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### **Investment dispute settlement à la carte within a multilateral institution: A path forward for the UNCITRAL process?\***

by

Stephan W. Schill and Geraldo Vidigal\*\*

In November 2018, the consensus that investor-state dispute settlement (ISDS) needs to be reformed received multilateral imprint: UNCITRAL's Working Group III agreed that reform is "desirable" with respect to (1) consistency, coherence, predictability, and correctness of arbitral rulings; (2) independence, impartiality and diversity of decision-makers; and (3) costs and duration of proceedings.<sup>1</sup>

Recent investment agreements entered into by key international actors demonstrate a willingness to advance along the same lines. The [Comprehensive and Progressive Agreement on Trans-Pacific Partnership](#) (CPTPP) (which succeeded the [Trans-Pacific Partnership](#) (TPP) after the US withdrawal), the [United States-Mexico-Canada Agreement](#) (USMCA), the [Comprehensive Economic and Trade Agreement](#) (CETA) concluded between the EU and Canada, [Brazil's Cooperation and Investment Facilitation Agreements \(CIFAs\)](#),<sup>2</sup> and [India's 2016 model bilateral investment treaty](#) (BIT), all seek increased transparency, enhanced efficiency and the implementation of mechanisms for more effective state control over substantive rules and their interpretations.

However, in relation to dispute-settlement design, these key models diverge starkly. The CPTPP and the USMCA, which texts reflect the US position, retain investor-state arbitration but reform it. The EU is proposing the establishment of a Multilateral Investment Court (MIC) that would replace investment arbitration entirely.<sup>3</sup> India's model BIT strengthens the role of domestic courts by re-introducing the exhaustion of local remedies rule. Finally, Brazil's CIFAs feature inter-state adjudication rather than ISDS.

It is of course tempting to seek multilateral consensus by opening a debate about the pros and cons of each model; in fact, this is what the proponents of each model currently do, within UNCITRAL and beyond. At the same time, it is unlikely that one model will find universal support, as the different positions on investment dispute-settlement design reflect largely entrenched political stances. The predictable outcome of every party sticking to its own

model—institutional fragmentation—threatens the achievement of key objectives of the current reform process, in particular the aim to enhance consistency, coherence and predictability. Therefore, the question arises whether the Gordian Knot can be cut, and the mutually incompatible dispute-settlement design models reconciled.

We propose adding to UNCITRAL’s agenda discussions on the establishment of a Multilateral Institution for Dispute Settlement on Investment (MIDSI), which could provide an umbrella for “dispute settlement à la carte”. Building on the idea of an “open architecture”<sup>4</sup> and the approach to dispute settlement under the United Nations Convention on the Law of Sea,<sup>5</sup> a MIDSI would not feature compulsory jurisdiction, but would rather allow states and organizations to opt into the dispute-settlement mechanism of their choice. Apart from administering inter-state and investor-state arbitrations, the MIDSI would also encompass, as one of its pillars, the proposed MIC.

On an opt-in basis, the MIC could perform different roles for different states, serving as a fully-fledged two-tiered investment court for some and as an appeals body or annulment institution for others. Even for those that do not opt to use it for adjudication, the MIC could carry out such procedural functions as deciding on challenges to arbitrators or rendering provisional measures before an arbitral tribunal is constituted. Finally, the MIC could perform “systemic” functions that are currently absent in investment dispute settlement, such as issuing advisory opinions or rulings on preliminary references by arbitral tribunals or even national courts, thus providing clarity on specific points of interpretation and resolving inconsistencies that have arisen under the current system.

The MIDSI, of which the MIC is part, could also serve as a forum for future investment treaty negotiations. While at the outset it could be expected that the law applicable to investment disputes would remain fragmented, over time states could use the MIDSI to collectively develop new rules, addressing for example standards of protection or investor obligations.

A key challenge in reforming investment dispute settlement is to prevent the divergent models and proposals currently being floated from leading to a fragmented system. The establishment of a MIDSI would address that risk. It would provide a solution for disagreements on dispute-settlement design by establishing an institutional framework within which participants can agree to disagree—and still effectively cooperate multilaterally in settling investment disputes and shaping the future of the international investment regime. Such an institutional framework would not only promote procedural convergence in investment dispute settlement, but could also provide states with a long-term tool for building a comprehensive investment governance system, including substantive matters.

While details of organizational structure, mandate, competence, and relations to existing institutions, including the International Centre for Settlement of Investment Disputes or the Permanent Court of Arbitration, would need to be negotiated, establishing a MIDSI would create a structure for consensus-building, adjudication and negotiation at the multilateral level

and reassure states that they remain sovereign to decide on their preferred model for settling investment disputes.

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<sup>1</sup> [UNCITRAL, "Draft report of Working Group III \(investor-state dispute settlement reform\) on the work of its thirty-sixth session," A/CN.9/964, November 6, 2018.](#)

<sup>2</sup> A list of CIFAs signed so far is available at <https://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu>.

<sup>3</sup> See ["Submission of the European Union and its Members States to UNCITRAL Working Group III" \(18 January 2019\)](#).

<sup>4</sup> *Ibid.*, para. 39.

<sup>5</sup> [United Nations Convention on the Law of Sea, Part XV.](#)

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