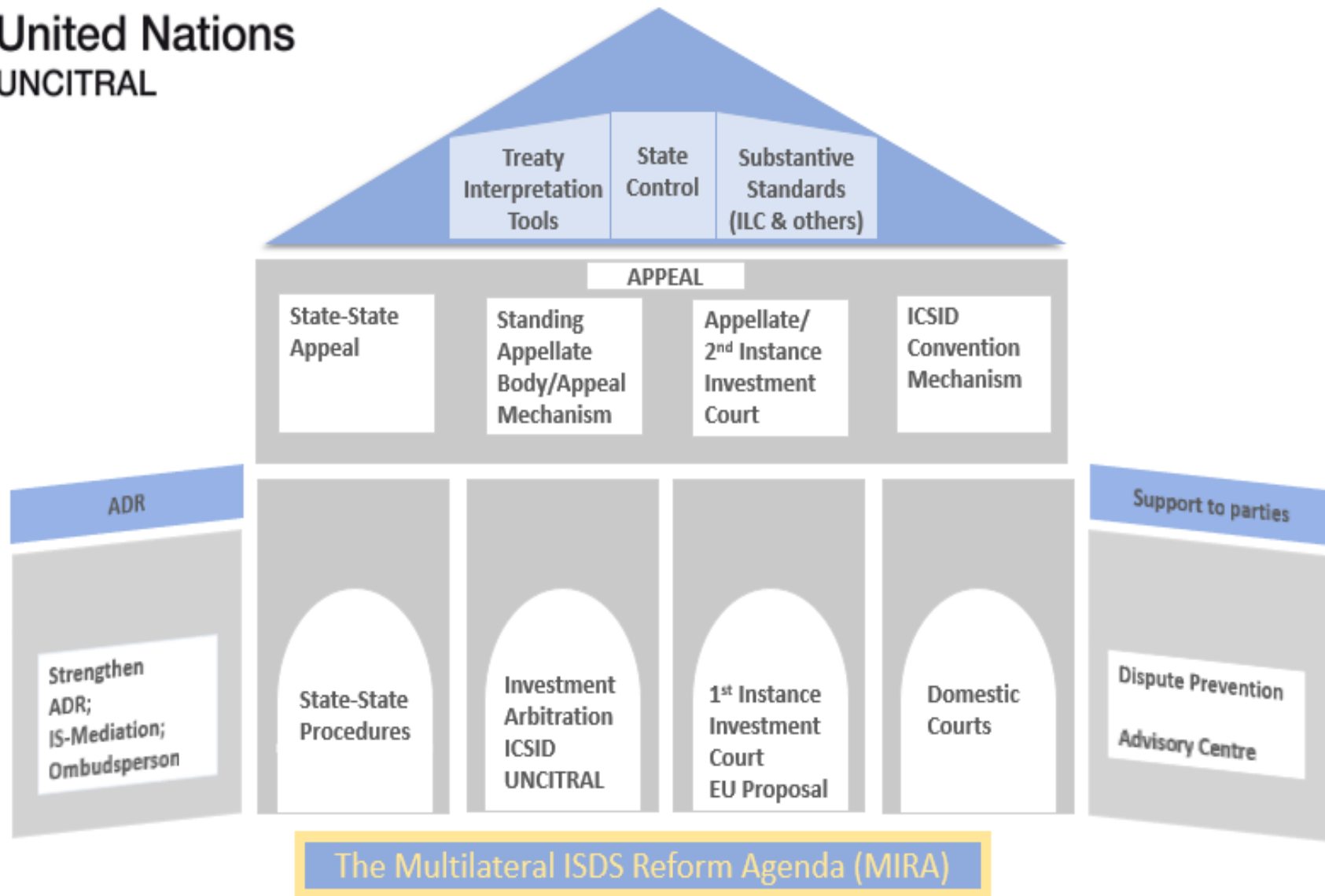
As I understand them, these approaches seek to offer for our future consideration tools that would allow for both flexibility and coherence; tools that could accommodate different reforms at different times; and tools that could encompass and integrate into one overarching structure or system, all of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

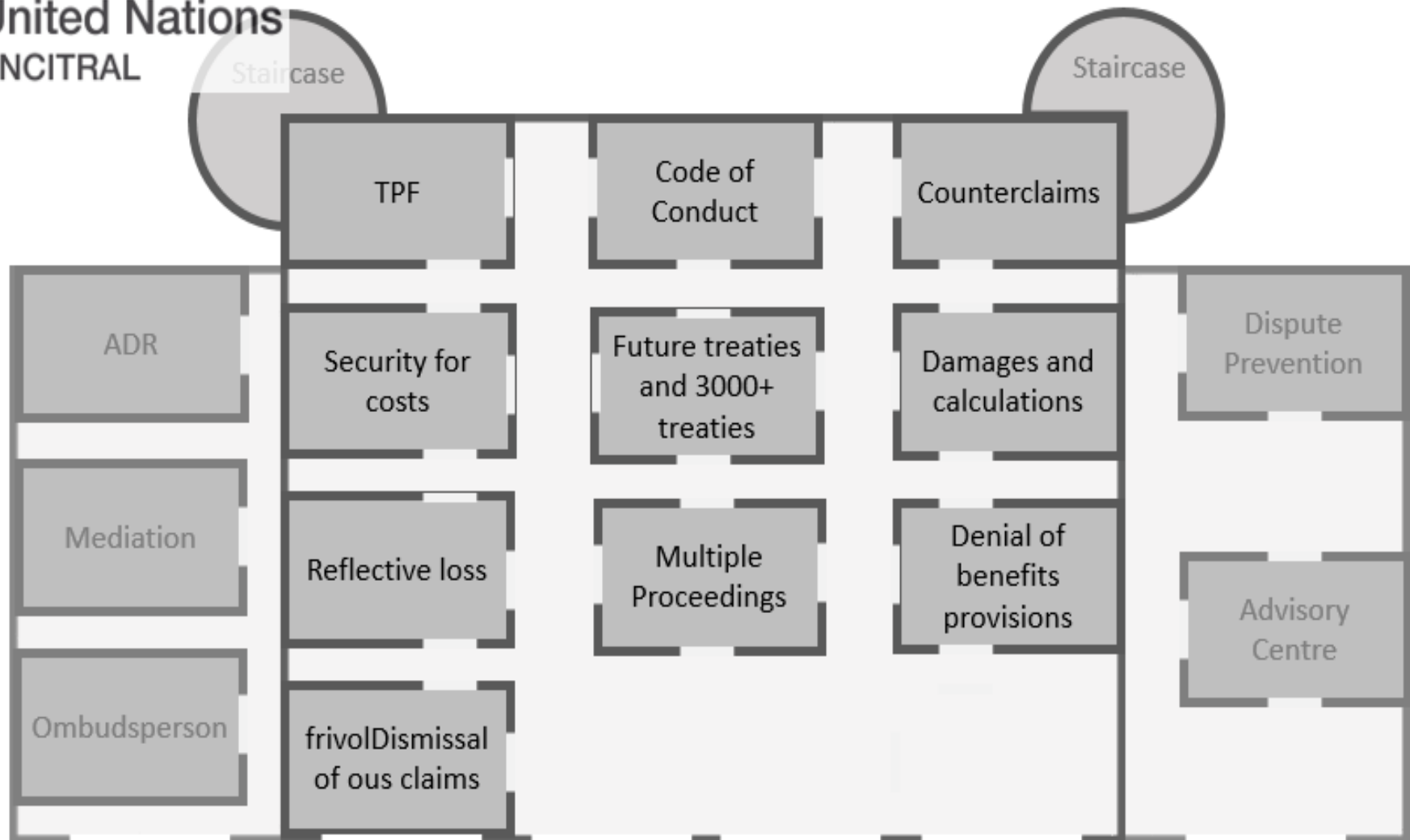
I look forward to a “deeper dive” into these complex topics and to hearing your questions and comments as we learn more about these mechanisms and prepare for a future Working Group session.

Sincerely

Shane Spelliscy
Chair of Working Group III

Annex 2 - Chart on reform options





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 for 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/WP.194](#), Note by the Secretariat on a multilateral instrument on ISDS Reform
- Document [A/CN.9/1004](#), Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)
- CIDS Research Paper, Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap, Section VII, pp. 75–93, by Gabrielle Kaufmann-Kohler and Michele Potestà, (the “CIDS report”) available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf
- The OECD Multilateral Tax Instrument: A Model for Reforming the International Investment Regime? Brooklyn Journal of International Law, Vol. 45, Issue 1 (2019), Ottawa Faculty of Law Working Paper No. 2019-09, by Wolfgang Alschner, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311256
- Cutting the Gordian Knot: Investment Dispute Settlement à la Carte (2018) (RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB)), by Stephan W. Schill and Geraldo Vidigal, available at https://www.ictsd.org/sites/default/files/research/rta_exchange_-_investment_dispute_settlement_-_schill_and_vidigal.pdf
- Designing Investment Dispute Settlement à la carte: Insights from Comparative Institutional Design Analysis (2019) (2019) 18 Law &

Practice of Int'l Courts & Tribunals 311-341, also available as Amsterdam Law School Research Paper No. 2020-03, Amsterdam Center for International Law No. 2020-02, by Stephan W. Schill and Geraldo Vidigal, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519259

- UNCITRAL and ISDS Reform: Visualising a Flexible Framework, EJIL: Talk 24 October 2019, by Anthea Roberts and Taylor St. John, available at <https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/>
- Reforming International Investment Arbitration: an Introduction, in The Law & Practice of International Courts and Tribunals, by Chiara Giorgetti, Laura Létourneau-Tremblay, Daniel Behn and Malcolm Langford, available at https://brill.com/view/journals/lape/18/3/article-p303_4.xml
- See also bibliographic references published by the Academic Forum, available under “Additional resources” at https://uncitral.un.org/en/working_groups/3/investor-state or <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/> and <http://bit.ly/isds-academic-forum>
