

UNCITRAL and ISDS Reform: A Flexible Framework

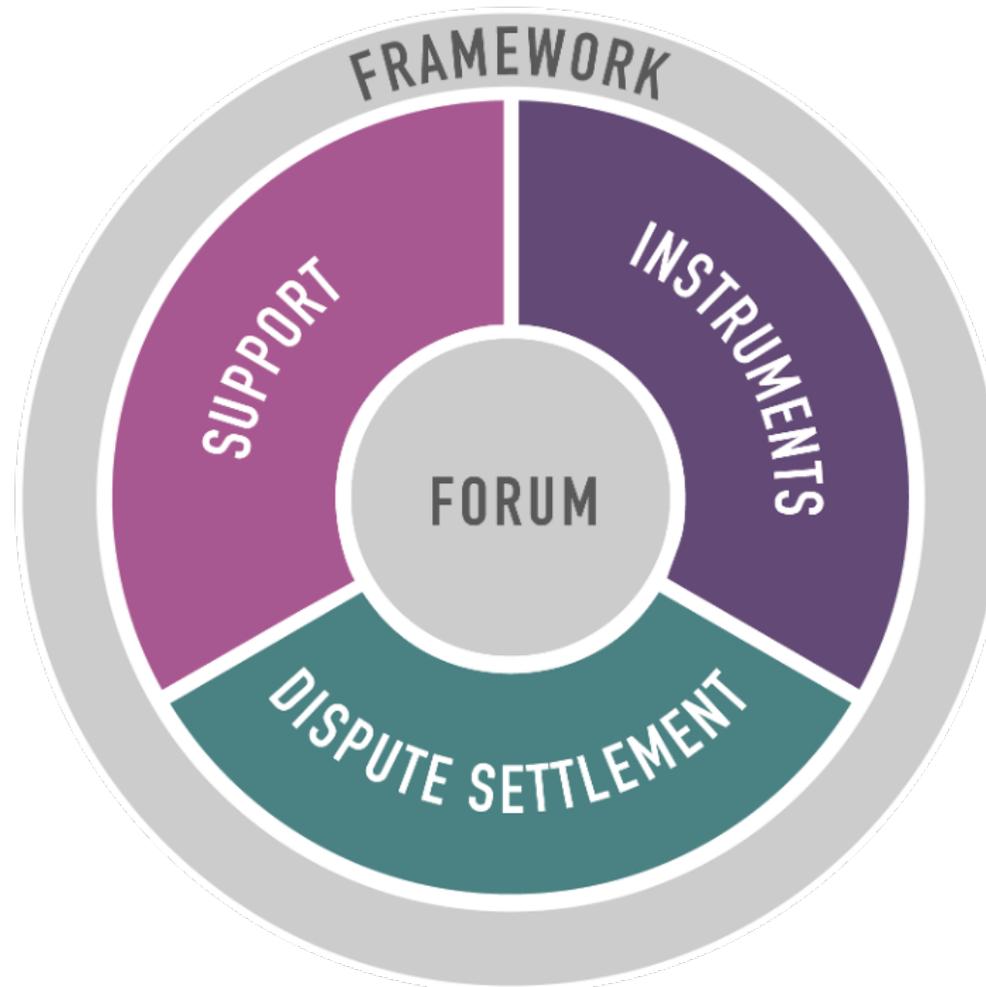
by

**Anthea Roberts, Taylor St John
and Wolfgang Alschner**

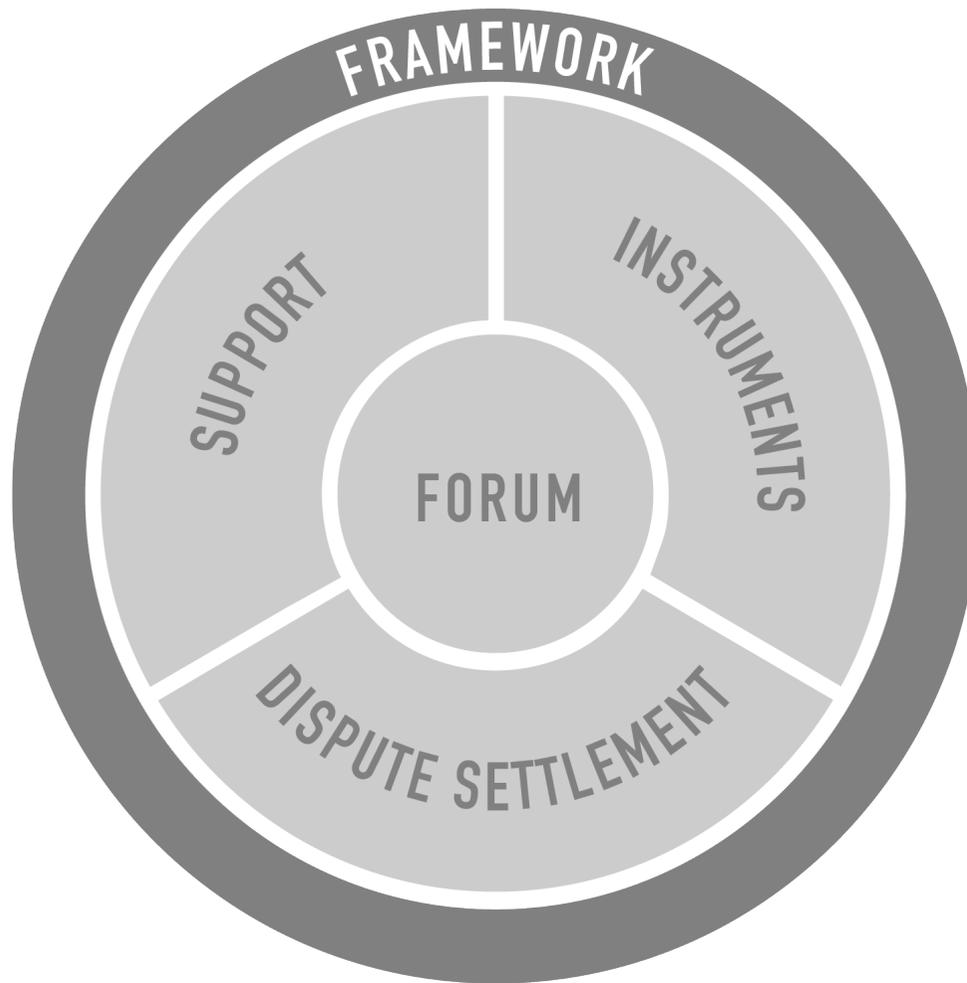
Guiding Principles

- Listening to UNCITRAL delegates
- Equality of concerns
- Some centralization & minimum standards
- But flexible & adaptable

Developing a Flexible Architecture

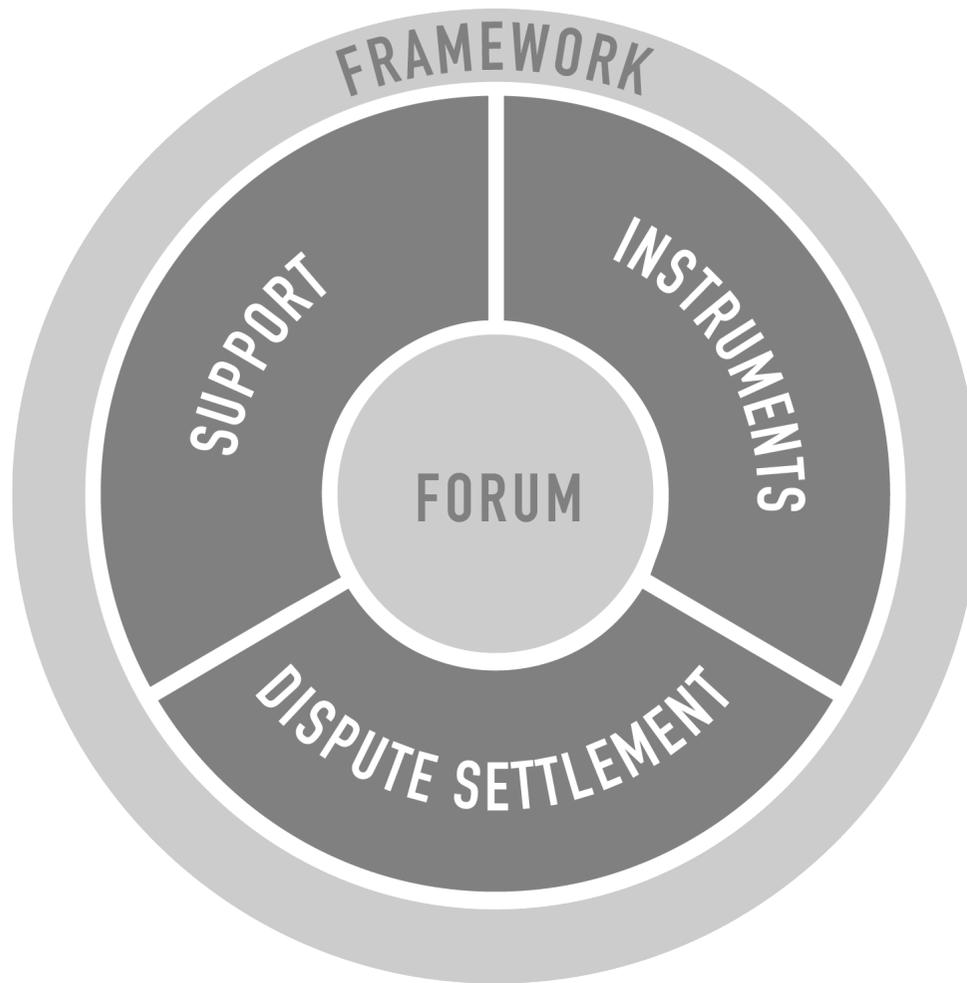


Developing a Flexible Architecture



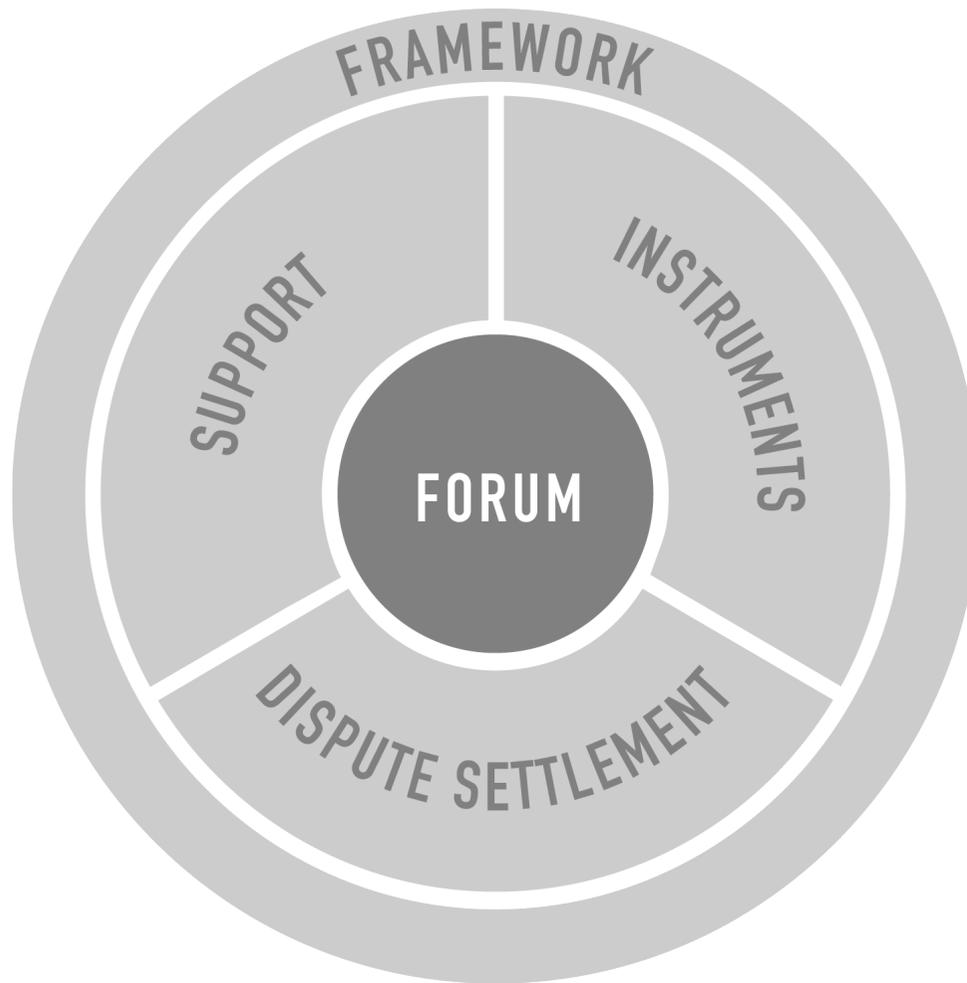
1. Framework convention

Developing a Flexible Architecture

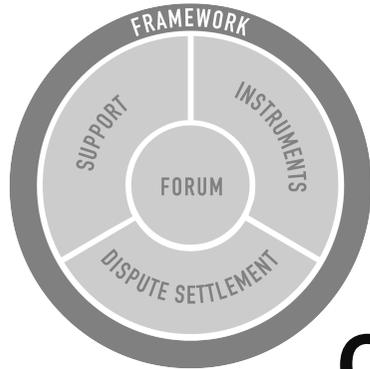


1. Framework convention
2. Separate protocols

Developing a Flexible Architecture



1. Framework convention
2. Separate protocols
3. Central forum



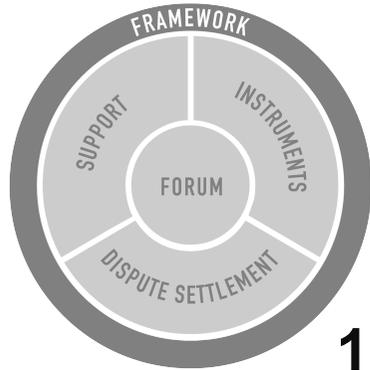
1. Framework Convention

Convention + Protocol model

a. Provides coherence but flexibility

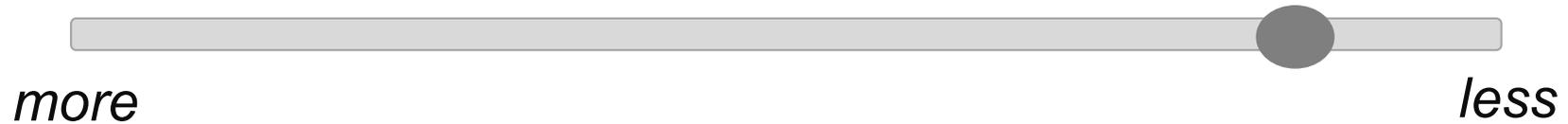
b. Many examples in other areas

- UN Framework Convention on Climate Change
- WHO Framework Convention on Tobacco Control
- WTO multilateral and plurilateral agreements



1. Framework Convention: Design Considerations

1) How detailed is the framework convention?



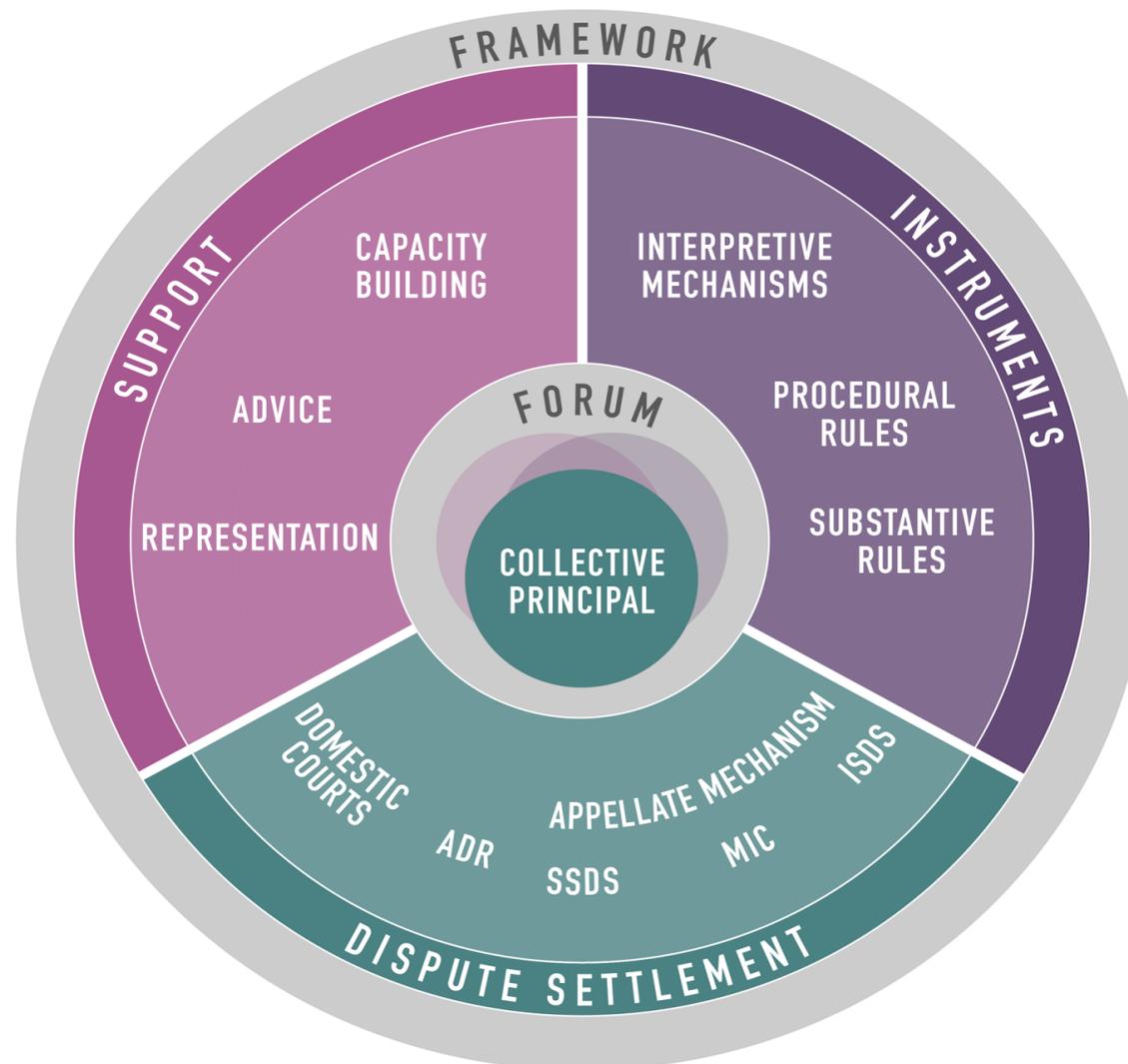
2) How autonomous are the protocols?

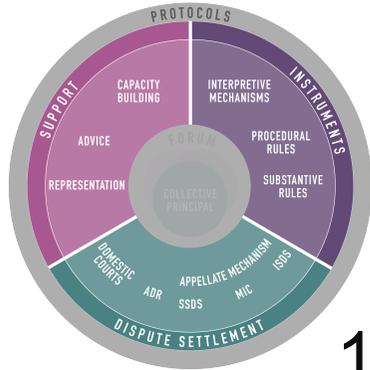


3) How much agreement is needed to add a protocol?



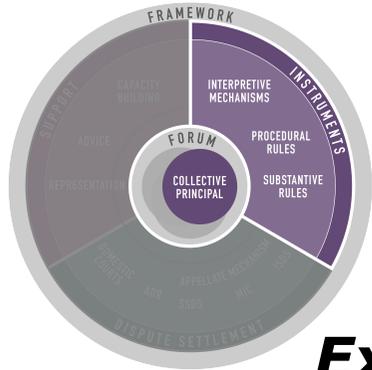
2. Separate Protocols





2. Separate Protocols: Design Considerations

1. Opt-in protocols provide flexibility to states
2. Different protocols can be adopted at different times
3. BEPS process and MLI provide a good model
 - soft law (guidelines) + hard law (MLI)
 - minimum standards, but also opt-ins/outs
 - potential to include new issues



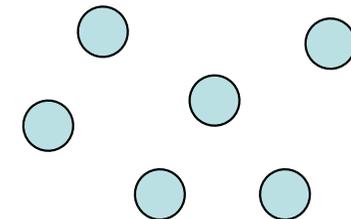
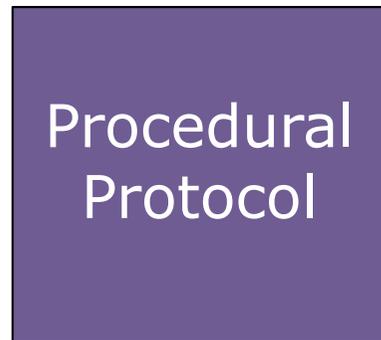
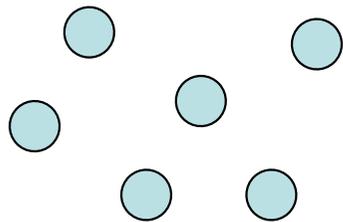
2. Separate Protocols:

Developing a protocol on procedural rules

Ex Ante

Managing centralization

How to identify norm convergence for minimum standards?



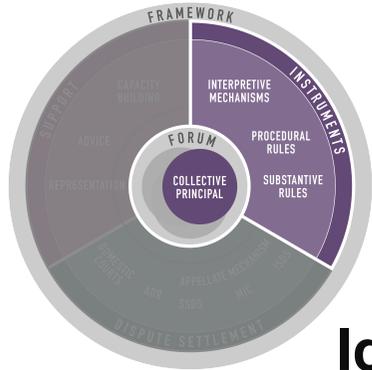
Technology can efficiently and reliably identify areas of normative consensus across recent IIAs for all states in real time.

Ex Post

Managing decentralization

How to ensure order and predictability amidst parallel layers of interacting treaties?

Technology can trace how agreements are modified through interaction, track reform uptakes and model outcomes.



2. Separate Protocols: Developing a protocol on procedural rules

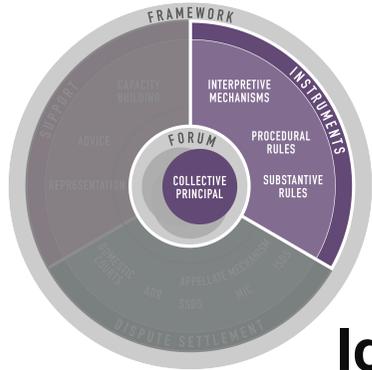
Identifying convergence and divergence in recent treaties

See A/CN.9/WG.III/WP.182 - Submission from the Governments of Chile, Israel, Japan, Mexico and Peru

REFORM MEASURE	CPTPP	EU-MEX FTA	USMCA
<i>Concerns related to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals</i>			
Special expertise requirements for arbitrators for certain claims (e.g., financial services)	X	X	X
Non-disputing Party submissions on treaty interpretation	X	X	X
Other third-party submissions (not limited to issues of treaty interpretation)	X	X	X
Binding joint interpretations by treaty Parties of treaty provisions	X	X	X
Tribunal-appointed experts	X	X	X

Using technology to add

ScaleDetail



2. Separate Protocols: Developing a protocol on procedural rules

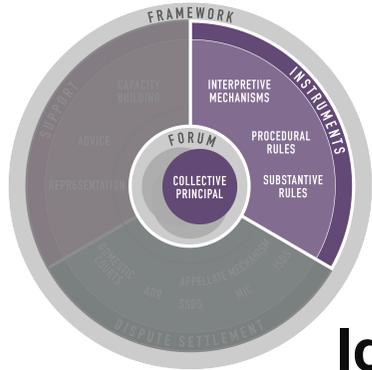
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Using technology to add

ScaleDetail



2. Separate Protocols: Developing a protocol on procedural rules

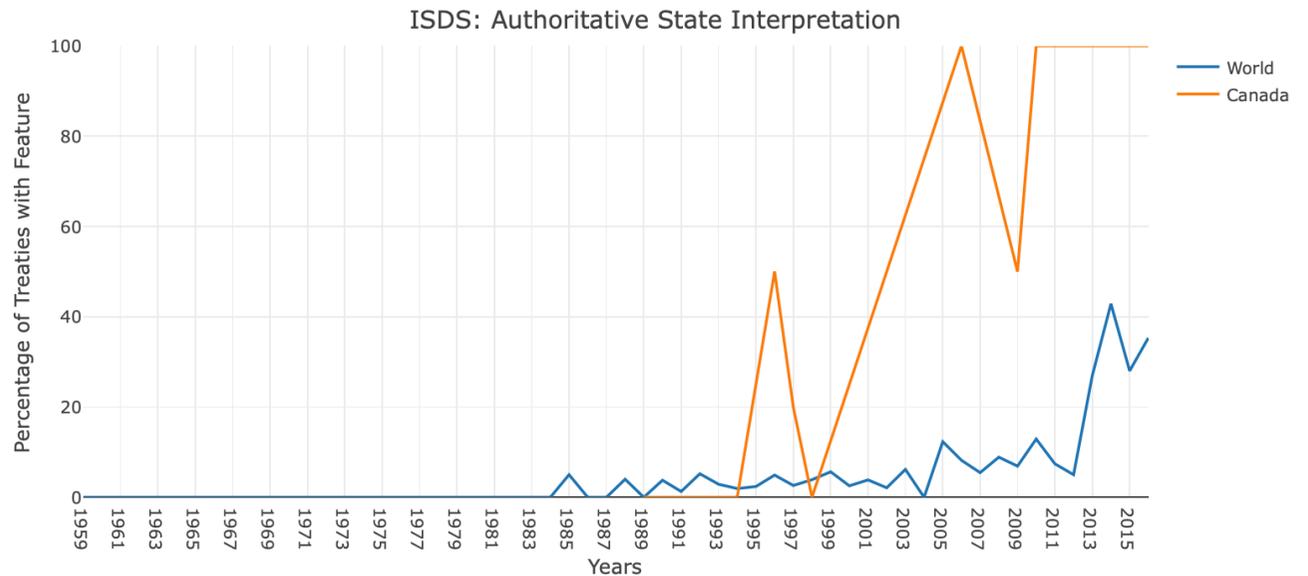
Identifying convergence and divergence in recent treaties - Adding Scale

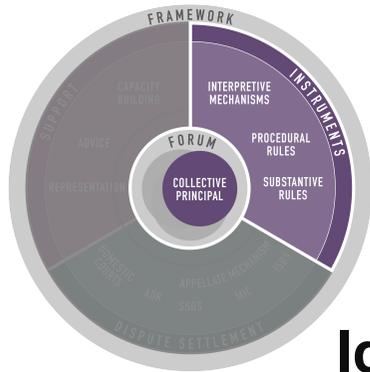
Investment Treaty Feature Analytics

Select a Feature:

ISDS: Authoritative State Interpretation

Based on UNCTAD Data





2. Separate Protocols: Developing a protocol on procedural rules

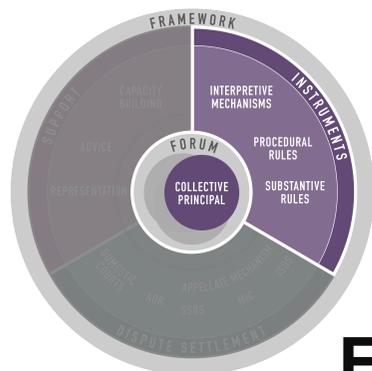
Identifying convergence and divergence in recent treaties - Adding Detail

CPTPP Article 9.27 Expert Reports

Without prejudice to the appointment of other kinds of experts when authorised by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions that the disputing parties may agree.

EU-Vietnam Investment Protection Agreement Article 3.52 Expert Reports

The Tribunal, at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in a proceeding.



2. Separate Protocols: Developing a protocol on procedural rules

Ex post: Using technology to manage complexity

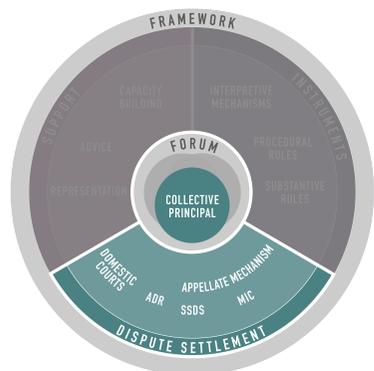
Minimum standards, opt-ins, opt-outs, notifications:

- Different “matches” depending on states’ choices
 - Agreements apply in parallel
- Use of technology to make outcomes transparent, accessible & predictable

MLI Matching Database beta
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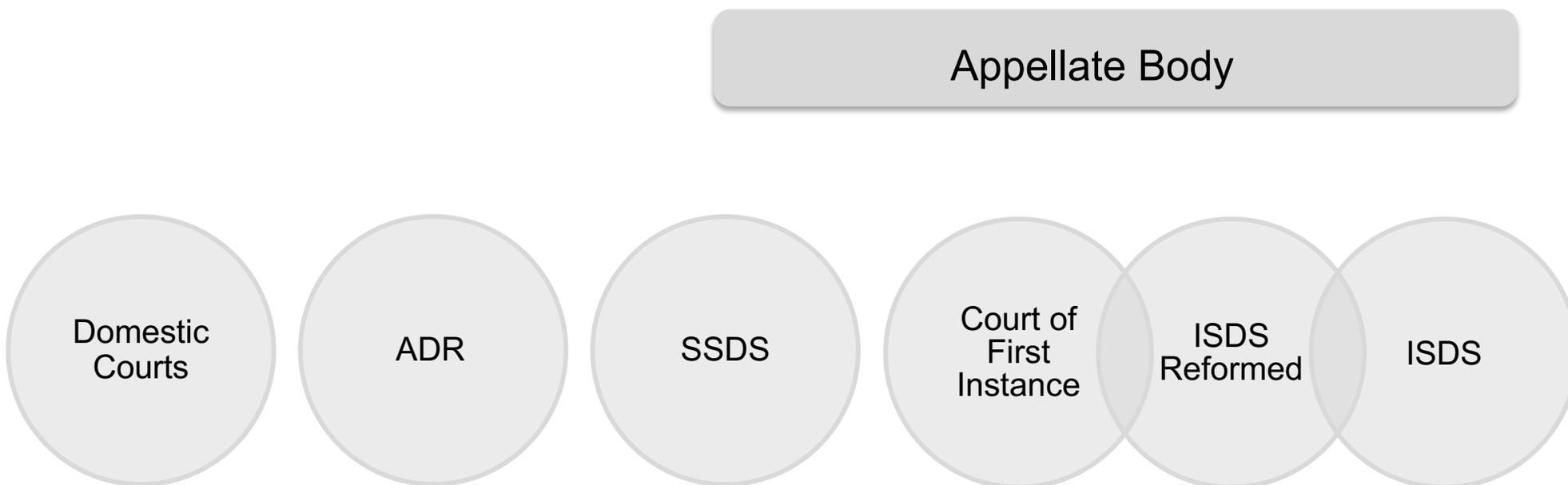
Select jurisdictions:		Australia	Canada
Status as of 30 April 2020		Australia	Canada
Signature MLI		07/06/2017	07/06/2017
Ratification instrument deposited		26/09/2018	29/08/2019
Mock-up date of ratification			
Status of List		Definitive	Definitive
Synthesised text	published by Australia	Not available yet	
	published by Canada	Not available yet	
Article 2 Covered Tax Agreement		Notification mismatch. Need to check whether both the same agreement.	
Article 3 Transparent Entities		Article 3 would not apply.	
Article 4 Dual Resident Entities		The last sentence of Article 4(1) would be re-described in Article 4(3)(e). A.4(4) would be 4(1).	

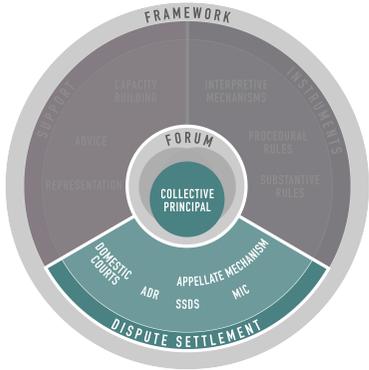
Example:
BEPS MLI Matching Database



2. Separate Protocols: Developing a Protocol on Dispute Settlement

Step one: Identify dispute resolution options





2. Separate Protocols: Developing a Protocol on Dispute Settlement

Step two: Determine selection and appointment options

Who appoints? Length of appointment?

*Court of
First Instance*

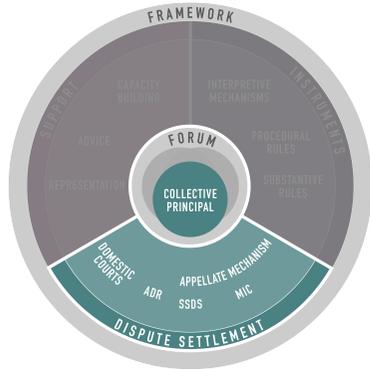
*Only treaty parties appoint,
Appointment for fixed term*

*ISDS reformed
(roster)*

*Treaty parties appoint to roster
for fixed term, disputing
parties appoint off roster for
one case*

ISDS

*Only disputing parties appoint,
Appointment for one case*



2. Separate Protocols: Developing a Protocol on Dispute Settlement

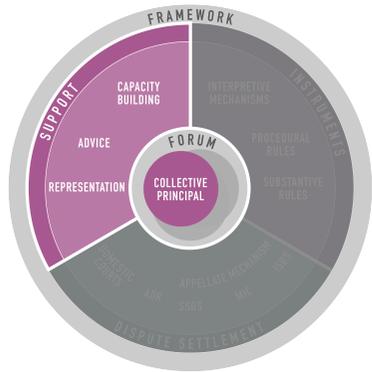
Step three: Define jurisdiction and relationships among options

3.1 Open architecture

- Define relationship among first level options e.g., choice of SSDS, ISDS, ISDS reformed, CFI or combination
- Define relationship between first level and AB e.g., optional for states that want to add it; when AB is available

3.2 Default rules

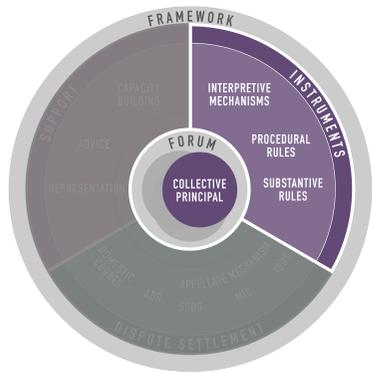
- Define what rules apply if there is not a match between the two disputing parties at first instance



3. Central forum

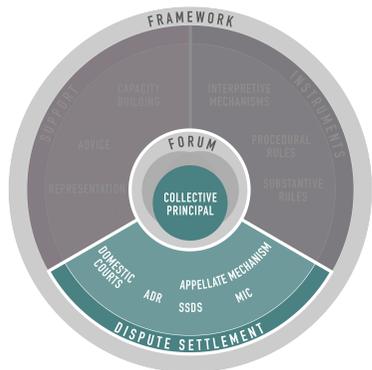
Meet at least annually

- ICC Assembly of States Parties
- UNFCCC Conference of the Parties
- BEPS Inclusive Framework



Different groups of states meet

- World Bank meetings
- UNFCCC meetings



Monitor, adapt & expand over time

Further Resources

- Appendix One: Frameworks, protocols, and forum
- Appendix Two: The BEPS MLI model
- Appendix Three: How technology can help

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Note: We would like to thank Karina Pelling at CartoGIS, ANU for helping us to develop these visualisations.

Appendix 1

Further Resources on Frameworks, Protocols, and Forum

Anthea Roberts and Taylor St John, UNCITRAL and ISDS Reform:
Visualising a Flexible Framework, 24/10/2019,
[https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-
framework/](https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/)

Resources on Framework Conventions

- Note by the Secretariat on the Framework Convention Concept, UN Economic Commission for Europe:
<https://www.unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf>
- Introductory Note on the UN Framework Convention on Climate Change, by Laurence Boisson de Chazournes:
<https://legal.un.org/avl/ha/ccc/ccc.html>

Resources on Protocols

- Guide for Negotiators of Multilateral Environmental Agreements, prepared by the United Nations Environment Programme:
<https://www.cbd.int/doc/guidelines/MEAs-negotiators-guide-en.pdf>
 - This guide discusses framework-protocol structures repeatedly, since it is one of the most common structures for multilateral environment agreements.
- WHO Protocol to Eliminate Illicit Trade in Tobacco Products:
<https://www.who.int/fctc/protocol/en/>
 - Note recording the Chairperson's personal view of discussions from the first session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products:
https://apps.who.int/iris/bitstream/handle/10665/75623/FCTC_COP_INB_IT1_7-en.pdf

Resources on the role of a Forum

- Conference of the Parties (COP) for the Convention on Biological Diversity: <https://www.cbd.int/cop/>
- OECD Inclusive Framework (IF) on BEPS: <http://search.oecd.org/tax/beps/about/>
- Summary of the governing, process management, subsidiary, constituted and concluded bodies related to the the UN Framework Convention on Climate Change: <https://unfccc.int/process-and-meetings/bodies/the-big-picture/what-are-governing-process-management-subsidiary-constituted-and-concluded-bodies>



Appendix 2

Lessons from the BEPS MLI

Wolfgang Alschner, *The OECD Multilateral Tax Instrument: A Model for Reforming The International Investment Regime?*

<https://brooklynworks.brooklaw.edu/bjil/vol45/iss1/1>

Wolfgang Alschner, *Squaring bilateralism with Multilateralism: What investment law reformers can learn from the international tax regime,*

<http://ccsi.columbia.edu/files/2020/02/No-272-Alschner-FINAL.pdf>

Three Lessons from the BEPS MLI

- 1. Mechanics:** Opt-in treaty to modify but not replace parallel treaties.
- 2. Minimum Standards:** Updating of bilateral treaties to reflect today's best practices in both procedure and substance.
- 3. Design:** Squaring universal minimum standards with flexibility, differentiation and customization.

MLI Mechanics

- MLI =
 - Opt-in agreement
 - Exists in parallel to tax treaties, modifies but does not replace them
- Differences compared to Mauritius Convention
 - Positive List (only applies to notified agreement) vs Negative List of Mauritius Convention
 - Relationship between MLI and tax treaties depends on specific MLI clauses, not a general default rule

See also: Bravo, Nathalie. “The Mauritius Convention on Transparency and the Multilateral Tax Instrument: Models for the Modification of Treaties?”

Transnational Corporations 25, no. 3 (June 3, 2019): 85–109.



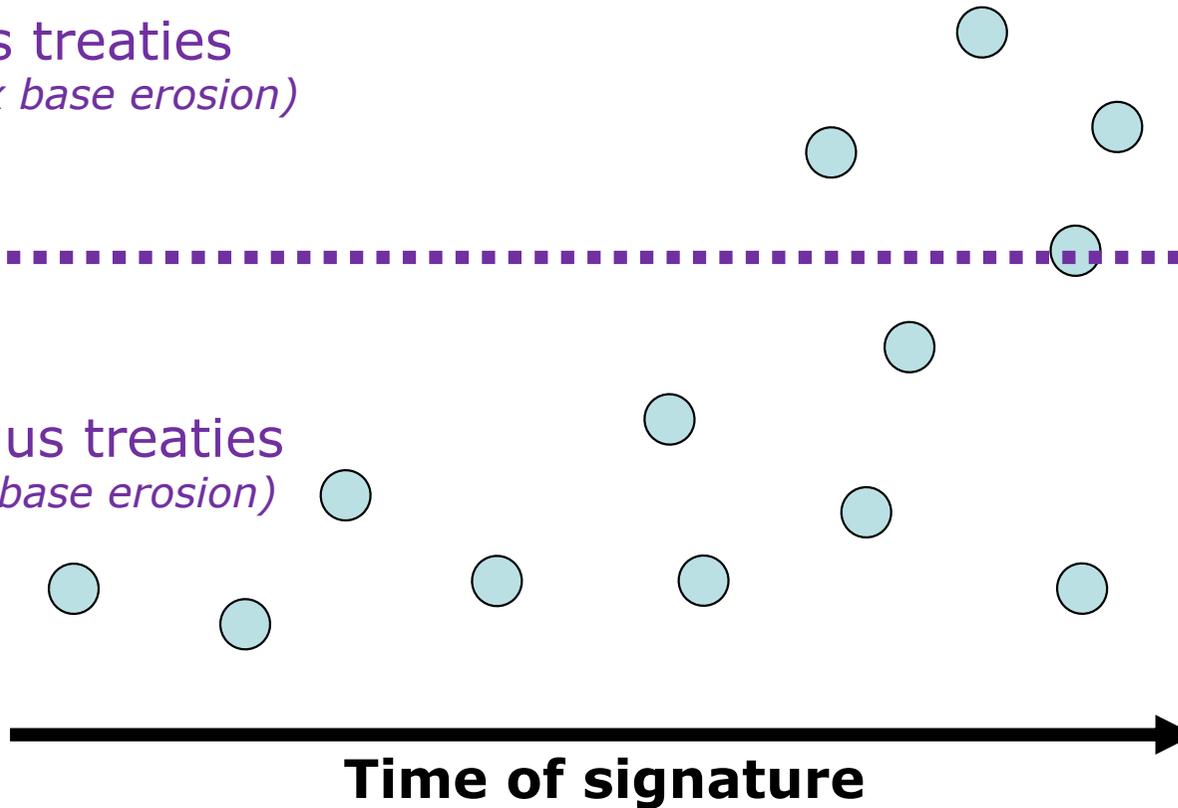
MLI Minimum Standards

Before MLI

BEPS plus treaties
(prevent tax base erosion)

BEPS

BEPS minus treaties
(enable tax base erosion)



Old Double Tax Treaties

New Double Tax Treaties



MLI Minimum Standards

After MLI

BEPS plus treaties
(prevent tax base erosion)

BEPS

BEPS minus treaties
(enable tax base erosion)

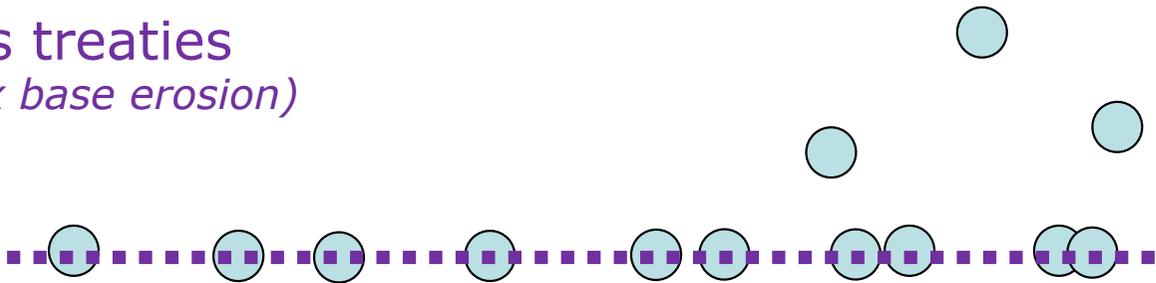
MLI Lifts up covered bilateral treaties to common minimum standards (both substantive & procedural)



Time of signature

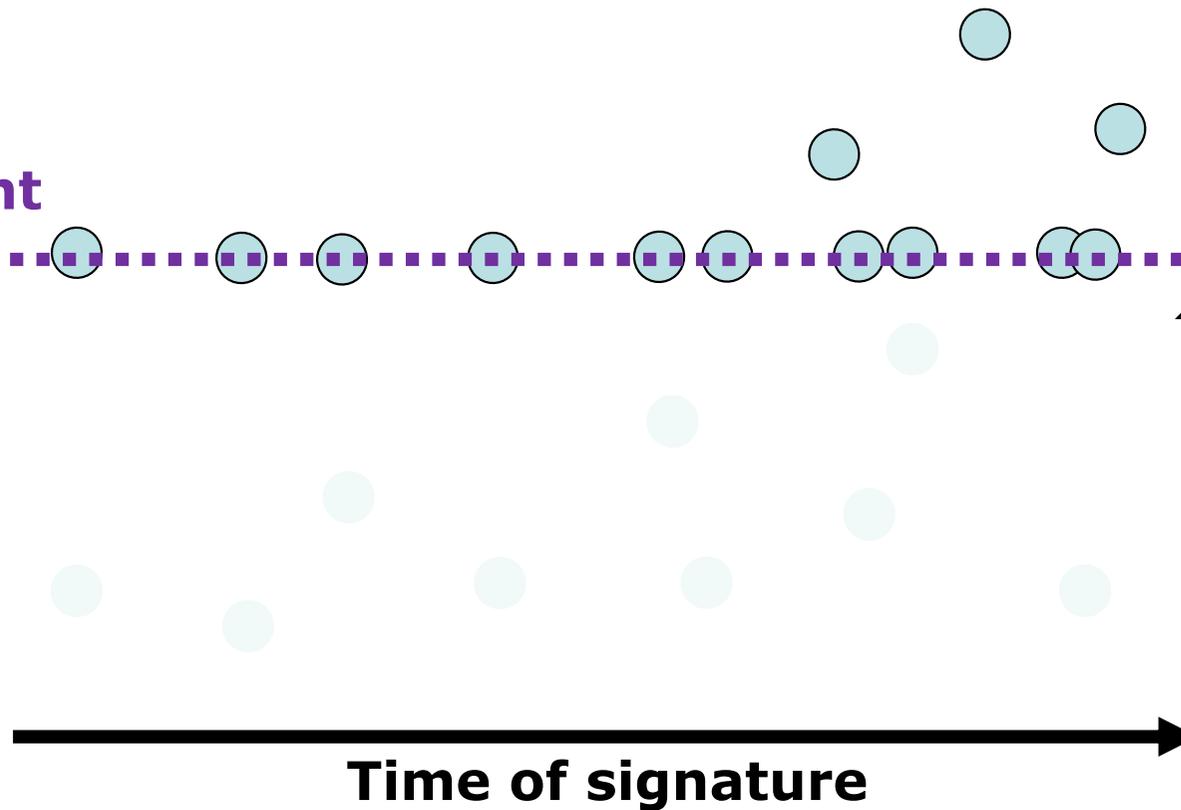
Old Double Tax Treaties

New Double Tax Treaties



Investment Minimum Standards?

**Investment
Law Best
Practices?**



MLI Lifts up
covered bilateral
treaties to
common
minimum
standards (both
substantive &
procedural)

MLI Design

		Depth of Required Reform	
		<i>Shallow</i>	<i>Deep</i>
Level of Int'l Consensus	<i>Low</i>	Hybrid Mismatches (MLI Part II) Flexibility: Opt-Out	Arbitration (MLI Part VI) Flexibility: Opt-In
	<i>High</i>	Preamble Change (MLI Part III, Art. 6) Mandatory: Add-on	Denial of Benefits (MLI Part III, Art. 7) Mandatory: Choice

*MLI unites different design elements
under one treaty umbrella*

Design Equivalents for Investment?

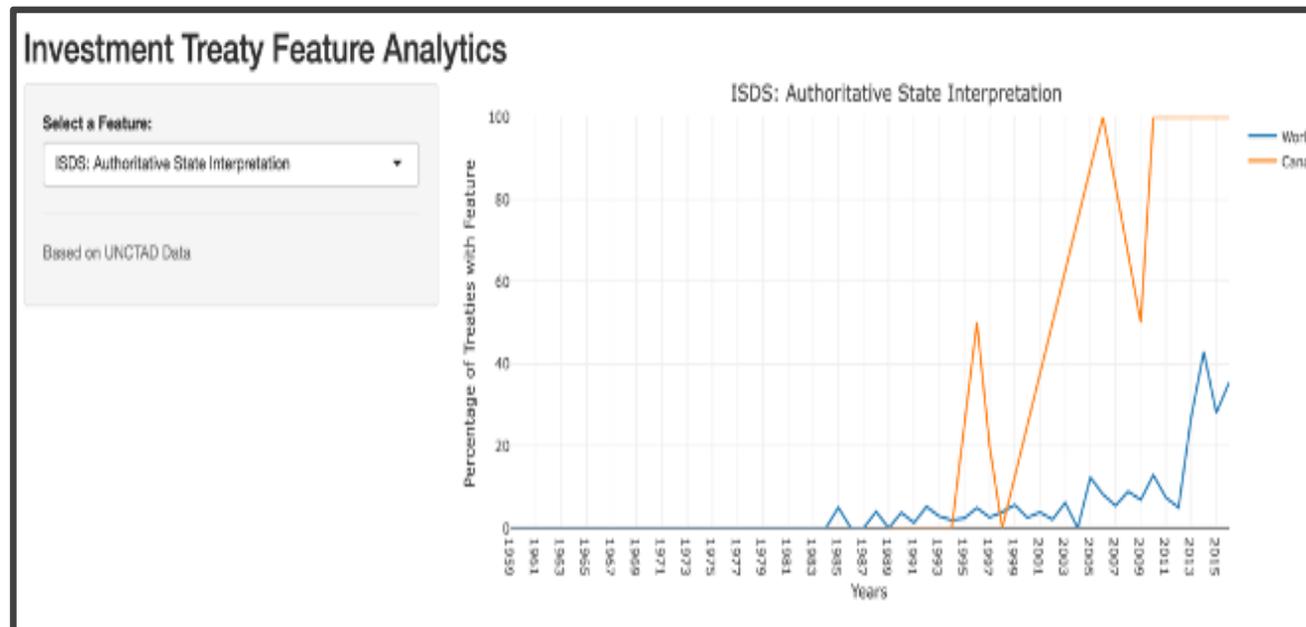
		Depth of Required Reform	
		<i>Shallow</i>	<i>Deep</i>
Level of Int'l Consensus	<i>Low</i>	? Flexibility: Opt-Out	? Flexibility: Opt-In
	<i>High</i>	? Mandatory: Add-on	? Mandatory: Choice



Appendix 3

How Technology Can Help

Ex Ante Drafting: Managing Centralization



Prototype Treaty Feature Tracker:

https://treaty-analytics.shinyapps.io/IIA-Feature_Tracker/

Ex Ante Drafting: Managing Centralization

TPP Article 9.27 Expert Reports

Without prejudice to the appointment of other kinds of experts when authorised by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions that the disputing parties may agree.

EU VNM 2016 FTA Article 26 Expert Reports

The Tribunal, at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in a proceeding.

Comparison between Treaty Clauses:

<http://mappinginvestmenttreaties.com/specials/tpp/>

Ex Post Application: Managing Decentralization

MLI Matching Database beta
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Select jurisdictions: **Australia** **Canada** [Read the Disclaimer](#)

	Australia	Canada	
Status as of 30 April 2020	Australia	Canada	
Signature MLI	07/06/2017	07/06/2017	Jump to entry into effect MLI
Ratification instrument deposited	26/09/2018	29/08/2019	
Mock-up date of ratification			
Status of List	Definitive	Definitive	
Synthesised text	published by Australia	Not available yet	
	published by Canada	Not available yet	
Article 2 Covered Tax Agreement	Notification mismatch. Need to check whether both jurisdictions have identified the same agreement.		
Article 3 Transparent Entities	Article 3 would not apply.		
Article 4 Dual Resident Entities	The last sentence of Article 4(1) would be replaced with the text described in Article 4(3)(e). A.4(4) would be replaced by Article 4(1).		

OECD MLI Matching Database:

<https://www.oecd.org/tax/treaties/mli-matching-database.htm>