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

![Diagram showing a flexible architecture with sections for framework, instruments, support, and dispute settlement.]}
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?

- More
- Less

2) How autonomous are the protocols?

- More
- Less

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

- Unanimity
- Super majority
- Majority
- Quorum
- De minimis
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?

*Ex Post*
Managing decentralization
How to ensure order and predictability amidst parallel layers of interacting treaties?

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

**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

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<tr>
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Concerns related to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

Using technology to add

Scale

Detail
2. Separate Protocols: Developing a protocol on procedural rules

Identifying convergence and divergence in recent treaties

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Using technology to add

Scale

Detail
2. Separate Protocols:
Developing a protocol on procedural rules

Identifying convergence and divergence in recent treaties - Adding Scale
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

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,
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

  – 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 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

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

**MLI Minimum Standards**

**Before MLI**

- **BEPS plus treaties**
  - (prevent tax base erosion)

- **BEPS**

- **BEPS minus treaties**
  - (enable tax base erosion)

---

**Time of signature**

- **Old Double Tax Treaties**
- **New Double Tax Treaties**
MLI Minimum Standards

BEPS plus treaties
(prevent tax base erosion)

BEPS

BEPS minus treaties
(enable tax base erosion)

Old Double Tax Treaties

New Double Tax Treaties

Time of signature

After MLI

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

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

Time of signature

Old BITs

New BITs

Investment Law Best Practices?
## MLI Design

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<th>Depth of Required Reform</th>
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<td><strong>Shallow</strong></td>
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<tr>
<td>Hybrid Mismatches</td>
<td><strong>Arbitration</strong></td>
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<tr>
<td>(MLI Part II)</td>
<td>(MLI Part VI)</td>
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<td><strong>High</strong></td>
<td><strong>Deep</strong></td>
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<tr>
<td>Preamble Change</td>
<td>Denial of Benefits</td>
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<td>(MLI Part III, Art. 6)</td>
<td>(MLI Part III, Art. 7)</td>
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*MLI unites different design elements under one treaty umbrella*
### Design Equivalents for Investment?

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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**

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**EU VNM 2016 FTA Article 26 Expert Reports**

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Comparison between Treaty Clauses:
http://mappinginvestmenttreaties.com/specials/tpp/
Ex Post Application: Managing Decentralization

OECD MLI Matching Database: