

Reforming the International Law of Foreign Investment – State of Play in International Organizations

‘The UNCITRAL Working Group III Process’

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UNCITRAL Working Group III Agenda

- ‘(i) first, **identify and consider concerns** regarding ISDS;
- (ii) second, consider **whether reform was desirable** in light of any identified concerns; and
- (iii) third, if the Working Group were to conclude that reform was desirable, **develop any relevant solutions** to be recommended to the Commission.’

- UNCITRAL Working Group III, Annotated Provisional Agenda (15 Sept. 2017)

Key Concerns

A. Outcomes of decisions

- consistency
- coherence
- predictability
- correctness

B. Arbitrators

- qualifications
- independence and impartiality
- diversity and representiveness

Prevalence of Arbitrators from Asia in ICSID cases

	Number of cases	Total number of ICSID cases	Per cent of all ICSID cases
ASEAN MS nationals			
Malaysia	12	45	5.8 %
Philippines	9		
Singapore	24		

Asian nationals			
ASEAN MS	45	69	8.9 %
China	8		
Japan	2		
Republic of Korea	14		

Note: Out of a total of 768 cases featured on ICSID's website. Includes treaty-based and contract-based disputes brought under the ICSID rules (ICSID Convention or ICSID AF) or administered by ICSID. The consolidated cases of *Churchill Mining Plc v Indonesia* and *Planet Mining Pty Ltd v Indonesia* are here counted as a single case and a single appointment.

Source: ICSID website

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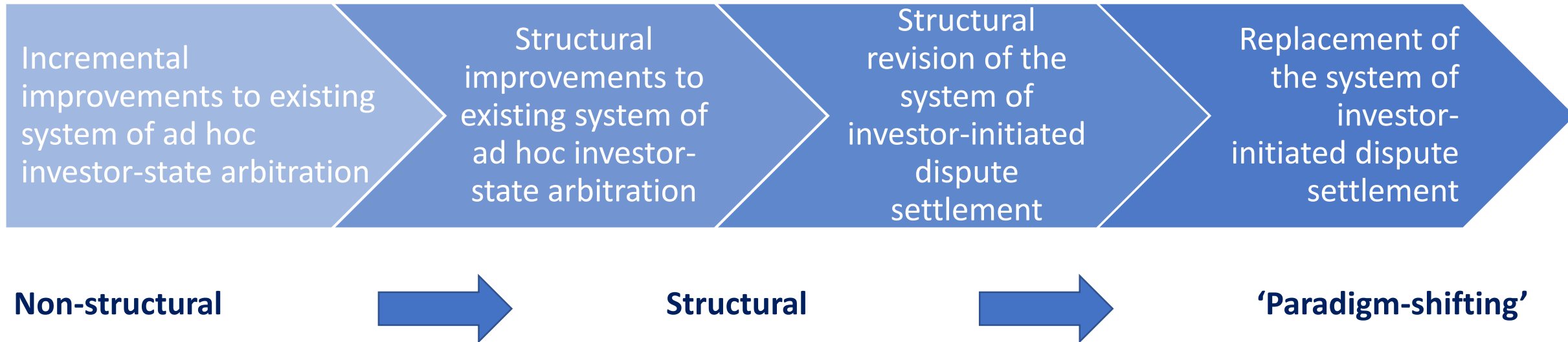
C. Cost and duration

- size of awards
- arbitral/legal costs and recovery
- third party-funding
- duration

D. Procedural imbalance

- state control over access to ISDS
- state control over treaty interpretation
- state capacity to defend ISDS claims

A Continuum of ISDS Reform



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State Positions

“Non-structural” reformers

“Structural” reformers

“Paradigm- shifters”

	Appellate mechanism	Multilateral Investment Court	
United States	China	European Union	Brazil
Russian Federation	India	Canada	
Japan	Argentina		

Current WGII Workplan

1. ADR Mechanisms and Dispute Prevention

- Dispute settlement mechanisms other than arbitration (ombudsman, mediation)
- Local remedies (model clauses)
- Frivolous claims, including early dismissal
- Multiple proceedings, reflective loss and counterclaims (e.g., consolidation, stay of proceedings, exchange of information among tribunals)

2. Selection and Appointment of Arbitrators

- Selection, appointment and challenge (including, e.g., appointing authorities, rosters etc.)

3. Code of Conduct

4. ISDS Procedural Rules Reforms (and ‘Cross-cutting Issues and Damages’)

- Control mechanisms for treaty interpretation
 - Joint interpretation mechanisms
 - *Renvoi*
 - IIA committees
 - Cooperation between state authorities

- Cost management:
 - Expedited procedures
 - Cost allocation - Security for costs orders
 - Other tools (e.g., ceiling for costs, processes to enhance budget consciousness)
- Damages
- Third party funding

5. Multilateral Advisory Centre

6. Appellate Mechanism

- Scrutiny of awards prior to issuance
- Post-award actions like interpretation, revision, annulment

7. Multilateral Permanent Investment Court

8. Multilateral Instrument to Implement Reforms

Current WGIII Workplan (2021-2026)

	ADR Mechanisms and Dispute Prevention	Selection and Appointment of Arbitrators	Code of Conduct	ISDS Procedural Rules Reforms ¹	Multilateral Advisory Centre	Appellate Mechanism	Multilateral Permanent Investment Court	Multilateral Instrument to Implement Reforms
WG Days	7	4	4	12	6	9	8	10
Other Days ²	8	7	4	13	7	12	12	14
Total	15	11	8	25	13	21	20	24
Timing	2021-23	2022-26	2021-22	2021-25	2021-24	2022-25	2021-25	2021-26

¹ Including 'Cross-cutting Issues and Damages'.

² Other meetings and inter-sessional meetings.

Total Working Group Days: 60

Total 'Other Days': 77

Total: 137

Source: A/CN.9/WG.III/WP.166/Add.1 (30 Jul 2019)

Initial Draft Secretariat Papers for Comment

Establishment of an advisory centre

- Initial draft (2 documents) on services, beneficiaries, costs and financing
- For comments until 15 July 2021

Regulation of third-party funding

- Initial draft for comments until 30 July 2021

Draft Code of Conduct for Adjudicators Version Two

- Version Two of the draft for comments
- First Reading in 41st session in November 2021

Implementation and Enforcement of the Code of Conduct

- Draft note for comments
- Envisaged for discussion in 41st session in November 2021

Source: UNCITRAL Secretariat (as of 2 June 2021)

Initial Drafts in Preparation

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Appellate mechanism	
Cost of establishing a permanent body	
Damages	<ul style="list-style-type: none">• Expected release of the initial draft: end of June 2021
Dispute prevention and mitigation	
Enforcement of decisions by a court or appellate body	
Mediation	<ul style="list-style-type: none">• Expected release of the initial draft: end of June 2021
Multilateral Investment Court	
Procedural rules reform and cross-cutting issues	
Selection and appointment of arbitrators	<ul style="list-style-type: none">• Existing paper on the selection and appointment of ISDS tribunal members, to be updated as needed
Treaty interpretation	

Source: UNCITRAL Secretariat (as of 2 June 2021)

Observations on the Process

- Increasingly complex
- Major capacity challenges for developing states
- Questions about the availability of resources within UNCITRAL
 - Secretariat; translation, esp. inter-sessional/'other' meetings
- Asian participation ('leadership'?)
 - Significant by developed states (e.g., Japan, Korea, Singapore)
 - Less from China
 - ASEAN participation (Indonesia; Thailand; Viet Nam)