

Reform of Investor-State Dispute Settlement - UNCITRAL

Treaty Interpretation

Webinar on 4 June 2020, 2-4 pm (CEST)

The UNCITRAL Secretariat and the ISDS Academic Forum are organizing a webinar on the topic of treaty interpretation and control by States Parties over the interpretation of their investment treaty in the context of ISDS. It will in particular focus on the existing framework which foresees unilateral, joint and multilateral interpretations and the current practice.

See attached:

- Note from the Chairperson of Working Group III (Annex 1)
(*English – French*)
 - Background information (Annex 2)
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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 at uncitral@un.org and join on 4 June 2020, from 2-4 pm (CEST).

Programme

1. Opening of the session (2-2.20pm)

Welcome remarks by Anna Joubin-Bret, Secretary, UNCITRAL, Malcolm Langford, Academic Forum, and Shane Spelliscy, Chairperson, Working Group III.

2. Presentations (2.20-3.30 pm)

By Members of the Academic Forum:

- *The dual role of States as respondents and treaty Parties: subsequent practice in the application of the treaty*, by Gabriel Bottini, Adjunct Professor, University of Buenos Aires;
- *Treaty Parties' role in treaty interpretation: joint committees and commissions*, by Yuliya Chernykh, Guest researcher PluriCourts (University of Oslo);
- *The role of State Parties in IIA interpretation: Past practice and implications for reform*, by Lise Johnson, Columbia Centre for Sustainable Investment (CCSI);

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- *The Timing of Treaty Party Interpretations: A Treaty-Design Perspective*, by Catharine Titi, Research Associate Professor, CNRS-CERSA, University Paris II Panthéon-Assas.

The session will be chaired by Daniel Behn, Senior Lecturer, Queen Mary University, School of Law

By Government Representatives:

- Sylvie Tabet, Representative of the Government of Canada;
- Jaemin Lee, Representative of the Government of Korea;
- Cindy Rayo, Representative of the Government of Mexico;
- Karin Kizer and Nicole Thornton, Representatives of the Government of the USA.

3. Comments by participants (3:30-3:55 pm)

Participants will be invited to make comments and ask questions.

4. Concluding remarks (3:55-4:00 pm)

Anna Joubin-Bret, Secretary, UNCITRAL

Annex 1 – Note from the Chairperson of Working Group III

Distinguished Delegates,

In the next webinar in the series organized by the UNCITRAL Secretariat and the Academic Forum, we are turning to a topic that we have yet to address in depth in our Working Group sessions – the use of interpretative tools by the Parties to a treaty.

Delegations will recall that in Phase I of our work, we identified concerns about incorrectness, unjustifiable inconsistency, and a lack of predictability and coherence in ISDS decisions. We have considered already some possible reforms that certain delegations have suggested can address these issues, including in particular, the creation of an appellate mechanism and a multilateral investment court. However, other delegations questioned the efficacy and advisability of those reforms and stated that there were more effective tools to achieve the objectives relating to increasing correctness, consistency, predictability and coherence in awards, including a greater role of for the treaty parties in treaty interpretation.

The Secretariat's Working Paper, [A/CN.9/WG.III/WP.191](#), provides us with detailed further information on this latter option. In particular, it notes that there are a number of examples of treaty Parties taking a greater role in treaty interpretation instead of leaving it solely to ISDS tribunals. For example, treaty Parties have taken a role in interpretation through unilateral, joint or multilateral interpretative declarations, guidance to tribunals on the meaning of certain standards, binding interpretations, and the establishment of joint committees and commissions on interpretative issues.

The Secretariat's paper also raises a number of issues for our further consideration, such as the dual role of States as respondents and treaty Parties, the rights granted to foreign investors by investment treaties, and the distinction between amendments and interpretations. The paper also raises a number of considerations for us in designing potential tools with respect to the timing of treaty party involvement, i.e. during the negotiations, after the conclusion of the treaty, when a dispute arises and after the dispute has been concluded.

I look forward to a first preliminary discussion of these issues and considerations at the next webinar. I once again take the opportunity to emphasize that the purpose of these webinars is solely to facilitate the effective and efficient functioning of the Working Group. No decisions are taken in these meetings and these webinars do not in any way replace the Working Group. No delegation will in any way be prejudiced by the fact that it has not participated in any of these events. These webinars are solely for informational purposes.

Shane Spelliscy

Chairperson of Working Group III

Mesdames et messieurs les délégués,

Lors du prochain webinaire organisé par le Secrétariat de la CNUDCI et le Forum Académique, nous allons aborder une question que nous n'avons pas encore traitée de façon approfondie lors de nos sessions du Groupe de travail III, à savoir l'utilisation par les parties à un traité d'outils interprétatifs.

Vous vous souviendrez que lors de la 1^{ère} phase de notre travail, nous avons identifié des préoccupations portant sur l'irrégularité, le manque d'uniformité injustifié ainsi que le manque de prévisibilité et de cohérence dans les décisions relatives au RDIE. Nous avons déjà examiné plusieurs réformes possibles qui, selon certaines délégations, pourraient répondre à cette question, notamment la création d'un mécanisme d'appel et d'un tribunal multilatéral d'investissements. Toutefois, d'autres délégations ont contesté l'efficacité et l'opportunité de ces réformes et ont déclaré qu'il existait des outils plus efficaces pour réaliser les objectifs permettant d'améliorer la justesse, la prévisibilité et la cohérence dans les sentences, y compris un rôle plus important laissé aux parties en matière d'interprétation des traités.

Le document de travail du Secrétariat, [A/CN.9/WG.III/WP.191](#), fournit des informations plus détaillées sur cette option. En particulier, il indique qu'il y a de nombreux exemples de Parties assumant un rôle plus important dans l'interprétation des traités, plutôt que de s'en remettre uniquement aux tribunaux tranchant des affaires de RDIE. Par exemple, les Parties au traité ont participé à l'interprétation par le biais de déclarations interprétatives unilatérales, communes ou multilatérales, d'indications aux tribunaux sur le sens de certaines normes, d'interprétations contraignantes et de la mise en place de comités et de commissions mixtes chargés des questions d'interprétation.

Le document du Secrétariat pose aussi un certain nombre de questions que nous devons examiner, telles que le double rôle des Etats en tant que défendeurs et Parties au traité, les droits accordés aux investisseurs étrangers et la différence entre modifications et interprétation. Le document comporte aussi plusieurs considérations pour nous guider lors de la création d'outils potentiels concernant le moment de la participation des Parties au traité, c'est à dire pendant les négociations, après la conclusion d'un traité, lors de la naissance d'un litige et une fois que le litige a été réglé.

J'attends avec impatience un premier débat préliminaire sur ces questions et considérations lors de notre prochain webinaire. Je saisis à nouveau cette occasion pour souligner que le seul objectif de ces webinaires est de faciliter le fonctionnement efficace et efficient du Groupe de travail. Aucune décision ne sera prise lors de ces réunions et ces webinaires ne cherchent aucunement à remplacer le Groupe de travail. Aucune délégation ne sera d'aucune façon désavantagée si elle ne participe pas à ces réunions. Ces webinaires sont uniquement informatifs.

Shane Spelliscy
Président du Groupe de travail III

Annex 2

Background information

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).

- Document [A/CN.9/WG.III/WP.191](#) Note by the Secretariat on a treaty interpretation
- 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>
