

# Reform of the ISDS System

## - Lessons from Other International Dispute Settlement Mechanism

Workshop on Possible Approaches to a Multilateral Reform of the ISDS System

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*“The best thing you can do is the right thing; the next best thing you can do is the wrong thing; the worst thing you can do is nothing.” - Theodore Roosevelt*

# Order of Presentation

- Taking Stock of the ISDS System
- Reform of the ISDS System
- Lessons from Other International Dispute Settlement Proceedings
- Glimpse of Specific Issues
  - Standing Court
  - Appellate Proceedings
- Concluding Thoughts

# Where We Stand

- 51 years
- 3,324 International Investment Agreements (IIAs”)
- 767 (Known) Investment Arbitrations
- Increasing interest in and concern over ISDS System
- September 2015 proposal and emerging consensus
- Have reached a critical juncture
- Can or will we change gear or course?

# Proposed Reform - Main Ideas

- **Standing Tribunal**
- **Appellate Mechanism**
- Mediation Proceeding
- Third Party Funding
- Strengthened Ethics Code
- Enhanced Transparency
- Enhanced Third Party Right
- Enhanced Non-Disputing Party Right

# Bilateral Court – An Example

- EU TTIP Proposal Article 9 – Tribunal of First Instance
  - 15 judges, 5 from each Party and 5 from third countries
  - Expertise in international investment law or trade law
  - 6 year term
  - President of the Tribunal
  - 3 member division hears a dispute
  - A standing entity
  - 2,000 Euro per month for retainer fee w/payment for hours worked
  - Part-time basis now, but can turn into a full-time basis

# Bilateral Appellate Mechanism – An Example

- EU TTIP Article 10 – Appeal Tribunal
  - 6 members
  - 2 from each Party and 2 from third countries
  - 3 member division
  - 6 year term
  - 7,000 Euro per month with fees for hours worked
  - No authority to issue a final award
  - No authority of remand (or automatic remand)
  - Limited scope of appellate review



# In short...

- The recent ISDS reform discussion aims to:
  - Introduce more judicialization for ISDS proceedings
  - Introduce more procedural guardrails for ISDS proceedings
  - Enhance the legitimacy of the ISDS proceedings
  - Enhance the transparency of the ISDS proceedings
  - Address the concerns from domestic constituents

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# Future Discussions and Elaboration

- Final Destination:
  - Bilateral Court(s) vs. Multilateral Court
- Mere Upgrade or Structural Changes:
  - Compatibility with existing IIAs including ICSID Convention
  - Keep or abandon the existing regime
- Redefining the Concept
  - Moving away from arbitration to judicial adjudication
  - Confirming consensus
- Short Stay in Way Station
  - Plans in the interim
  - Avoiding further fragmentation of the international investment regime

# Lessons from Other Int'l Dispute Settlement Proceedings

- Various international courts provide useful observation
  - International Court of Justice
  - Permanent Court of Arbitration
  - ICSID
  - U.S.-Iran Claims Tribunal
  - State-to-State Dispute Settlement Proceeding in FTAs
  - World Trade Organization
- Among these, arguably the WTO's DSM offers the most meaningful and reliable information
  - Gradual Judicialization
  - Successful Appellate Proceeding
  - Different views and interest canvassed for the past 22 years
  - Disputes-tested (529 disputes)
  - Its own reform process under way since 1997

# Lessons from Previous Experience

- Standing Court Mechanism

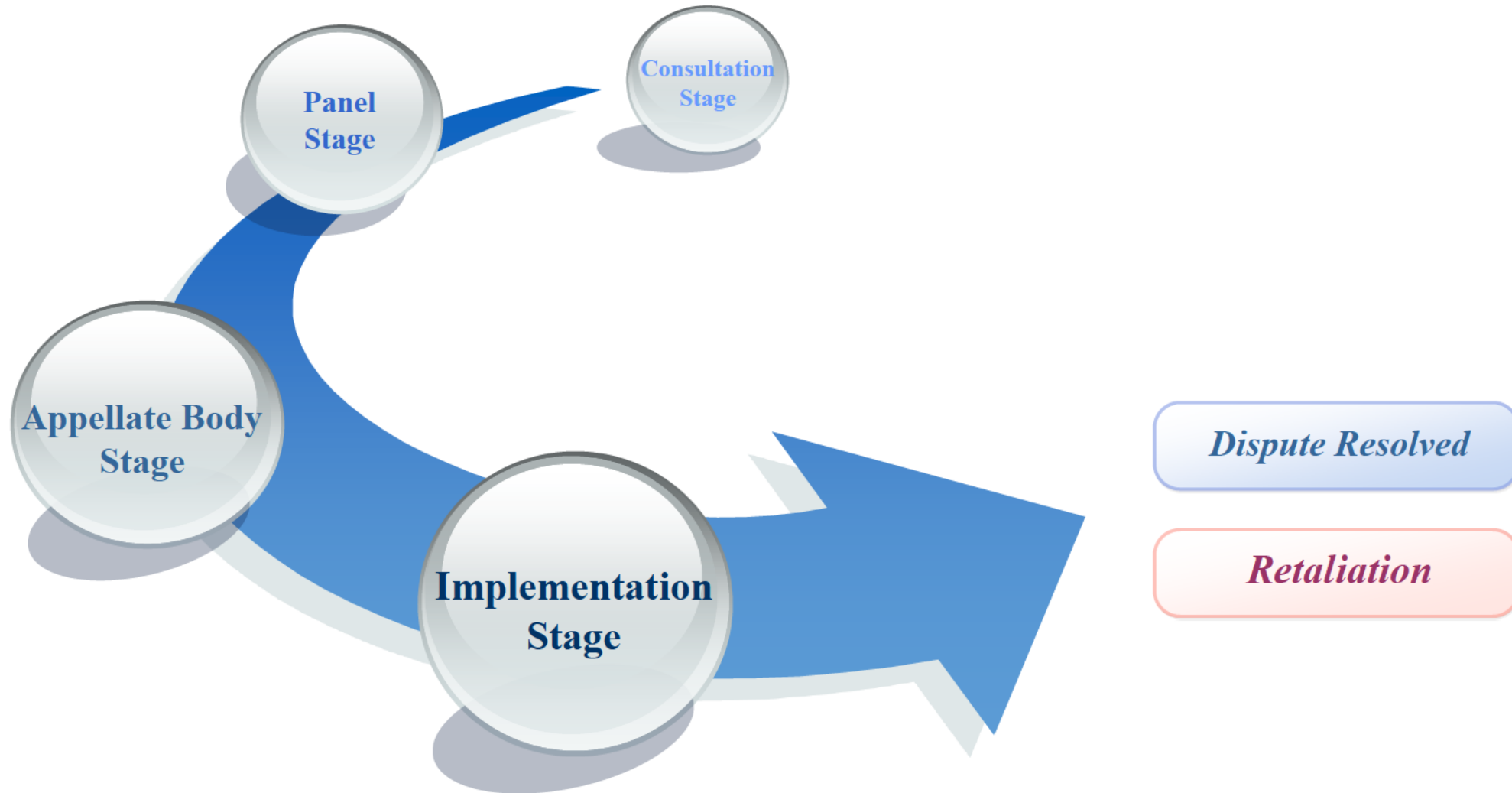
# International Investment Court

- From *ad hoc* arbitration to standing judicial proceedings
  - New logistical issues
  - New financial issues
- Legal document:
  - A bilateral IIA or
  - A multilateral convention
- Contracting parties in the driver's seat of the proceedings
  - Regulatory authority vs. Foreign investor protection
  - Adjustment of balance
- Significant departure from the existing regime
  - Possibly fundamental changes of the 1966 framework

# Experience and Lessons from WTO Proceedings

- Investment court discussion may have to address:
  - Selection of judges for the court
  - Profile of judges – expertise or diversification
  - Relationship with the appellate tribunal
  - Management of enhanced ethics rules
  - Handling financial and logistical burden
  - (Not) Accommodating developing states' situations
  - Management of enhanced transparency
  - Creation and administration of a secretariat

# WTO Dispute Settlement Procedure



# Lessons from Previous Experience

## - Appeals Mechanism



# Appellate Mechanism in ISDS

## ❖ Widespread Consensus

- Ideas already reflected in the texts of recent IIAs
- Look at the WTO's Appellate Body

## ❖ Increasing concern over single, one-time decision making process

- Given the importance of the national interest at stake
- Given the complexity of legal issues
- Decisions from Appellate Tribunal may easy to implement domestically

## ❖ Ensuring consistency of jurisprudence

- Sometimes conflicting decisions of respective tribunals at present
- An appellate mechanism will be able to facilitate and foster 'rule of law'
- Increase predictability
- Reduces unnecessary disputes

# Experience and Lessons from WTO Proceedings

## ❖ Successful operation and contribution of the WTO Appellate Body

- Enhanced rule of law
- Accumulation of important jurisprudence
- Still unwavering status in the surge of FTAs

## ❖ Key Questions:

- Nature of appeal
- Composition of an appeal tribunal
- Scope of appeal
- Remand authority
- Logistical support

# Specific Issues – Nature of Appeal

- ❖ How to define the nature of an appeal in the ISDS proceeding
  - An appellate mechanism as an avenue to offer a ‘second bite at the apple’
    - i.e., one more chance to be heard before a different set of adjudicators
  - Or a ‘genuine’ appellate proceeding
    - Which would largely resemble appellate proceedings in domestic courts or WTO
- The former scheme:
  - An appellate system may simply repeat *ad hoc* nature of investment arbitration
    - Parties would have to agree upon the appellate jurisdiction one way or another; select appellate arbitrators for their proceeding only; agree on the place of arbitration, etc.
- The latter scheme:
  - A standing appellate tribunal is to be established beforehand, either bilaterally or multilaterally, with a clear description of appellate jurisdiction

# Specific Issues – Composition of Appellate Tribunal

## ❖ Key Outstanding Issues:

- Bilateral vs. multilateral
- Where to be located
- How to select appellate judges (or members) – expertise or diversification
- Whether and how to consider regional representation
- How to regulate appellate judges' participation in other proceedings or work
- Compensation scale
- How to define the relationship between the new appellate procedure and the existing annulment proceeding
- The issue of collegiality

# Specific Issues – Logistical Support

## ❖ Key Outstanding Issues:

- How to constitute and maintain a secretariat
- How to maintain a secretariat separate from that of the Tribunal of First Instance
- Where to locate the secretariat in the absence of an international organization
  - Compare with WTO
- How to manage cost and administrative burden
- How to recruit professionals who can help draft final reports or awards
- Keeping the stipulated deadlines despite heavy caseloads

# Specific Issues – Scope of an Appeal

## ❖ How to define the scope of an appeal

- Whether review covers both factual and legal issues, or legal issues only
- Whether review is permitted for the award of the Tribunal of First Instance only

## ❖ Possibly a legal-issues-only approach

- But still sometimes complex, given WTO experience
- Difficult to separate legal and factual issues in int'l economic disputes
  - DSU Articles 11, 17.6
- Completing analysis on its own
  - Can the Appellate Tribunal complete the analysis when factual information is on the record?

# Specific Issues – Remand Authority

- ❖ Interaction and/or relationship between Appellate Tribunal and Tribunal of First Instance
- ❖ Decision to (or not to) introduce a remand authority
  - What should an appellate tribunal do when the Tribunal of First Instance has failed to apply a proper legal standard?
  - Can the appellate tribunal complete the analysis *de novo* or should it send (i.e., remand) the case back to the original tribunal?
  - What if factual information on the record is lacking or somehow insufficient?
- ❖ Potentially significant impact
  - A decision on the introduction or non-introduction of a remand would alter the dynamics and structure of any future appellate proceeding

# Concluding Thoughts



# A Multilateral Court

- Global Community Stands at a Critical Turning Point
- A Multilateral Court
  - A ‘single’ multilateral court
  - Perhaps the most viable option to address this issue
  - The most efficient way to address the current problem
- Addressing Structural Issues:
  - Practical and logistical burden
  - Compatibility with existing framework
  - Managing the situation in the interim
- The “Mauritius Convention” Approach
  - A tried and proven path

# Mauritius Convention – A proven path

## *Convention on Transparency in Treaty-Based Investor-State Arbitration*

- Text Adopted in July 2014 UNCITRAL Meeting in New York
- Applies UNCITRAL Transparency Rules to pre-April 1, 2014 BITs
- New ideas, new attempt
- States have an option to:
  - Accede to the convention
  - Carve out BITs that they want to leave outside the Transparency Rules
- This option has been made possible through “reservations”

# Mauritius Convention – A proven path

- Preamble
- Article 1 - Scope of Application
- Article 2 – Application of UNCITRAL Rules on Transparency
- Article 3 – Reservation
- Article 4 – Formulation of reservations
- Article 5 – Application to investor-State arbitrations
- Article 6 – Depositary
- Article 7 – Signature, ratification, acceptance, accession
- Article 8 – Participation by regional economic integration org.
- Article 9 – Entry into force
- Article 10 – Amendment
- Article 11 – Denunciation of this Convention

# The Initiative of UNCITRAL

- UNCITRAL's Decision
  - 50<sup>th</sup> Commission Session in July 2017
  - Designates the ISDS Reform as one of the core tasks for the future
- UNCITRAL WG III
  - Assigned to this issue
  - First session scheduled to convene in late November 2017
  - Reform proposals for ISDS to be discussed
  - Investment court and appellate mechanism
  - Set to change the existing framework of the ISDS System

# The Mandate for WG III

- The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement...The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate...

*Report of the United Nations Commission on International Trade Law, Fiftieth session (3-21 July 2017), para. 264.*



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Thank you.

