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

Schill, S.W.; Vidigal, G.

Citation for published version (APA):
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.¹

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),² 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.³ 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 (MIDS1), which could provide an umbrella for “dispute settlement à la carte”. Building on the idea of an “open architecture” and the approach to dispute settlement under the United Nations Convention on the Law of Sea, a MIDS1 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 MIDS1 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 MIDS1, 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 MIDS1 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 MIDS1 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 MIDS1 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.

* The Columbia FDI Perspectives are a forum for public debate. The views expressed by the author(s) do not reflect the opinions of CCSI or Columbia University or our partners and supporters. Columbia FDI Perspectives (ISSN 2158-3579) is a peer-reviewed series.

** Stephan W. Schill (s.w.b.schill@uva.nl) and Geraldo Vidigal (g.vidigal@uva.nl) are, respectively, Professor and Assistant Professor at the University of Amsterdam. This Perspective draws on ideas presented in Stephan W. Schill and Geraldo Vidigal, “Cutting the Gordian Knot: Investment dispute settlement à la carte,” RTA Exchange (Geneva: ICTSD, 2018). The authors are grateful to Jan Paulsson, Anthea Roberts and Giorgio Sacerdoti for their helpful peer reviews.


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

3 See “Submission of the European Union and its Members States to UNCTICAL Working Group III” (18 January 2019).

4 Ibid., para. 39.


The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "Stephan W. Schill and Geraldo Vidigal, ‘Investment dispute settlement à la carte within a multilateral institution: A path forward for the UNCTICAL process?’, Columbia FDI Perspectives, No. 248, March 25, 2019. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the Perspectives, please contact: Columbia Center on Sustainable Investment, Marion A. Creach, marion.creach@sciencespo.fr.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at http://www.ccsi.columbia.edu.

**Most recent Columbia FDI Perspectives**

- No. 247, Karl P. Sauvant, “The state of the international investment law and policy regime,” March 11, 2019
- No. 246, Joachim Pohl, “Is international investment threatening or under threat?,” February 25, 2019
- No. 245, Carlos Esplugues, “A future European FDI screening system: solution or problem?,” February 11, 2019
- No. 244, Mark Feldman, “China’s Belt and Road investment governance: building a hybrid model,” January 28, 2019
- No. 243, Karl P. Sauvant, “Five key considerations for the WTO investment-facilitation discussions, going forward,” January 14, 2019