Multilateral instrument on ISDS Reform

Comments on A/CN.9/WG.III/WP.194

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Expert Comments
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1. I have been asked to comment on WP194, Note by the Secretariat, 'Possible reform of investor-State dispute settlement (ISDS) - Multilateral instrument on ISDS reform', and to answer the questions in paragraph 39 of this document.

2. Below are my views on different parts of the document and my answers to all questions in a logical order and structure.

1. **Q(iii). "What guiding principles should apply to determine the reform options that should be included in a multilateral instrument? For instance, should it be the nature of the instrument to implement the specific reform option?"**

3. As a starting point, States and international organizations can prepare a non-binding instrument or a binding international agreement. They may include any content and institutional structures within these instruments (as long as no *jus cogens* norms are being deviated from, which does not appear to be the case in the context of the present discussions).

4. Nature of the instrument: The term 'nature of the instrument' in question (iii) is vague (perhaps intentionally). If what is being asked is whether the instrument should be non-binding, such as 'model agreement', or a binding international agreement, my views are the following.

5. If it is a 'model agreement' it will be non-binding; it will not be a treaty and will not bind States/international organizations. An advantage of non-binding instruments is that they have 'soft persuasion' over the behaviour of States. However, the instrument envisaged here concerns the reform of *procedural* rules. The usefulness of a non-binding instrument in this case is doubted. In addition, adopting a non-binding instrument may allow for 'feedback over time' to be given by stakeholders (States, international organizations, investors and NGOs) to the content of the non-binding instrument, which may be useful in terms of 'maturity' in the minds of negotiators of some provisions assuming a treaty is negotiated in the future. However, the non-binding form of such an instrument runs a high risk of being 'frozen' (namely losing the momentum for negotiations of a multilateral treaty) thus ultimately failing to achieve the principal objective of the instrument: reform.

6. For these reasons, I believe that pursuing the conclusion of a binding international agreement (a treaty) would be advisable. The title/designation of the instrument (for instance, 'convention', 'protocol', 'treaty', 'covenant', 'agreement') would not affect its nature as 'a written international agreement governed by international law'. How it is called would not be material from an international law point view, as long as there is an intention to create an international agreement (albeit there may be political reasons for choosing a particular title).

7. Other guiding principles: My understanding is that the future multilateral treaty's aim would be to achieve a level of harmonization, clarity and predictability. At the same time, there would be need for flexibility in order to attract wide participation of States and international organizations. These are important, especially in relation to flexibility options discussed below.

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2. **Q(iv): "Based on the assumption that the multilateral instrument would cover different reform options, should combinations of various options be provided for? How would the process of opting into or out of the reform options work? Should the instrument include the flexibility to allow over time accession by States Parties to certain reform options?";**

   AND

   Q(i): "Should there be core provisions or minimum standards that should be adopted in the multilateral instrument and that all parties to that instrument must accept? If so, what should such core provisions or minimum standards address in order to result in an agreeable multilateral framework?"

8. In this section I answer Questions (iv) and (i) together, since these are directly connected. My answer to Question (i) is affirmative: there should be core provisions that all parties should accept in order to achieve a minimum level of harmonization, coherence, flexibility.

9. I clarify below (A) the terminology about 'unilateral statements' used in WP 194 which has implications of legal nature; (B) the rules governing reservations and the advantages and challenges these pose; (C) opt-in system and its advantages and disadvantages; (D) how an opt-out system would work, its advantages and disadvantages. Finally, (E) I address the question about whether accession should be permissible

A. Terms

10. WP 194 uses the terms 'reservations', 'declarations', 'opt-in' and 'opt-out'. Before addressing how these work, I clarify the terms.

11. The term 'reservation' is a term of art in international law. An authoritative definition of the term can be found in VCLT Article 2(1)(d): 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

12. The term 'declarations' used in WP194 implies unilateral statements. A unilateral statement may be entitled 'declaration', but nomenclature does not to determine the unilateral statement's legal nature. A statement entitled 'declaration' may in fact be a reservation if its purpose is to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[1]

[1] This is for instance the case of conditional interpretative declarations, namely 'a unilateral statement formulated by a State […] when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State […] subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.' Guideline 1.4, ILC, Text of the Guide

13. The term 'declaration' may also allude to an 'interpretative declaration', namely 'a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions'.[2] Interpretative declarations may constitute a supplementary means of interpreting the treaty to which they are made.[3]

14. Finally, unilateral statements – other than reservations or interpretative declarations – may be entitled or called 'declarations' or 'notifications', and may have specific legal implications under a treaty, pursuant to the treaty's provisions. I believe that this is the implied legal nature of the term 'declaration' used in WP 194. For instance, a treaty may provide that by unilateral statement (however this may be called, e.g. notification or declaration) at any time or within a prescribed period of time, a State or international organization may choose (and thus express consent to the jurisdiction of) a specific adjudicatory body. Or a treaty may provide that by unilateral statement a State may object to or accept an amendment of the treaty. These two options concern what may be called 'opt-out and opt-in systems'.

15. Reservations, opt-out and opt-in systems ensure flexibility because they provide for ad hoc fashioning of the rights and obligations of treaty parties. However, each option achieves flexibility in different ways and is governed by different rules. I discuss these below.

B. Reservations

16. Given the principles that should guide the future instrument (section 1 above), permitting reservations would not be advisable.

17. However, if the option of reservations is preferred by negotiators, my view is that a future treaty should expressly prescribe which type of reservations are permissible and in relation to which provisions of the treaty.

18. My reasoning is that reservations lead to a significant level of complexity and by implication unpredictability for investors and States.

19. First, assuming that a reservation is permissible, as a default rule, it is subject to acceptance and objection under the law of treaties (custom or treaty-based). This means that a matrix of different relations will be established in pairs between parties depending on whether they have accepted or objected to the reservation in question, and depending on the effect that the objecting State has chosen to attribute to its objection to a reservation: namely, whether it has chosen to oppose the entry into force of the treaty between itself and the reserving State (VCLT Article 20(4)(c))or whether instead it has chosen not to oppose the treaty's entry in force between itself and the reserving State, in which case 'the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation' (VCLT Article 21(3)).

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to Practice on Reservations to Treaties (Guide to Practice), UN Doc. A/66/10/Add.1 (2011), at 1–603 ('ILC Guide to Practice on Reservations to Treaties').

[2] Guideline 1.2, ILC Guide to Practice on Reservations to Treaties.

[3] Conclusion 4, ILC, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries thereto adopted by the Commission on second reading, UN Doc. A/73/10, (2018), at 12-140.

20. Second, a significant complexity would potentially arise about (1) whether a reservation is permissible and thus valid or impermissible and thus void of legal effect; and (2) what is the status of the State (or international organization) that has made an impermissible reservation: is this State or international organization bound by the treaty without the benefit of the reservation (i.e. the reservation is severed) or is the State or international organization not party to the treaty (i.e. severing the expression of consent to be bound)? A reservation is permissible only if it falls within the category of reservations that the treaty expressly permits or does not prohibit or if the treaty does not expressly permit or prohibit specific reservations, then a reservation is permissible only when it is compatible with the treaty's object and purpose (VCLT Article 19). This is a matter of interpreting the treaty in question and the reservation made, and it is likely to lead to disputes.

21. To be clear, although the VCLT (and the 1986 VCLT) do not specify the effect of impermissible reservations,[4] impermissible reservations are invalid; and are not subject to the acceptance and objection regime of permissible reservations.[5] This according to the International Law Commission is customary international law.[6]

22. However, the status of the State or international organization that attaches an impermissible reservation is unclear. As mentioned above, there are two options: either the impermissible reservation is severed and the State or organization making it remains party without the benefit of the reservation;[7] or the consent to be bound is severed altogether and the reserving State or organization is not a contracting State/organization to the treaty at all. The ILC in its 2011 Guide to Practice on Reservations to Treaties, has taken the position that the status of the reserving State or organization depends on its intention: if there is no intention to the contrary, that State or organisation is a contracting State without the benefit of the reservation.[8] The intention about the status of the State or organization can be established by the text of the reservation, reasons given for formulating reservation, declarations made when formulating reservation, reaction of reserving State (including its silence) to reactions by other contracting States.[9]

23. Given the above complexity and lack of clarity, disputes about these two matters are likely to arise. A dispute settlement body will have competence to determine whether a reservation is compatible with the treaty's object and purpose (if reservations are not specifically prescribed) or whether they fall within the list of reservations prescribed by the treaty provisions or not, as well as the effect of the impermissible reservation, and the status of the State or organization that has made an impermissible reservation. But, prohibiting reservations altogether or prescribing which specified reservations are permissible at least pre-empts the additional uncertainty about whether a reservation is compatible or not with the treaty's object and purpose *before* an adjudicative body is seized.

24. For all these reasons, in my view reservations should be altogether prohibited under the future treaty. Reservations bring high degree of complexity and bilateralize relations under multilateral treaties, while this is a (future) treaty whose purpose would be to bring coherence, consistency and predictability.

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[4] Guide to Practice on Reservations to Treaties, p. 505, para. 11 and p. 508, para. 17.
[5] Guideline 4.5.1, ILC Guide to Practice on Reservations to Treaties.
[6] Guideline 4.5.1, ILC Guide to Practice on Reservations to Treaties.
[7] Human Rights Committee, General Comment 24, 1994, para. 18.
[8] Guideline 4.5.3 and commentary, ILC Guide to Practice on Reservations to Treaties.
[9] Guideline 4.5.3, and commentary, ILC Guide to Practice on Reservations to Treaties. See similar reasoning in *Belilos v. Switzerland*, ECtHR, 1988, para. 60: 'it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration.'

25. There are a few multilateral treaties that prohibit reservations entirely. Some examples are: Energy Charter Treaty ('ECT'); UN Law of the Sea Convention; WTO Agreement.

26. Additionally, there are *reasonable* alternatives for introducing flexibility in a treaty without the complications of the regime of reservations. More specifically, I discuss below out-out or opt-in systems.

C. Opt-In Systems

27. Under opt-in systems, a State/organization has to make a 'unilateral statement' to accept (take a positive step to express consent in relation to) the provisions to which the opt-in system applies, in addition to the consent to be bound by the treaty.

28. For this to work, it is necessary to have a core that will be accepted by all States; the opt-in system would provide 'add-ons'; and to be clear about to which provisions an opt-in system applies.

29. The advantage of an opt-in system is that (1) the complexity created by the default rules on reservations to treaties set out above is avoided, while (2) giving States flexibility in terms of the rules they accept.

30. The disadvantage of an opt-in system is that because it sets an additional step for positively expressing consent beyond the consent to be bound by the treaty, (1) it may take longer time for States/organizations to express consent by positive action; and (2) because the *status quo* in opt-in systems is that States/organization say 'no' unless they expressly say 'yes,' it is less likely that States/organizations would say 'yes' through this system, because of what in behavioural economics is called 'status quo bias'.[10]

31. For this reason, it may be useful to consider a flexible system that combines an opt-in system with a default minimum for all parties, similar to the 'declarations system provided in the Article 287(1) and (3) of the United Nations Law of the Sea Convention,[11] according to which there is a core minimum default rule for all parties, but there are options to which they can choose to opt-in. For the reader's convenience, the provision reads:

> 1. When signing, ratifying or acceding to [the Law of the Sea Convention] or at any time thereafter, a State *shall be free to choose, by means of a written declaration*, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
> (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
> (b) the International Court of Justice;
> (c) an arbitral tribunal constituted in accordance with Annex VII;
> (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. […]

[10] Jean Galbaith, Treaty Options: Towards a Behavioral Understanding of Treaty Design, Virginia Journal of International Law (2013) 309 at 349-355.

[11] This provision provides for multiple options of judicial settlement which States can choose. Because different States may choose different options from the prescribed list, the default rule of Annex VII arbitration ensures that parties to a dispute that have opted for different options, will have consented (by virtue of consenting to be bound by the Convention) to Annex VII arbitration.

3. A State Party, which is a party to a dispute *not covered by a declaration in force*, shall be *deemed to have accepted* arbitration in accordance with Annex VII.[12]

D. Opt-Out Systems

32. An opt-out system means that the treaty provides that a State or international organization can by 'unilateral statement' express its intention not to consent to a particular provision or provisions, within a prescribed period of time. Once this time passes, and a unilateral statement of this kind has *not* been made, the State or international organization has consented to the provisions in question. In other words, silence – lack of objection – expresses consent.

33. For this system to work, there needs to be a minimum core of provisions accepted by all States, with a possibility of opting-out from specific provisions.

34. Opt-out systems have been adopted in numerous treaties for multiple purposes and in a variety of specification. Indicative examples are:

- Pursuant to the WHO Constitution[13], the World Health Assembly composed of Member States' delegates adopts Regulations on the basis of an opt-out procedure (Article 22). Regulations 'come into force for all Members after due notice has been given of their adoption by the Health Assembly, *except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice*.'[14] The International Health Regulations (IHR),[15] which have applied and continue to apply during the global COVID-19 pandemic, have been adopted through this silent acceptance mechanism. None of the 193 WHO member states submitted a rejection of the IHR in their entirety, and only two States have made reservations.[16]

- The Convention on International Trade in Endangered Species of Fauna and Flora (CITES) prohibits international trade (export, re-export, import and introduction from sea) of selected species included in its Appendices I, II and III, and prescribes an amendment procedure of its Appendices I and II – meaning a change of the species included in these appendices and thus protected under CITES – through an opt-out system (Articles XV, XVI and XXIII).[17] These procedures have been widely used for amending CITES Appendices since its entry into force. Of the 184 Parties to CITES, 180 have used silent acceptance in relation to the amendment of Appendix I; and 158 Parties have used silent acceptance in relation to the amendment of Appendix II.

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[12] Emphasis added.
[13] Constitution of the World Health Organization (signed 22 July 1946, entered into force 7 April 1948) 14 UNTS 185, Article 22.
[14] *ibid.* Emphasis added.
[15] International Health Regulations with annexes (signed 25 May 2005, entered into force 15 June 2007) 2509 UNTS 79 (IHR).
[16] The US (reservation regarding federalism) and India (reservation on yellow fever).
[17] Amendments to Appendices I and II that have been adopted at a meeting of the COP enter into force 90 days after that meeting *for all Parties except those which make a reservation* (Article XV(1)), namely those who notify in writing the Depositary Government making reservation with respect to the amendment. Making a reservation to Appendix I or II amendments means that 'the Party shall be treated as a State not a Party to the [CITES] Convention with respect to trade in the species concerned': *ibid* Article XV(3).

- Other examples are numerous conventions under the auspices of the International Maritime Organization,[18] the International Convention for the Regulations of Whaling,[19] and ICAO.[20]

35. The advantages of opt-out systems are the following: (1) they promote efficiency because they accelerate expressions of consent; (2) it is more likely that States/international organizations will accept these (on the basis of 'status quo bias' explained above); (3) they signal (even at a symbolic level) commitment to the default provision, since the *status quo* is 'yes' to it unless a State takes positive action to not be bound by it; and (4) they ensure flexibility.

36. However, a disadvantage of opt-out systems is that it might raise issues of domestic or internal (for States and international organizations respectively) accountability for some States and organizations, because the executive will not go through parliament to get approval for the additional consent to be expressed. The executive's inaction alone would produce consent for the provisions subject to the opt-out system.[21]

(E) Accession

37. Accession allows States that have not participated in negotiations to later express consent to be bound. It ensures wider participation and for this reason, it is a valuable mechanism for maximizing participation over time.

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3. Question (ii) "Should the instrument apply to both existing and future investment treaties?"

38. I comment on different options regarding the relationship between treaties that have already entered in force when the future ISDS reform treaty would enter in force. More specifically, I discuss: (A) amendment of existing treaties; (B) Termination of the earlier treaty implied by the later treaty on the same subject matter; (C) *Inter Se* Modification; (D) Application of successive treaties.

A. Amendment of existing treaties

39. The amendment of earlier treaties depends on their provisions. For instance, an amendment of the ICSID Convention can take place in accordance with the provisions of that Convention (Arts 65 and 66). This means that Administrative Council has to decide by a two-thirds majority

[18] Convention on the International Regulations for Preventing Collisions at Sea (signed 20 October 1972, entered into force 15 July 1977) 1050 UNTS 16 (COLREG) Article VI; International Convention for the Prevention of Pollution from Ships (signed 17 February 1973, entered into force 2 October 1983) 1340 UNTS 61 (MARPOL Article 16); International Convention for the Safety of Life at Sea (signed 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2 (SOLAS) Article VIII.

[19] International Convention for the Regulation of Whaling (signed 2 December 1946, entered into force 10 November 1948) 161 UNTS 74, Article V.

[20] Convention on International Civil Aviation (signed 7 December 1947, entered into force 4 April 1947) 15 UNTS 295, Article 90.

[21] To be clear, this is entirely compatible with international law, since consent to be bound by the treaty, including its provisions that would provide for such opt-out system, would have been expressed as usual, namely through positive conduct, which could ensure internal accountability assuming the relevant internal process is followed. In any event, States can choose how to express their consent, including by their silence.

of its members to circulate the amendment proposal made by a Contracting State, and the amendment can enter in force only after all Contracting States have expressed consent to be bound by the amendment. Given that the ICSID Convention has over 160 parties, one should be realistic about the plausibility of this option.

40. Similarly, the ECT requires unanimity in the Charter Conference for an amendment of the Charter (ECT Arts 42, 36, 34).

41. In the absence of any such provisions in existing treaties, the agreement of all parties is required for an amendment (VCLT Articles 39-40).

B. Termination of the earlier treaty implied by the later treaty on the same subject matter

42. The termination of ICSID or the ECT implicitly by the conclusion of the future treaty is unlikely because that option requires under the VCLT that all ICSID Convention Parties or all ECT parties conclude the latter treaty. This option may be more likely in relation to bilateral investment treaties.

43. However, in order to terminate earlier treaties as implied by the later treaty on the same subject matter, the following requirements have to be fulfilled pursuant to VCLT Article 59, which reflects custom.

44. Either the future treaty expressly indicates that this terminates all earlier treaties relating to the same subject-matter; or parties to the future treaty indicate this common intention that the matter should be governed by the latter treaty (VCLT Art 59(1)(a)).

45. Alternatively, if the provisions of the later (future) treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time (VCLT Article 59(2)).

46. These alternatives may indeed be plausible depending on the terms of the existing treaties and future treaty. However, they will be a matter of interpretation which is likely to lead to disputes (and thus dispute settlement under existing treaties or the future treaty).

C. *Inter Se* Modification

47. Another option may be that the future treaty (or other agreements that cross-refer to it) modify multilateral existing treaties between certain of the parties only (of the existing treaties). This concerns situations where some parties to an existing treaty are also parties to the future treaty.

48. The question here whether Some ICSID or ECT parties can modify *inter se* the ICSID or ECT through the conclusion of the new treaty. The answer revolves around whether modification would meet the two *cumulative* requirements in VCLT Article 41(1)(b). Namely, that

> (a) The inter se modification does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; *and*
> (b) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

49. This is not a clear-cut question, and views may differ about whether one or both these requirements are not met. But, ultimately, there are plausible arguments that one of these requirements is not met thus making this option difficult to sustain.

50. In any event, document WP194 deals with the relationship between States that are parties to the future treaty (and have modified inter se an existing treaty) and those States that are parties to the earlier treaty but not to the future treaty. As paragraph 35 of WP 194 suggests, the Party to the existing investment treaty which is not a Party to the future multilateral treaty could not be subject to the ISDS reforms without its consent. The new ISDS reform establishes procedural obligations for States, and a third State cannot be bound without its express consent (and under the VCLT Article 35, but not custom, also written consent).

51. Paragraph 35 of WP 194 asks whether in the above scenario, 'in addition to those existing options, an investor would be entitled to resort to the reform options contained in the multilateral instrument in reliance of a unilateral offer made by the respondent host State through the multilateral instrument.' The scenario envisaged is one where the respondent is party to the new instrument but the investor's home State is not a party to the new instrument. A unilateral offer by the host State to afford substantive and/or procedural rights to such investors would not face the same hurdle as the case of a host State not being party to the ISDS reform treaty. This is because the ISDS reform system establishes (substantive and/or procedural) rights for third States (and more specifically rights for their nationals abroad). Thus, only the assent of the third home State is needed, which can be given tacitly (VCLT Article 36(1)), and it is unlikely to be lacking since the rights would be to the benefit of its nationals abroad.

52. Three scenarios arise:

(1) the investor would only have the option of the 'old dispute settlement' system if an offer by the host State is not made; or when the host State makes the offer but the home State does not assent.
(2) the investor would only have the option of the 'new dispute settlement' system, assuming that the home State consents since this would deprive it and its nationals abroad existing dispute settlement rights. However, it is highly questionable whether this option would be compatible with the fair and equitable treatment standard.
(3) The investor would have any of these two options open to it - old and new dispute settlement - assuming that the host State has made a unilateral offer to the investor and the home State has assented. In the case that the assent of the home State is lacking, often existing investor-State dispute settlement clauses provide first a period of negotiations for the resolution of the dispute between the investor and the State (e.g. ECT Art 26(1)). It is possible that an investor may agree with the host State under this negotiations clause to submit the dispute to a different DS process and this can be the one of the new multilateral forum. This would be ad hoc consent of the investor during negotiations pursuant to the existing treaty to which the home State has already consented (and its later assent is not required).

D. Application of successive treaties

53. A future multilateral treaty on dispute settlement in the field of investment protection will relate to a subject-matter that is governed by existing treaties, such as the ICSID Convention, the ECT and bilateral investment treaties. This raises the question of which treaty applies.

54. If all the parties to the earlier treaty (e.g. ICSID, Energy Charter Treaty or a bilateral investment treaty) are parties also to the later treaty, and this earlier treaty is not terminated or its operation is

not suspended, then the earlier treaty (i.e. ICSID, ECT or bilateral investment treaties) would apply *only* to the extent that its provisions are compatible with those of the later treaty (VCLT Art 30(3)).

55. For bilateral treaties whose parties are also parties to the future treaty, the earlier treaty's provisions apply only to the extent that they are compatible with those of the future treaty.

56. For multilateral treaties (e.g. ICSID Convention; ECT), this option is more unlikely, because it is unclear whether all parties to these existing treaties will become parties to the future treaty.

57. In the scenario where the parties to the future treaty do not include all parties to the earlier (bilateral or multilateral) treaty, two parallel groups of relationships will arise. More specifically,

(a) as between parties to both treaties, the earlier treaty (e.g. ICSID, Energy Charter Treaty or a bilateral treaty) can apply *only* to the extent that its provisions are compatible with those of the later treaty (VCLT Article 30(4)(a) and 30(3)).
(b) as between a party to both treaties and a party to only one of the treaties (e.g. ICSID, ECT or a bilateral agreement), the treaty to which both States are parties governs their mutual rights and obligations (i.e. in this case, ICSID or ECT or an earlier existing bilateral treaty) (VCLT Article 30(4)(b)).

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4. Question (iv): "What form for a multilateral instrument would be the most appropriate to keep the ISDS reformed framework coherent and relatively easy to refer to and understand for users?"

58. In terms of <u>form</u>, many options are available. For instance, it could take the form of one document (e.g. UN Law of the Sea Convention) or an umbrella instrument with annexes with the specific mechanisms (e.g. WTO Agreement with Annexes).

59. In order to ensure *coherence and adaptation over time*, I recommend the establishment of institutional bodies (other than the dispute settlement ones) under the future ISDS agreement.

60. It would be useful to consider two (not mutually exclusive) options:[22]

- Establishing a Conference of Parties or Meeting of Parties. This would <u>offer a permanent *forum* of communication about the treaty over time between all</u> States parties. This is a <u>positive means of exchanging views and experiences</u> regarding the treaty's implementation over time. Since the Conference of Parties would be composed of all treaty Parties, it would also have the function of authentically interpreting the treaty over time, and possibly amending it.

- Attributing to some body (existing or new) administrative functions besides acting as depository. For instance, having a function in relation to consolidating publicly (e.g. online) reservations/opt-in/opt-out systems so as to make it easier for States and investors to know the relationships created under the flexibility mechanisms.

[22] Other institutional bodies can also be created such as those established under numerous multilateral treaties ('expert treaty bodies') whose functions differ considerably, but usually they oversee compliance with the treaty (e.g. Human rights Committee which has competences in relation to the International Covenant on Civil and Political Rights; the Aarhus Commission). In this case, the body would be composed of independent experts, and would made non-binding decisions and pronouncements. However, this design it unlikely to be useful in the case of this treaty, given its scope, content and objectives.

Preliminary Comments on UNCITRAL, Working Group III
UN Doc. A/CN.9/WG.III/WP.194 (June 20, 2020)

Duncan B. Hollis
May 11, 2022

Comment A: "…implementation through a single instrument that would provide an overall framework" versus a Framework Convention + Protocols Approach

- WP.194 proposes UNCITRAL pursue a "single instrument" and that is certainly an available option under the law of treaties. But I propose UNCITRAL also weigh the pros/cons of a "framework convention" approach.
    - A framework convention is a treaty governed by international law that sets out basic objectives, principles, and processes for future decision-making on a particular problem.
        - Prominent examples include the 2003 WHO Framework Convention on Tobacco Control, 2302 UNTS 166; the 1992 UN Framework Convention on Climate Change, 1771 UNTS 107; and the 1985 Vienna Convention for the Protection of the Ozone Layer, 1513 UNTS 293.
    - Without creating a formal intergovernmental organization, Framework Conventions usually involve a "Conference of the Parties" (COP) or "Meeting of the Parties" (MOP) to help administer the Framework Convention and its Protocols.
    - Framework Conventions are usually supplemented by one or more Protocols. Protocols can perform various functions that would be useful to the investment reform effort.
    - Protocols can amend earlier treaties.
        - For example, a 1972 Protocol amended the 1961 Single Convention on Narcotic Drugs, 973 UNTS 3, and a 1921 Convention for the Suppression of the Traffic in Women and Children was amended by a 1947 protocol. *See* U.N. Doc. A/RES/126 (Oct. 20, 1947).
        - Most examples of protocol amendments deal with a prior multilateral treaty, but there is no reason parties to a bilateral treaty could not agree to do the same via a multilateral instrument in accordance with Article 39 of the 1969 Vienna Convention on the Law of Treaties (VCLT) (requiring only "agreement between the parties").
    - Protocols can supplement an existing treaty.
        - Thus, the 1989 Montreal Protocol on Substances that deplete the Ozone Layer, 1522 UNTS 3, elaborates the 1985 Vienna Convention's general obligation to protect the ozone layer.
        - The Three Protocols to the UN Convention against Transnational Organized Crime are framed as supplementing the underlying Convention by targeting specific areas and adopting different approaches. *See, e.g.,* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319; Protocol against the Smuggling of Migrants by Land, Sea and Air, 2241 UNTS 507; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, 2236 UNTS 208.

- Protocols can supersede prior treaty commitments.
    - For example, the 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, applied only to European refugees after World War II – a category of refugee that no longer exists. In 1967, States concluded a Protocol to the 1951 Refugee Convention that incorporated and extended the 1951 Conventions' provisions geographically *and* temporally, making them applicable universally to refugees from any country at any time.
    - The 1996 London Protocol on ocean dumping superseded the 1972 London Convention as between parties to the Protocol, replacing the Convention's negative listing approach with a positive listing approach. *See* 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, Art. 23.
    - And the 2018 Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) did what its title suggests. *See* Para 1 ("Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.").
- Why would states choose to use protocols instead of a single treaty instrument? States may have various reasons for doing so, e.g., to make these provisions optional or to subject them to different entry into force or amendment procedures than the main agreement. Although these functions could be accomplished in a single agreement (e.g., in an annex), placing them in a separate instrument also serves to highlight their separate status.
    - Protocols operate as treaties in their own right. Thus, they may have different rules on participation and entry-into-force, along with separate "status" lists for tracking states parties and their relevant reservations, understandings, and declarations. As such, protocols may be simpler vehicles for identifying which states have consented to which particular aspects of investment reform and identifying the relevant commitments assumed vis-à-vis prior international investment agreements with other specific parties.
    - The relationship between a Framework Convention and a Protocol can often be flexible. For example, although States will often be required to be parties to the Framework Convention to become party to one of its protocols, there is nothing inherent about the Framework Convention format itself that requires this.
        - Indeed, two Protocols to the UN Rights of the Child Convention allowed for a State to join even if it was not a party to the ROC itself. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (2171 UNTS 227); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2173 UNTS 222). Thus, the United States joined both Protocols even though it has never ratified the Rights of the Child Convention itself.
- In the investment context, therefore, a Framework Convention with Protocols might be better than a "single" instrument for purposes of transparency and coherency.
- It will be easier to track which States accept which obligations if different suites/blocs of obligations are housed in individual protocols (e.g., one on ethics, one on an appellate mechanism, one on third-party funding, etc.).

- Each Protocol could have its own provisions on reservations, opt-in/opt-out declarations, and entry into force requirements as well as different relations to the underlying Framework Convention.
    - For example, it might be possible to have a Protocol on Enforcement addressing NY Convention issues that a State could join without having to join the Framework Convention or any of its other Protocols.

Comment B: "A multilateral instrument could allow States to opt for the reform options of their choice"

- I think it's important to emphasize to Working Group representatives that states are the "masters of their treaties."[1] *See, e.g.,* Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation* in D. HOLLIS (ED.), THE OXFORD GUIDE TO TREATIES (2nd ed., 2020) at 481 ("the parties are collectively masters of their own treaty relations subject to the few peremptory rules of international law"); ROBERT KOLB, THE LAW OF TREATIES: AN INTRODUCTION (2016) at 209 ("The Parties are the masters of the treaty; they can conclude it and also undo it as they see fit."); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 (1989) at 128 ("the contractual nature of the international treaty – in jurisprudential terms – imposes its stamp on everything to do with a treaty"…. "consent alone creates the legal bond").
    - As a general matter, therefore, States have a capacity to control their treaty relations. Indeed, the law of treaties reflected in the VCLT is celebrated for its flexibility -- its "rules" are frequently drafted so that States may contract around them or choose from among a list of available options. *See* Duncan B. Hollis, *Defining Treaties*, in HOLLIS, op cit., at 3, n.11 ("VCLT frequently frames its rules or some of their elements as endorsing the application of whatever the treaty provides (e.g., Arts 10, 12–17, 19–20, 22, 24–25, 28–31, 33, 40–41, 44, 54–58, 72, 76–78). It also regularly authorizes parties to 'otherwise agree' (e.g., Arts 11, 22, 25, 37, 44, 70, 72, 77, 79) or to allow the establishment of a different intention to vary the rule's application (e.g., Arts 7, 12–15, 28–29, 37, 39, 44, 59).").
    - This flexibility means that where there is a unity of parties between a prior international investment agreement and any later multilateral treaty framework, those states can design the relations between the new treaty and earlier investment agreements as they see fit. They can, moreover, do so in different ways. Thus, the multilateral instrument may
        - ***constitute a subsequent interpretative agreement*** that, per VCLT Art. 31(3)(a) must form part of the corpus of interpretative materials relevant to "the interpretation of the treaty or the application of its provisions" vis a vis existing international investment agreements.
        - ***amend*** prior international investment agreements by operating as the requisite "agreement between the parties" pursuant to VCLT Art. 39
            - If the new multilateral instrument implicates earlier multilateral investment agreements, the VCLT contains additional provisions for amendment approvals

[1] Although this phrase is widely employed in the treaty context, given its origins, international lawyers might be better suited to replace it with a different phrase (e.g., "states rule their treaties").

in Article 40 as well as for modifications among certain parties *inter se* in Article 41.

- ***suspend the operation*** of a prior international investment agreement in whole or in part. *See, e.g.,* Rosario Huesa Vinaixa, *Article 57 1969 Convention*, in O. CORTEN AND P. KLEIN (EDS.), THE VIENNA CONVENTION ON THE LAW TREATIES, A COMMENTARY (OUP, 2011), vol. II, at 1281 (suspension implicates the operation of a treaty via a "temporary interruption of the effects of the treaty (creation of norms, rights, and obligations for the parties) rather than the non-application of the treaty as a legal act. On the other hand, the suspension contemplated can affect all the effects of the treaty or only some of its provision (total or partial suspension)."); ME VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009) at 709-10 (same).
- ***terminate the prior international investment agreement*** in its entirety.
    - Both the suspension and termination options can occur expressly "by consent of all the parties after consultation with other contracting States" pursuant to VCLT Art. 54 (termination) and VCLT Art. 57 (suspension).
    - Alternatively, VCLT Art. 59 provides that termination or suspension of the operation of a treaty may be ***implied*** by the conclusion of a later instrument (e.g., the contemplated multilateral instrument) if either the later treaty or the parties' intentions suggest that the latter treaty should so operate and the "provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time."
- ***Disapply (supersede)*** an earlier treaty's provisions on the same "subject-matter" under the *lex posterior* rule endorsed in VCLT Art. 30(3) ("3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.")
    - Discerning when treaties involve (a) the same subject-matter and/or (b) are incompatible with the successive treaty are both interpretative questions that may be open to contestation. Witness, for example, differences of opinions among investors and EU Member States as to whether intra-EU BITs and the EU Treaties (namely, TEU and TFEU) address the same subject-matter and, if so, whether they are incompatible.
    - It is, moreover, always possible, for the parties to a new treaty to adopt a lex prior or a lex specialis approach to prior treaties. See VCLT Art. 30(2) ("When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."); International Convention on Arrest of Ships (1999) UN Doc A/ CONF.188.6, Art. 10(2) ("A State may, when it is also a State Party to a specified treaty on navigation on inland water-ways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in article 7 of this Convention.").
        - Indeed, the parties can basically dictate whatever approach to successive treaties so long as they rech agreement on it. In other words, VCLT Art. 30

is largely a residual set of rules that the parties can modify by their consent or agreement. *See, e.g.,* O DÖRR AND K SCHMALENBACH (EDS), VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (2nd ed., 2018) at 546 ("The provisions laid down in Art. 30 are residual rules; if a treaty contains special clauses regulating its relations to other treaties (conflict clauses, saving clauses or compatibility clauses), Art 30 does not apply."); VILLIGER, op. cit., at 403 (noting Waldock considered Articles 30(3)-(5) as "residual rules, giving way to other conflict clauses chosen by the parties to a treaty to govern the relations of a particular succession of treaties"); *see also* Alexander Orakhelashvili, *Article 30 of the 1969 VCLT,* in O. CORTEN AND P. KLEIN (EDS.), THE VIENNA CONVENTION ON THE LAW TREATIES, A COMMENTARY (OUP, 2011), vol. I, at 774.

    - That said, VCLT Article 30 is less useful where there is a lack of unanimity of parties between successive treaties (e.g., a party to a prior international investment agreement is not a party to the new multilateral instrument). In such cases where the treaties conflict, the law effectively leaves the question of which treaty a state should comply with to their own, political discretion, and leaving to the law of state responsibility any consequences for a state's non-compliance with the other treaty in question. *See* VCLT Art. 30(4)-(5).

- ***A plurality of functions*** is also possible, where the multilateral investment instrument can serve several different functions simultaneously (e.g., it could be a subsequent interpretative agreement in one respect, an amendment in another, and a suspension or termination of still other treaty rights or obligations).

    - For a previous example, see the 2007 U.S.-EU Air Transport Agreement which contained agreements on both suspension and termination. *See* Art. 22 ("1. During the period of provisional application … of this Agreement, the bilateral agreements listed in section 1 of Annex 1, shall be suspended, …. 2. Upon entry into force … of this Agreement, this Agreement shall supersede the bilateral agreements listed in section 1 of Annex 1 ...").

- Finally, it is worth noting that there are a **plurality of means** to effectuate any one or more of these functions.

    - They can be done in general provisions that regulate all treaty parties.
    - They can be done by provisions to which parties "opt in" via their consent to be bound (or at any time thereafter).
    - Or, they can be effectuated via provisions that apply by default except for parties that "opt-out" of their coverage.
    - More hybrid possibilities may work as well (e.g., a default rule of "opt in" that parties can "opt out" of on ratifying or otherwise consenting to be bound by the treaty).
        - Professor Fitzmaurice has researched such variations extensively in the past so I would defer to her expertise on which variations may make the most sense in the investment context.

Comment C: Thinking through the Trade-offs between Treaties and Political Commitments

- The Working Group's approach to a new multilateral framework appears to focus on pursuing a new treaty, but it is important to flag that international agreements need not always adopt the treaty form. Although Prof. Klabbers may disagree with me on this point given his prior work, I would flag that State practice now recognizes three different categories of international agreement –
    - *agreements that are "binding" under international law (treaties)*;
    - *agreements that are binding as a matter domestic law (contracts)*; and
    - *agreements that are not binding (political commitments)* in the sense that law provides none of the normative force for the agreement's formation or operation.

  Today, political commitments, including many titled as "MOUs," have become an increasing vehicle for inter-State and inter-institutional agreements alongside treaties and various forms of transnational contracts.

    - At least part of the political commitment's appeal derives from the general absence of domestic procedures for their conclusion. See DUNCAN B. HOLLIS, RAPPORTEUR, GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON BINDING AND NON-BINDING AGREEMENTS (WITH COMMENTARY) 24-25, 102-03 (OAS, 2020) (noting that the lack of domestic approval procedures may explain how political commitments have developed "a reputation for greater *speed* (in terms of the timing of their formation), *flexibility* (in terms of adjustments or modifications), and *exit* (in terms of bringing the commitment to an end) than treaties").
    - Treaties, in contrast, benefit from a greater reputation for credibility. They also can generate a range of legal effects unavailable to political commitments, including (a) the "primary" effects from a state's consent to be bound by the treaty (e.g., *pacta sunt servanda*); (b) "secondary" effects triggering other relevant rules of international law including the law of treaties and the law of state responsibility; and (c) domestic legal effects for those states who allow treaties to operate as domestic law directly. *See id.* OAS Guideline 5.

- As such, a question for Working Group III is whether all of the identified reforms necessarily require a treaty commitment to effectuate them or if some might be implemented by domestic legal means (e.g., contracts) or political commitments.

- If some could be done by a non-binding political commitment, it may lead to a quicker outcome (and one that avoids) domestic treaty approval procedures (although it should be noted that "provisional application" provides a functionally equivalent treaty-based mechanism for having states implement a treaty before it enters into force).
    - According to the UN International Law Commission, for example, a subsequent interpretative agreement under VCLT Art. 30(3)(a) can, but need not be, manifested in a legally binding instrument. ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice* [2018] YBILC, vol. II, pt. 2 (Conclusion 10: "Such an agreement may, but need not, be legally binding for it to be taken into account."). In other words, a subsequent interpretative agreement vis-à-vis pre-existing international investment agreements need not take the treaty form.
    - In other cases (e.g., amendments), a new treaty is likely required to produce the desired legal effects on prior existing international investment agreements. There is, however, no *acte contraire* doctrine in international law, meaning amendments (or agreements on suspension or

termination) can occur via tacit or oral agreements among treaty parties. *See* ILC, *Draft Article on Law of Treaties with Commentaries* [1966] YBILC, vol. II, at 249 ("In its opinion, international law does not accept the theory of the '*acte contraire*'. The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination."); Waldock, *Fifth Report on the Law of Treaties* [1966] YBILC, vol. I, pt. 1, at 225, ¶94 (use of phrase "by consent of all parties' as substitute for 'by agreement of all the Parties', was intended to take account of tacit consent to terminate," a provision Waldock read to apply to suspension as well); VILLIGER, op cit., at 513 ("It transpires from the materials of the Vienna Conference that the agreement [to amend] need not be in writing; it may—notwithstanding constitutional difficulties—be oral or even tacit, and can occur, for instance, by means of subsequent practice.").

- It's also possible to think about sequencing the process – i.e., starting with a political commitment for those issues susceptible to that approach that can be folded into an overarching treaty when/as negotiators reach agreement on solutions that require outcomes governed by international law.

- Not all provisions of a treaty, moreover, trigger *pacta sunt servanda;* parties can make certain provisions non-binding (in other words, a treaty can contain provisions that comprise a political commitment even though a political commitment cannot, by definition, contain any legal obligations). *See, e.g.,* Technical Annex, Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) (2003) 2399 UNTS 100 ("This Technical Annex contains suggested best practice for achieving the objectives contained in Articles 4, 5 and 9 of this Protocol. This Technical Annex will be implemented by High Contracting Parties on a voluntary basis.").

Comment D: The Limitations of using Reservations, Declarations, and Understandings to regulate choices in a new multilateral instrument

- I do not see any legal objection to having a new multilateral investment treaty that lets parties use reservations and declarations to dictate what obligations they will accept or exclude in consenting to be bound.

  - States have exhibited some precision in past treaties, delineating specific reservation authorizations while denying others (or other reservations more generally). *See, e.g.,* Convention on Cybercrime (2001) 2296 UNTS 167, Art. 42 ("By a written notification addressed to the Secretary General of the Council of Europe, any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of the reservation(s) provided for in Article 4, paragraph 2, Article 6, paragraph 3, Article 9, paragraph 4, Article 10, paragraph 3, Article 11, paragraph 3, Article 14, paragraph 3, Article 22, paragraph 2, Article 29, paragraph 4, and Article 41, paragraph 1. No other reservation may be made.").

  - Reservations may also be disavowed/allowed based on whether they involve a treaty's main text or its annexes. *See* Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction (1992) 1974 UNTS 45, Art. XXII ("The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.").

- Nonetheless, I would urge caution in using reservations as the primary vehicle for achieving flexibility in any multilateral investment agreement for at least 3 reasons.
    - First, VCLT Article 19 provides "State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is *incompatible with the object and purpose of the treaty*" (emphasis added).
        - The problem is that States often struggle to discern what a treaty's object and purpose "is," which complicates any effort to delimit which reservations are admissible and which are prohibited. Jan Klabbers has researched this problem extensively. See Jan Klabbers, *Treaties, object and purpose*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (OUP 2008)
            - The manifold goals of the current reform effort will undoubtedly complicate efforts to assess what is the resulting treaty's object and purpose. This may open space for objections to reservations (including perhaps variations on any that the treaty purports to allow expressly) that in turn may lead to arguments over both the admissibility and legal effects of such reservations.
            - This concern might be mitigated if negotiations could reach agreement on the object and purpose of the multilateral instrument (or on each individual protocol if that approach is followed). Some treaties do this explicitly. Article 1 of the Arms Trade Treaty thus provides

> *Object and Purpose*
> *The object of this Treaty is to:*
> - *Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;*
> - *Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;*
>
> *for the purpose of:*
> - *Contributing to international and regional peace, security and stability;*
> - *Reducing human suffering;*
> - *Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.*

The Arms Trade Treaty (2013) [2013] 52 ILM 985, Art. 1; *see also* The Paris Agreement (2016) [2016] 55 ILM 740, Art. 2 ("1.This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre- industrial levels … (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low

greenhouse gas emissions and climate- resilient development. 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.").

- Second, the VCLT does not address what effects follow from a reservation that is inadmissible. Does the reserving state cease to be a party (on the theory that its reservation was an essential element of its consent to be bound)? Or, does international law adopt the ECtHR/Nordic approach of "severing" the invalid reservation, to say nothing of the "intentional" approach advocated by the ILC Rapporteur Allain Pellet. *See, e.g.*, Ryan Goodman, *Human rights treaties, invalid reservations, and state consent*, 96 AM J. INT'L L. 531 (2002); ILC, *Guide to Practice on Reservations to Treaties* [2011] YBILC, vol II(3), at 23 et seq.
    - Absent clarity on how the law handles invalid reservations (to say nothing of ongoing contestation of who has authority to pronounce a reservation inadmissible), it may not make sense to use reservations as the chief vehicle for the desired optionality of the multilateral investment agreement
- Third, the law of treaties has a complex synallagmatic mechanism for accepting and objecting to reservations.
    - Under the VCLT, "a reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides." VCLT Art. 20(1).
    - Nonetheless, there may be questions of whether the reservation is expressly authorized, which will implicate the legal effects that follow from an objection to a reservation.
    - States that object to a reservation can deny treaty relations with reserving state, but "when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation." VCLT Art. 22.
        - The challenge is how to differentiate a reservation not applying "to the extent of the reservation" in case of an objection from cases where the reservation is affirmatively accepted (in which case the reservation modifies for the reserving State and the other accepting state "the provisions of the treaty to which the reservation relates to the extent of the reservation"). For more on this challenge, see Edward Swaine, *Reservations*, in D. HOLLIS (ED.) THE OXFORD GUIDE TO TREATIES (2nd ed. 2020).
- Hence, my own view is that using RUDs here is an invitation to complexities and controversies that can be avoided by drafting concrete options/solutions, rather than relying on the law of reservations to effectuate the desire for flexibility.

WP 194 – Some Brief Comments

Jan Klabbers[1]

I. Introduction

I was asked (as were some colleagues) to write down a few comments on Investor State Dispute Settlement ISDS) reform, in particular on Working Paper 194 (hereinafter WP 194) emanating from UNCITRAL.[2] I do so as a professor of international law with a particular interest in the law of treaties, having authored two research monographs and a number of articles and book chapters on different aspects of the law of treaties. As I understand it, the task before me is to provide comments on WP 194, rather than a reasoned and fully argued paper on the proposed ISDS reform.

One important caveat needs to be made. Law can offer techniques for achieving particular results and foreclose some avenues, but cannot by itself decide on the desirable results. In an exercise such as the present, law is a tool in the hands of decision-makers, in much the same way as a hammer is a tool in the hands of a carpenter: whether the hammer will be useful depends on what goal the carpenter aims to achieve. In other words: it is impossible to say much of concrete relevance as long as there is no clarity on what sort of regime is to be achieved. The law of treaties can help steer the diplomatic process, but cannot replace it. It is in this spirit that the following is written.

II. Some General Notes

The Vienna Convention on the Law of Treaties, concluded in 1969, is a highly versatile and flexible instrument. With some exceptions it contains mostly residual rules (*ergänzendes Recht, droit*

[1] University of Helsinki.
[2] A/CN.9/WG.III/WP.194, 16 January 2020.

supplémentaire), and thus leaves states much freedom to organize their treaty relations. It is generally said to rest on two overarching principles. First, there is the principle of consent: treaties need the consent of states, and if consent is somehow vitiated, the treaty may be invalidated. Second, once consent has been expressed in one form or another, the *pacta sunt servanda* principle is activated: treaties, once in force, are binding on the parties and should be performed in good faith.[3]

For present purposes, this entails two important considerations. First, any agreement, including any multilateral agreement, requires the consent of states, however precisely expressed – treaties, as a general rule, do not come to bind states by majority decision. They may be adopted by majority decision, but will only take legal effect for those state that have expressed their consent to be bound. Second, beyond this requirement of consent, the law of treaties itself does not present obstacles: requirements of form, e.g., are absent from the law of treaties. Such obstacles as the making of treaties may encounter typically stem from domestic (constitutional) law: the possible need to hear parliament; the possible need to consult an advisory body – these requirements owe nothing to the international law of treaties. Quite the opposite: the law of treaties facilitates cooperation and, in line with the general ethos underlying international law, is best seen as an instrument to make relations between states possible. As this is potentially in tension with considerations of democracy and popular support, it is domestic law that typically contains some brakes.

WP 194 contains a discussion of several possible ways to arrive at a new regime for ISDS, and what all proposed ideas have in common is that they entail a multilateral solution. In light of the existence of roughly 3000 possibly applicable bilateral treaties, the most appealing solution would entail the conclusion of a multilateral agreement that would not only be self-standing, but would also accommodate those existing bilateral treaties: a common multilateral roof on top of some 3000 pillars, so to speak.

This will not be easy. Each and every treaty is *res inter alios acta* (a thing between the parties), and as noted, treaties need to be based on consent. Still, there are possible precedents. WP 194 names

[3] The relevance of consent is obvious from the circumstances that all bit one of the recognized causes of a treat's invalidity concern defects in the formation or expression of state consent (articles 46-52 of the Vienna Convention). The *pacta sunt servanda* principle is laid down in article 26 Vienna Convention.

two: the 2013 Mauritius Convention on Transparency,[4] and the OECD's Multilateral Instrument (MLI).[5] The main challenge will be twofold: respecting state sovereignty and the need for consent, while aiming to create a truly common regime. The eventual solution in terms of the sort of instrument to be concluded will depend in part on the substantive dispute resolution model chosen: attempting to create a world court for investment will carry demands that are different from a more modest attempt to harmonize existing arbitration possibilities.

III. Some Possible Precedents

Possibly the best-known early example of a multilateral agreement amending existing bilateral treaties is the 1957 European Convention on Extradition.[6] Its key provision is Article 28, which provides that the Convention supersedes existing bilateral agreements, and may not be departed from by newer bilateral undertaking between parties to the multilateral convention: these may only supplement the multilateral convention. The Council of Europe repeated the experience two years later, when concluding the European Convention on Mutual Assistance in Criminal Matters. This provides effectively that it supersedes earlier bilateral treaties, and gives its parties the freedom to conclude supplementary agreements.[7] Something similar applies to the 1970 European Convention on Repatriation of Minors, although this is less demanding in nature, allowing for instance the conclusion of later treaties departing from its terms.[8]

Interesting as these examples are, they differ in some respects from the ambitions laid down in WP 194. One obvious difference is the geographical scope: the three Council of Europe Conventions, when initially concluded,[9] only covered the existing treaties in force between at most

[4] The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.
[5] Its full name is Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.
[6] ETS no. 24.
[7] ETS no. 30, Article 26.
[8] ETS no. 71, Article 27.
[9] Over time, the European Convention on Extradition has attracted the accession of the former communist states of eastern Europe, and even three non-members of the Council of Europe: Israel, South Korea and South Africa. The fourth non-member of the council listed is the recently expelled Russian Federation. Much the same applies to the Mutual Assistance Convention: 50 parties, several non-members of the Council, including Russia. The Repatriation Convention, by contrast, only has three parties to date (Italy, Turkey and Malta); all three conventions required three expressions of consent in order to enter into force.

a few handfuls of states, and fairly homogenous states at that (western European), with roughly similar judicial systems and underlying liberal values.[10] None of them, moreover, aimed to create a broadly applicable dispute settlement regime: instead, existing mechanisms were assumed to continue. The three conventions broadly harmonize some substantive rules, but stopped short of establishing a multilateral dispute settlement regime – whereas this is precisely what WP 194 is looking for.

That said, these conventions nonetheless establish that supersession of earlier bilateral agreements by a new multilateral one, while allowing for supplementary agreements, can be a possible technique. A different technique, applied in the Mauritius Convention, is to graft a new substantive rule (*in casu*, on transparency) onto sets of pre-existing bilateral regimes. This is a relatively straightforward matter, as it presumes the continued legal existence of those pre-existing bilateral agreements, essentially giving states the option to apply the icing of the cake, while leaving their cakes intact. In essence, much the same applies to the OECD's MLI: creating cooperative options for states alongside their bilateral treaties, rather than replacing or amending these.

An intriguing further option, perhaps more to the point in the WP 194 setting, is how the World Trade Organization (WTO) came to replace the earlier General Agreement on Tariffs and Trade (GATT). In essence, this involved building a new multilateral regime around the foundations of a pre-existing multilateral regime, and what makes the example interesting is precisely that the WTO involves a dispute settlement mechanism. While the entire package included some agreements on substantive trade-related matters (regarding intellectual property, regarding investment, regarding services), the main *raison d'être* of the WTO was – and is – its dispute settlement mechanism, a much more streamlined and judicialized version of what used to be the trade diplomacy mechanisms of GATT.

[10] The Council of Europe has sponsored a number of other multilateral conventions affecting pre-existing bilateral treaties, but many of these combine harmonization with the possibility for parties to derogate by means of later bilateral or multilateral undertakings. Examples include the 1977 Convention on the Service Abroad of Documents Relating to Administrative Matters (ETS no. 94, Article 16) and the 1983 European Convention on the Transfer of Sentenced Persons (ETS no. 112, Article 22.)

To put it in simple terms, the pre-existing GATT continued to exist, as did the various trade concessions states had made over the years,[11] but its very loose and largely improvised institutional structure, including its dispute settlement mechanism, came to be replaced by the WTO. GATT parties became WTO founding members, as did the European Union. The main difference with the WP 194 exercise is that it concerned a pre-existing multilateral agreement (instead of bilateral agreements) being replaced by a new multilateral agreement. Even so, however, what gives the example some relevance is that it involved dispute settlement and other institutional matters. This presupposed, quite naturally, that the parties applying GATT were broadly in agreement about both the desirability of a revamping of the dispute settlement mechanism, as well as the contours of the new mechanism.

IV. Interim Conclusion

So where does all this leave us? It would seem that while there are examples of 'multilateralization' of treaty regimes, none of these are exactly on point. They either involved relatively small numbers of relatively homogenous states (the various Council of Europe Conventions) or merely grafted a particular multilateral substantive rule on top of existing bilateral treaties (Mauritius Convention, in some sense also the OECD's MLI). What is more, unlike the current exercise, none of these sought to create a multilateral dispute settlement mechanism.

The one example thereof (GATT/WTO) is likewise not fully on point, for the different reason that here it concerned not a multilateral regime replacing dyads of bilateral regimes, but a new multilateral mechanism replacing an existing multilateral mechanism. It would also seem that at the time, there was considerable consensus among states that such a new regime was desirable, and considerable consensus about what it should look like. Much the same, incidentally, applies to the OECD's MLI. Its initial impetus stemmed from the most powerful grouping of states in the world: the G20.

[11] This much is clear from the Preamble to the WTO Agreement (fourth recital), resolving to further develop the trading system on the basis of GATT, the results of past trade liberalization efforts, and the results of the Uruguay Round of trade negotiations.

V. Some Final Thoughts

It is axiomatic to claim that well-nigh anything is possible in the law of treaties. If it is possible to amend a multilateral regime by a minority of states even prior to the entry into force of that regime (this happened with the 'implementation agreement' relating to the UN Convention on the Law of the Sea, in 1994[12]), then it can fairly be stated that creativity and political momentum are much more decisive than technical law of treaty points. The law of treaties facilitates, but rarely, if ever, constrains, and the law of treaties cannot alone indicate which route to follow – the primacy of the political (diplomacy) is clear.

That said though, when looking for a creative solution two important structural elements need be factored in. The first is that ISDS reform is about dispute settlement concerning investments, and thus, in essence, about final determinations of rights and obligations having potentially a huge distributive (or re-distributive) effect. The political stakes, in other words, are extremely high, far higher than on most other topics. What is more, ISDS can potentially affect not just relations between states, but also those involving civil society as well as investors. Indeed, it is not unheard of to view investment relations as 'triangular', involving host state, investor state, and investor. While this is not a settled position in positive law, it may at the very least give rise to arguments that rights or legitimate expectations of investors under current bilateral regimes cannot simply be ignored without provoking much discussion and political opposition.

Finally, it is noteworthy that all attempts at multilateralization have involved policy domains that would seem to be more or less inherently bilateral in nature. Extradition, repatriation, mutual legal assistance – the subjects of the Council of Europe Conventions discussed above are all such that they can easily be implemented bilaterally, even in case of an underlying multilateral regime. After all, normally speaking an extradition relationship (or a repatriation relationship, or one of legal assistance) consists of a state asking extradition, and the extraditing state. The relations remain bilateral, even if the substantive regime is the same for a larger number of states due to

[12] Much here depends on framing: it would not have been eccentric to view the implementation agreement as an act defeating object and purpose of UNCLOS pending entry into force, and thus in great tension with Article 18 of the Vienna Convention.

the existence of a multilateral convention. Much the same applies to taxation and even investment, especially when not taking the investor in to account.

Dispute settlement, however, is inherently different. With many bilateral treaties employing similar terms and similar concepts, it seems nigh-on inevitable that a judicial decision or award rendered on the basis of a multilateral undertaking will come to affect the rights and obligations of many states, even if the tribunal would explicitly limit itself to applying but a single bilateral treaty. Indeed, general international judicial practice seems cognizant of the issue. Disputes ending up before the International Court of Justice often involve boundary demarcations (where the radiating effect of the decision will be limited) or will otherwise concern situations that for the better part steer clear of non-bilateral pronunciations; and where such pronunciations are inevitable (as before the WTO), third parties to disputes are afforded the possibility to make their views known, and use this facility eagerly. Dispute settlement may look bilateral (state A starting proceedings against state B), but it involves a bilateralism radically different from that prevailing in many substantive regimes. This circumstance alone makes that a multilateralization of the ISDS regime represents quite a challenge.

(Helsinki, 15 May 2022)

POTENTIAL OPTIONS FOR A MULTILATERAL INSTRUMENT – PROS & CONS

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A. Introduction

1. This memorandum considers various existing conventional approaches with the purpose of identifying elements which may be adapted for the multilateral instrument contemplated by the UNCITRAL WG III.

2. In particular, this memorandum highlights, where applicable, the following aspects of the treaties:

(a) The manner in which the rights and obligations of State parties are structured;
(b) The permissibility of reservations and variations by State parties;
(c) The relationship between the treaty and other treaties which may have overlapping subject matter (through the use of compatibility clauses);
(d) The procedure for the amendment of the treaty;
(e) The procedure for withdrawal or the denunciation of the treaty by State parties; and
(f) The inclusion of provisions or mechanisms to resolve issues of treaty interpretation which may arise.

3. Each section of this memorandum discusses a treaty or a network of interrelated treaties and evaluates their advantages and disadvantages vis-à-vis the contemplated multilateral instrument. In this regard, given that the substantive content of the multilateral instrument is still under discussion, this memorandum casts a wider net in identifying potentially relevant elements of the treaties.

B. International Labour Organisation Maritime Conventions

4. One set of treaties that may be referred to are those adopted under the auspices of the International Labour Organisation ("**ILO**") in relation to maritime labour.

5. Significantly, in 2006, the ILO made available for signing the Maritime Labour Convention ("**MLC**"). This consolidated and updated 68 out of the 72 existing ILO Conventions and Recommendations adopted since 1920 by incorporating (with modifications) the rules, standards and guidelines set out therein,[1] with the intention of gradually phasing out the existing Conventions and Recommendations.[2] Prior to this, the said ILO Conventions and Recommendations had existed in piecemeal form.

Structure

6. The MLC creates a "*single, coherent instrument embodying… up-to-date standards of existing maritime labour Conventions and Recommendations*".[3] It is comprised of three parts. The Articles and Regulations set out the core rights and principles and basic obligations of member states. The Code contains details for the implementation of the Regulations.

7. The Code comprises Part A (mandatory standards) and Part B (non-mandatory guidelines).[4] This provides flexibility which is intended to secure the widest possible acceptability amongst states.[5]

8. The Explanatory Note casts further light on the structure of the Code, as follows:

> *"The second area of flexibility in implementation is provided by formulating the mandatory requirements of many provisions in Part A in a more general way, thus leaving a wider scope for discretion as to the precise action to be provided for at the national level. In such cases, guidance on implementation is given in the non-mandatory Part B of the Code.*

[1] Article X of the MLC.
[2] See paragraph 16 below.
[3] Paragraph 3 of the Preamble to the MLC.
[4] Article VI(1) of the MLC.
[5] Securing the widest possible acceptability is one of the guiding principles in the drafting of the MLC, as indicated at paragraph 12 of the Preamble.

In this way, Members which have ratified this Convention can ascertain the kind of action that might be expected of them under the corresponding general obligation in Part A, as well as action that would not necessarily be required.

For example, Standard A4.1 requires all ships to provide prompt access to the necessary medicines for medical care on board ship (paragraph 1(b)) and to "carry a medicine chest" (paragraph 4(a)). The fulfilment in good faith of this latter obligation clearly means something more than simply having a medicine chest on board each ship. A more precise indication of what is involved is provided in the corresponding Guideline B4.1.1 (paragraph 4) so as to ensure that the contents of the chest are properly stored, used and maintained."

Reservations & variations

9. No reservations may be made to the MLC.[6] However, the MLC contemplates two broad situations where variations, derogations or exemptions may be permitted.

10. First, under Article VI(3), the manner in which the rights and principles in Part A of the code are implemented may be departed from if:

(a) The member state is "*not in a position to implement the rights and principles*" in the manner provided by Part A;
(b) The member state implements the rights and principles through other laws and regulations which are "*substantially equivalent*" to the provisions of Part A; and
(c) There is no express provision in the Convention against this.[7]

11. It should be noted that Article VI(3) does not permit members to derogate from the rights and principles, only the manner in which they are implemented.

12. Second, Article VIII states as follows:

"Any derogation, exemption or other flexible application of this Convention ***for which the Convention requires consultation with shipowners' and seafarers' organizations*** *may, in cases where representative organizations of shipowners or of seafarers do not exist within a Member,* ***only be decided by that Member through consultation with the Committee referred to in Article XIII****."*

13. There are thus some derogations and variations which require consultation and some derogations which do not. Various provisions in the Code expressly provided that derogation can only be made upon consultation.[8] By implication, it would appear that derogations and variations may be permitted where no such requirement of consultation is expressed.

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[6] https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_700643/lang--en/index.htm
[7] Article VI of the MLC.
[8] See for example, A1.1(3)(b), A1.2(2) and A1.4(2) of the MLC.

Compatibility clause

14. The MLC does not contain a compatibility clause.

15. However, many other ILO conventions contain the following provision or some variation of it:

> *"1. Should the Conference adopt a new Convention revisiting this Convention in whole or in part, then, unless the new Convention otherwise provides:*
>
> *(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 16 above, if and when the new revising Convention shall have come into force*
>
> *(b) as from the date when the new revising Conventions come into force this Convention shall cease to be open to ratification by the Members.*
>
> *2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention."*[9]

16. Notably, many of the 68 ILO Conventions and Recommendations which the MLC seeks to replace contain the above provision. .[10] As such, these conventions are now closed to further ratification.[11]

Amendment

17. The Articles and Regulations can only be amended by the General Conference in the framework of article 19 of the Constitution of the International Labour Organisation.[12]

18. The Code can be amended through the simplified procedure set out in Article XV of the MLC. Since the Code relates to detailed implementation, amendments to it must remain within the general scope of the Articles and Regulations. Proposed amendments will only be adopted if at least two-thirds of the Special Tripartite Committee members vote in favour of the amendment.[13]

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[9] Freedom of Association and Protection of the Right to Organise Convention, 1948, Article 20. See also for example the Right to Organise and Collective Bargaining Convention 1949, Article 15.

[10] Recruitment and Placement of Seafarers Convention, 1996, Article 14.

[11] Maritime Labour Convention, 2006, Frequently Asked Questions, A19. https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_765083.pdf

[12] Article XIV(1) of the MLC

[13] Article XV(4) of the MLC

Withdrawal

19. Pursuant to Article. IX(1) of the MLC, members cannot withdraw from the MLC within the first 10 years from the date the MLC first comes into force. Subsequently, withdrawals may be made, and they take effect one year after being registered with the ILO.[14]

20. If a member does not withdraw from the MLC within a year from the expiration of the initial 10-year period, it will automatically be bound for another period of ten years.[15]

Interpretation provisions / mechanisms

21. The MLC contains a unique mechanism for determining certain issues relating to its applicability.

22. When there are doubts on whether an individual is a "seafarer" as contemplated by the MLC, the issue is to be determined by the "competent authority" (that is, the designated local authority of each State party),[16] in consultation with the relevant ship owners' organisations and seafarers' organisation.[17] A similar procedure is adopted when there are doubts as to whether the MLC applies to a particular ship.[18]

Evaluation

23. **Pros**:

i. The structuring of the MLC into Articles, Regulations and Codes creates a clear hierarchy of norms, with the Articles representing the most fundamental rules, the Regulations setting out more detailed rules and the Codes setting out the manner in which the Regulations can be implemented. Should this model be adopted for the new multilateral instrument, it would be possible to provide that there can be no reservations to Articles, but that reservations are permissible with respect to Regulations and Codes.

ii. The structuring of the Code into mandatory and non-mandatory sections may be highly useful for the contemplated multilateral instrument. This is in particular because international arbitration is an area where soft law may play an important role. Accordingly, if State parties are unable to agree on certain rules, such as those relating to conflicts of interest, double-hatting or other matters currently set out in the various guidelines issued by the IBA, these may be

[14] Article IX(1) of the MLC

[15] Article IX(2) of the MLC

[16] Article II(1)(a) defines the "competent authority" as the "*minister, government department or other authority having power to issue and enforce regulations, orders or other instructions having the force of law in respect of the subject matter of the provision concerned*".

[17] Article II(3) of the MLC

[18] Article II(5) of the MLC

incorporated into the multilateral instrument as non-mandatory guidelines instead.

iii. The inclusion of a clause which provides that the revision of the convention or adoption of a convention on the same subject matter in the future results in the immediate denunciation of the existing convention facilitates future reform.[19] However, care will have to be taken to determine what rights and obligations parties to different versions of the multilateral instrument owe towards each other, and such clauses should therefore be accompanied by transition / compatibility clauses.

iv. The creation of a bifurcated regime for making amendments to the Articles and Regulations, on one hand, and the Code, on the other, strikes the right balance between ensuring a higher level of participation and consent on more fundamental matters (as are enshrined in the Articles and Regulations), and permitting efficiency in more technical or practical matters (as are set out in the Code).

v. The unique regime for the resolution of issues of interpretation promotes efficiency and permits stakeholders (i.e. the state, the seafarers organisation and shipowners' organisation) to participate in the development of jurisprudence. Depending on what substantive reforms are implemented through the multilateral instrument, it may be worth considering if there is scope for the creation of a more efficient, less-judicialised body. However, this could also result in unnecessary issues in negotiating on the constitution of the interpretive body. Moreover, given that the legal issues arising under the new multilateral instrument are likely to have wide-reaching consequences for treaty law and/or the relationship between states, recourse to the usual forums may be more appropriate.

24. **Cons**:

i. Arguably, the prohibition on reservations may result in a lack of flexibility which greatly reduces the uptake of the new multilateral instrument. A better solution may be to bar reservations only on matters which are at the core of the reform.

ii. The absence of a compatibility clause is not ideal in an area where there are many potentially overlapping treaties.

C. United Nations Convention on the Law of the Sea

Structure

[19] See paragraph 15 above

25. The United Nations Convention on the Law of the Sea (the "**UNCLOS**") is an extensive treaty which contains provisions on many matters relating to the sea. For present purposes, the disputes mechanism is of interest.

26. Part XV of the UNCLOS contains the dispute settlement provisions. The binding nature of these provisions is clear from Article 286, which states that "*any dispute concerning the interpretation or application of this Convention* ***shall****, where no settlement has been reached… be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section*".

27. It is apposite to recall at this juncture that the UNCLOS was drafted as a "package deal". As such, treaty reservations, whether to Part XV or not, cannot be made, save where this is specifically permitted by the UNCLOS.[20]

28. Section 2 of Part XV of the UNCLOS provides parties with a choice of dispute resolution fora. Per Article 287, the available fora for the settlement of disputes are:

(a) The ITLOS (established under Annex VI of the UNCLOS);
(b) The ICJ;
(c) An arbitral tribunal constituted in accordance with Annex VII of the UNCLOS ("**Annex VII Arbitration**"); and
(d) A special arbitral tribunal constituted in accordance with Annex VIII for certain specialised disputes.

29. Parties may express their consent to submit to disputes to one or more of these mechanisms by making a written declaration when signing, ratifying or acceding to the UNCLOS or any time thereafter.[21] In the absence of such a declaration, a State Party is deemed to have accepted Annex VII Arbitration.[22]

30. When parties to a dispute have accepted the same procedure, the dispute may only be submitted to that procedure.[23] When parties have not accepted the same procedure, then it may only be submitted to Annex VII Arbitration.[24]

31. A limited category of disputes may be exempted from the above compulsory dispute resolution mechanism. These are exhaustively listed out in Section 3 of Part XV of the UNCLOS. Specifically, Article 297 sets out a list of "limitations" on the applicability of Section 2, while Article 298 sets out a list of "optional exceptions", the difference between limitations and exceptions being that the former apply automatically, while the latter only operate if a State party has declared in writing that it wishes to avail itself of the exception.[25]

[20] Article 309 of the UNCLOS
[21] Article 287(1) of the UNCLOS
[22] Article 287(3) of the UNCLOS
[23] Article 287(4) of the UNCLOS
[24] Article 287(5) of the UNCLOS
[25] Article 298(1) of the UNCLOS

32. Notwithstanding the above, parties may consent to subject disputes excluded by Articles 297 and 298 to Section 2 of Part XV of the UNCLOS.[26]

Extension of subject matter jurisdiction

33. Article 288 of the UNCLOS states as follows:

> *"1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.*
>
> *2. A court or tribunal referred to in article 287 shall also have jurisdiction over* ***any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention****, which is submitted to it in accordance with the agreement*."
>
> (**emphasis added**)

34. The jurisdiction of the dispute resolution fora listed under Article 287 is therefore not confined to disputes concerning UNCLOS, but may also extend to matters related to the purposes of the UNCLOS.

Compatibility clauses

35. The UNCLOS contains a supremacy clause in relation to certain earlier conventions. Article 311(1) states that the UNCLOS "*shall prevail, as between State Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958*."

36. It is also relevant to note that certain other maritime treaties contain subordination clauses. For example, Article 4 of the Fish Stocks Agreement states that "*[n]othing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the [UNCLOS]*" and that it will be "*interpreted and applied in the context of and in a manner consistent with the [UNCLOS]*".

Reservations & variations

37. As stated above, the UNCLOS does not admit of reservations unless where expressly permitted.[27]

38. However, parties are permitted to conclude agreements "*modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them*". This is subject to three conditions. First, the agreement must not *"relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention*." Second, the agreement must

[26] Article 299 of the UNCLOS
[27] Article 309 of the UNCLOS

not affect the "*application of the basic principles embodied herein*".[28] Third, the agreement must not affect the enjoyment of other State parties of their rights or the performance of their obligations under the UNCLOS.[29] State parties are required to notify other state parties of their intention to conclude such agreements before entering into them.[30]

Amendment

39. The UNCLOS contains a trifurcated procedure for the amendment of its provisions.

40. Firstly, amendments "*relating to activities in the Area*" (i.e. the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction)[31] must be approved by the Council (constituted under Article 161 of the UNCLOS) and then by the Assembly, which is comprised of members of each State party (constituted under Article 159 of the UNCLOS).[32]

41. Amendments relating to other subject matters may be approved either through the ordinary procedure or the simplified procedure.

42. Under the ordinary procedure, a State party proposing an amendment must request the convening of a conference to consider its proposal. This can only be done after 10 years have elapsed from the UNCLOS entering into force.[33] If more than half of the State parties respond favourably to the request, a conference is convened. The decision-making process adopted is the same as that applicable at the 3rd UN Conference on the Law of the Sea unless otherwise decided.[34] The amendment procedure is thus consensus based.

43. Under the simplified procedure, a State party may propose an amendment by writing to the Secretary-General.[35] The Secretary-General then circulates the proposed amendment to all State parties, who may object to the proposal within a period of 12 months. If no objections are raised during this period, then the amendment is adopted.[36] This amendment procedure is thus based on unanimity.

Withdrawal

[28] Article 311(6) clarifies that there shall be no amendments to the basic principle relating to the common heritage of mankind set out in Article 136 of the UNCLOS.
[29] Article 311(3) of the UNCLOS
[30] Article 311(4) of the UNCLOS
[31] Article 1(1)(1) of the UNCLOS
[32] Article 314(1) of the UNCLOS
[33] Article 312(1) of the UNCLOS
[34] Article 312(2) of the UNCLOS
[35] Article 313(1) of the UNCLOS
[36] Article 313(3) of the UNCLOS

44. State parties may withdraw from the UNCLOS by providing written notice to the Secretary General of the UN. They are required to provided their reasons for withdrawing, but the failure to do so does not affect the validity of the withdrawal.[37]

45. The withdrawal takes effect one year after the receipt of the notification, unless the notice provides for a later date.[38]

Interpretation provisions / mechanisms

46. The UNCLOS does not contain a specialised mechanism for the interpretation of its provisions.

Evaluation

47. **Pros**

i. The UNCLOS dispute resolution system may be highly useful as a model for the new multilateral instrument given that it provides for an array of options, which provides parties with the flexibility that they desire. However, it is also key to note that such flexibility is only able to be balanced with the compulsory nature of dispute resolution because of the existence of a binding default option (that is, Annex VII Arbitration) when parties did not agree to the same fora for dispute resolution. Should such a default option exist in the new multilateral instrument, it would have to be an option that is easily acceptable to State parties. Further, this default option would ideally be one which incorporates some of the elements which the multilateral instrument has reformed, rather than having parties revert to ad-hoc arbitration.

ii. The inclusion of a supremacy clause in the UNCLOS, to affirm that it prevails over the provision of earlier conventions on the same subject matter, lends clarity to its application.

iii. The UNCLOS does not permit reservations but permits parties to vary its provisions *inter se*, subject to conditions. This can be adopted for the new multilateral instrument, as it lends flexibility to the system which would promote greater state participation. It would further be useful to set out, in list form, which provisions can be varied rather than leave it to be resolved by treaty interpretation.

48. **Cons**

i. While the complete prohibition against reservations made sense for the UNCLOS (because it was drafted as a package deal), this may be unnecessary for the new multilateral instrument.

[37] Article 317(1) of the UNCLOS
[38] Article 317(1) of the UNCLOS

ii. The exclusions and limitations to the use of the UNCLOS dispute resolution system may not be suitable for the new multilateral instrument.

iii. The trifurcated amendment procedure appears to be unduly complicated. Moreover, it may not be efficient to make amendments by consensus.

D. Environmental treaties and associated protocols – Framework Convention Model

49. Environmental obligations under public international law are primarily governed by way of a network of treaties, consisting of framework conventions and protocols thereto. A few notable framework conventions in this regard are as follows:

(a) The United Nations Framework Convention on Climate Change ('**UNFCCC**');[39]
(b) The Vienna Convention for the Protection of the Ozone Layer ('**VCPOL**');[40]
(c) The United Nations Convention on Biodiversity ('**CBD**');
(d) The Antarctic Treaty System[41] and the Convention on the Conservation of Antarctic Marine Living Resources ('**CAMLR**')[42]; and
(e) the framework conventions negotiated by the United Nations Economic Commission for Europe ('**UNECE**').

50. Since the models followed by the UNECE conventions are practically identical, this memorandum references the 1979 Convention on Long-Range Transboundary Air Pollution ('**CLRTAP**')[43] and its protocols as an exemplification of this model.

51. At the outset, it is noteworthy that these systems do not seek to integrate regional treaties into their ambit, nor to modify past treaties. Instead, these systems implement additional obligations over and above those in existing treaties or create obligations in specific areas or regarding specific issues. These systems may also set out clauses excluding specific matters covered by older treaties from the newer treaties.

52. Given the above, these systems have been critiqued for fragmentation and lack of clarity on which provisions take precedence in the event that two or more treaties contain conflicting provisions which purport to govern a particular issue. . As such, this may not be of direct relevance to the multilateral instrument, however, the structure of compatibility clauses and interactions between the treaty networks may prove to be useful.

Structure

[39] https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf
[40] https://ozone.unep.org/treaties/vienna-convention/articles/article-2-general-obligations
[41] https://documents.ats.aq/keydocs/vol_1/vol1_2_AT_Antarctic_Treaty_e.pdf
[42] https://www.ccamlr.org/en/organisation/camlr-convention-text
[43] https://unece.org/sites/default/files/2021-05/1979%20CLRTAP.e.pdf

53. Environmental conventions have attempted to adopt a flexible model due to the fact that they apply on a 'common but differentiated' standard on their State parties.

54. This approach may be illustrated by reference to the UNFCCC, the Kyoto Protocol and the Paris Agreement. The UNFCCC sets forth broad obligations for developed states and developing states, and establishes a conference, secretariat, and subsidiary bodies for scientific advice and implementation of the convention, financial obligations of states, and the dispute resolution mechanism.[44] The Convention also specifically provides for the adoption of protocols to the Convention, and states that '*(d)ecisions under any protocol shall be taken only by the Parties to the protocol concerned.*' States cannot be parties to the Protocols without being parties to the framework convention.

55. The Kyoto Protocol[45] to the UNFCCC sets forth more specific obligations by committing industrialized countries and economies in transition to limit and reduce greenhouse gases emissions in accordance with agreed individual targets. Similarly, the Paris Agreement[46] (which is also under the aegis of the UNFCCC) sets forth more stringent obligations in respect of combatting climate change. Article 18 of the Kyoto Protocol and Article 24 of the Paris Agreement extend the dispute resolution clause of the UNFCCC to these protocols.

56. The CBD and its associated protocols adopt a similar model. The CBD sets forth broad standards, while the Nagoya and Cartagena Protocols thereto set forth additional obligations for the parties to those protocols. The CBD extends its dispute resolution clause to the protocols, except where otherwise agreed in the protocols.[47]

57. The UNECE Conventions such as the CLRTAP also follow the same approach. However, unlike the UNFCCC and the CBD, the CLRTAP does not contain any express provisions regarding protocols. The CLRTAP has eight protocols – seven of these set forth obligations in respect of specific aspects of air pollution such as sulphur emission, heavy metals, acidification, organic pollutants etc, and the remaining protocol sets forth obligations on financing a long-term programme on transboundary air pollution. Most of

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[44] The dispute resolution clause is as follows: "*When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:*
(a) Submission of the dispute to the International Court of Justice; and/or
(b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration"
… "*Subject to the operation of paragraph 2 above, if after twelve months following notification by one Party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.*
6. A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith."

[45] https://unfccc.int/sites/default/files/resource/docs/cop3/l07a01.pdf

[46] https://unfccc.int/sites/default/files/english_paris_agreement.pdf

[47] Article 27 of the CBD: "*The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned*".

these protocols do not contain a dispute resolution clause distinct from the framework convention. However, certain protocols such as the Oslo Protocol on Sulphur Emissions[48] contains its own distinct dispute resolution mechanism.

58. The Antarctic Treaty system operates through the Antarctic Treaty, which provides a list of matters requiring action by states (including inter alia conservation of living resources), and provides that the representatives of these states are required to meet, exchange information, and consult on these matters, and formulate proposals to present to their governments. The Antarctic Treaty also has a Protocol on Environmental Protection,[49] and the states which are parties to the protocol have assumed certain obligations in respect of preserving the environment in the Antarctic region.

59. The Antarctic Environmental Protocol has a separate dispute settlement clause, providing for the choice of either the ICJ or arbitration by means of declaration, with arbitration as the default in case of conflicting declarations, with certain Annexes excluding the clause in the event of issues pertaining to those Annexes, such as Annex IV which deals with marine pollution.

60. In addition to this, the CAMLR is an additional treaty, and is part of the Antarctic Treaty System, despite the fact that the parties to the CAMLR may or may not be party to the Antarctic Treaty itself. Although developed under the patronage of the Antarctic Treaty, the CAMLR Convention stands alone and its area of application is larger than that of the Antarctic Treaty. Article I of the CAMLR Convention sets the northern boundary of the Antarctic marine ecosystem as the Antarctic Convergence now known as the 'Antarctic Polar Front'.

61. The CAMLR however, imports standards from and binds parties to obligations within the Antarctic Treaty. Under Article III of the CAMLR Convention, Contracting Parties, whether or not they are Parties to the Antarctic Treaty, "agree that they will not engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty and that, in their relations with each other, they are bound by the obligations contained in Article I and V of the Antarctic Treaty". Article I of the Antarctic Treaty provides, inter alia, that Antarctica shall be used for peaceful purposes only. Article V of the Antarctic Treaty prohibits, inter alia, any, nuclear explosions in Antarctica and disposal of radioactive waste material.

62. Further, Article IV.1 of the CAMLR Convention binds its Contracting Parties to Articles IV and VI of the Antarctic Treaty in their relations with each other. The Antarctic Treaty and the CAMLR Convention (through Article IV of both) explicitly provide for all States' positions with regard to Antarctic territorial claims. Article IV.2 of the CAMLR Convention reflects Article IV.1 of the Antarctic Treaty, which safeguards all parties' positions regarding claims to territorial sovereignty.

63. **Pros and cons**: While this model provides flexibility, this is at the cost of having a coherent and unified system. The end result is a series of treaties with each have

[48] https://unece.org/sites/default/files/2021-10/1994.Sulphur.e.pdf

[49] https://documents.ats.aq/keydocs/vol_1/vol1_4_AT_Protocol_on_EP_e.pdf

different State parties, and a lack of clarity on their specific interaction with each other and with their protocols. Notwithstanding the above, the framework-protocol model itself is useful for the contemplated multilateral instrument, insofar as it gives states flexibility to customize their ISDS systems. Such flexibility can be achieved by ensuring that each State party is bound by the main framework convention containing a base set of norms which cannot be derogated from, and placing other less universally accepted elements of the reform in optional protocols, such as the framework for the multilateral investment court. . This would enable states who wish to adopt the other reforms to sign the framework convention and those who wish to use the court may sign the protocol in addition thereto.

Compatibility clauses

64. The UNFCCC does not contain a compatibility clause in respect of its own protocols. However, it does address the Montreal Protocol to the VCPOL, by excluding obligations pertaining to certain specific pollutants under the ambit of the Montreal Protocol from its own scope.[50] The same is followed in its Protocols as well. The interrelation between environmental conventions is also seen in Article 22[51] of the CBD, which creates further issues of interpretation. This Article provides that other rights and obligations under international conventions shall not be impacted by the CBD except insofar as there is a serious threat to biodiversity but does not define the contours of a serious threat. It also specifically requires compliance with the law of the sea in respect of marine biodiversity.

65. The Nagoya Protocol contains a clause on interaction with other treaties as well,[52] which appears to be in favour of harmonious construction and not entirely clear on which

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[50] See e.g. Article 4.1 (a): "*Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks* ***of all greenhouse gases not controlled by the Montreal Protocol****, using comparable methodologies to be agreed upon by the Conference of the Parties*" and Article 12 "*In accordance with Article 4, paragraph 1, each Party shall communicate to the Conference of the Parties, through the secretariat, the following elements of information: (a) A national inventory of anthropogenic emissions by sources and removals by sinks of all* ***greenhouse gases not controlled by the Montreal Protocol****, to the extent its capacities permit, using comparable methodologies to be promoted and agreed upon by the Conference of the Parties;"(*emphasis supplied)

[51] Article 22 of the CBD: "*1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights ana obligations would cause a serious damage or threat to biological diversity.*
2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights" and obligations of States under the law of the sea."

[52] Article 4 of the Nagoya Protocol:" *1. The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.*
2. Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.
3. This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.
4. This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol

obligation would take precedence. It states that its provisions "*shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.*" [*Note: Prima facie, it seems to take precedence only where the other treaty's rights/obligations cause a serious threat to biodiversity*.]

66. The Cartagena Protocol adopts a clearer approach, requiring the implementation of the higher standard of protection in the event of conflicting provisions. Article 14 thereof states as follows:

> "*1. Parties may enter into bilateral, regional and multilateral agreements and arrangements regarding intentional transboundary movements of living modified organisms, consistent with the objective of this Protocol and provided that such agreements and arrangements do not result in a lower level of protection than that provided for by the Protocol.*
>
> *2. The Parties shall inform each other, through the Biosafety Clearing-House, of any such bilateral, regional and multilateral agreements and arrangements that they have entered into before or after the date of entry into force of this Protocol.*
>
> *3. The provisions of this Protocol shall not affect intentional transboundary movements that take place pursuant to such agreements and arrangements as between the parties to those agreements or arrangements.*"

67. The CLRTAP and its protocols do not contain compatibility clauses of any kind.

68. As per Article 4 of the Antarctic Environment Protocol, the Protocol shall "*supplement the Antarctic Treaty and shall neither modify nor amend that Treaty*". It also places itself as subordinate to other treaties in the Antarctic Treaty System, stating that "*(n)othing in this Protocol shall derogate from the rights and obligations of the Parties to this Protocol under the other international instruments in force within the Antarctic Treaty system."*

69. It also specifically provides for consistency in the following terms:

> "*The Parties shall consult and co-operate with the Contracting Parties to the other international instruments in force within the Antarctic Treaty system and their respective institutions with a view to ensuring the achievement of the objectives and principles of this Protocol and avoiding any interference with the achievement of the objectives and principles of those instruments or any inconsistency between the implementation of those instruments and of this Protocol."*

70. Annex IV of the Antarctic Environmental Protocol also provides for compatibility in respect of the International Convention for the Prevention of Pollution from Ships ('**MARPOL**'), by importing definitions therefrom, and specifically providing that '*(w)ith*

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does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument."

respect to those Parties which are also Parties to MARPOL 73/78, nothing in this Annex shall derogate from the specific rights and obligations thereunder.'

71. The CAMLR Antarctic Treaty Article VI expressly recognises that 'nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of rights, of any State under international law with regard to the high seas within the area'.

72. Article 6.1 of Annex V of the Antarctic Environment Protocol (Area Protection and Management) and amendments to Annex II (Conservation of Antarctic Fauna and Flora), which were adopted by the ATCM in 2009 but are not yet in force, provide for consultation with CCAMLR.

73. CAMLR also addresses its interaction with 2 other treaties, specifying that "*(n)othing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.*" In contrast, the Seals convention contains no clause on its interaction with CAMLR.

74. **Pros and cons**: the benefit of specifying the interaction with past treaties cannot be overstated. It eliminates the need for recourse to Article 30 of the VCLT, and prevents the erosion of past treaties, while integrating them into the new framework. The CAMLR and Antarctic Treaty model of adding in obligations could also be considered – obligations under the ICSID Convention or the New York Convention could be integrated into the multilateral instrument if the need arises, ensuring compatibility. The environment treaties do not deal with modifying these past treaties, merely preserving them and adding obligations over and above them, which is not of direct relevance to the interaction between the proposed multilateral instrument and the existing BITs.

Amendment

75. The protocols can be amended by the parties to the protocols. However these must be sent to the parties to the Convention prior to amendment. The UNFCC allows amendment through consensus, and failing consensus, by a 3/4th majority vote. The CBD and CLRTAP follow the same model with 2/3rd majority. The Antarctic Treaty requires amendments to be proposed at its scheduled review meetings.

Withdrawal

76. The UNFCCC permits withdrawal at any point three years after entry into force by way of notice to the Depository, and withdrawal from the Convention amounts to an automatic withdrawal from the protocols. This takes effect one year after the deposit of such notification. Withdrawal from a Protocol does not automatically lead to withdrawal from the UNFCCC itself. The CBD follows an identical method with two years instead of three, and CLRTAP with five years and taking effect within 90 days. The Antarctic Treaty does not contain a provision for withdrawal, and the CAMLR requires notifications of withdrawal to be submitted on 30th June of any year.

Interpretation

77. The UNFCCC and CLRTAP do not specify whether the Convention prevails, overrides protocols, or whether the protocol would take precedence, and the Kyoto Protocol and Paris Agreement, and all 8 Protocols to CLRTAP are also silent in this respect .

78. In contrast, the VCPOL clearly specifies that obligations undertaken under the optional protocols as well as any other domestic measures cannot be incompatible with the VCPOL itself. The Montreal Protocol also partly defers to the VCPOL, stating '*(e)xcept as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol.*' *[note: this makes it somewhat unclear and circular insofar as it refers to a provision mandating compatibility in the VCPOL, then stating 'except as otherwise provided' – while also not making any such exception, thus the practical impact has not been seen]*.

79. The Cartagena Protocol to the CBD provides for implementation of the higher standard of protection in the event of conflicting norms, and the Nagoya Protocol as well as the CBD favour harmonious interpretation with an exception for serious threats to biodiversity.

80. The CAMLR, Seals convention, Antarctic Environment Protocol, and Antarctic Treaty do not directly specify rules of interpretation, however due to their 'nothing in this treaty derogates from other obligations' clauses, the higher protection standard is likely to be applied.

81. **Pros and Cons:** the provisions in the environment treaties on interpretation and hierarchy of treaties and obligations are somewhat vague, and in some cases, do not exist at all. This is not ideal for the multilateral instrument , which will be modifying a multitude of BITs, and having unclear standards or no standards would be highly detrimental.

Opt-in/Opt-out – Reservations – Optionality of protocols

82. The Framework Conventions do not allow for reservations. Several protocols, such as the Montreal Protocol, Paris Agreement, Kyoto Protocol, Nagoya Protocol, Cartagena Protocol, etc. do not permit reservations. The protocols are not binding by default and must be separately entered into, i.e. 'opt-in' to each protocol by signing/ratifying/acceding. Since the framework and protocols in this respect are not intended to govern an additional set of treaties, in contrast to the multilateral instrument (and as addressed in detail in the section on the Mauritius Convention and MLI in this Note), these do not contain lists of other conventions to be opted in or out of or conventions that would stand modified upon the entry into force of these conventions/protocols.

83. **Pros and Cons**: The advantage of such an optional protocol mechanism in respect of a multilateral instrument would be ease of operation and significant flexibility and options for regime customization, since states can simply sign/accede to the relevant

protocols once they are parties to the framework convention, with the framework convention setting out basic norms, being mandatory and not permitting reservations, and the protocols themselves addressing specific issues not universally agreed upon, as binding only between the parties to those protocols.

84. However, conversely, this may lead to issues, for instance where the investor's home state and the host state are both parties to 2 or more conflicting protocols, or where the protocols conflict with the framework convention. Thus, it may be useful to set out the relevant hierarchy of norms. It would also be useful to have specific conflict resolution provisions, for instance in the manner proposed in the Cartagena Protocol where the higher protection is accorded.

E. World Trade Organization Model

85. The World Trade Organization ("**WTO**") model is a self-contained system, and thus may not be directly applicable to the ISDS reform model, which seeks to (partly) modify a plethora of regional agreements and add rights and obligations in respect of member states which may or may not directly conflict with these existing agreements. Nevertheless, the WTO system interacts with regional trade agreements, which may provide an example of how the multilateral instrument can interact with the existing network of BITs, without requiring extensive individual amendment thereof.

Structure

86. The WTO model operates through one umbrella agreement (the Agreement Establishing the WTO[53]), which includes under its aegis 3 broad agreements (GATT, GATS, TRIPS), special agreements and annexes, and detailed lists/schedules of commitments by individual countries.

87. The countries make their decisions through various councils and committees, whose membership consists of all WTO members. Topmost is the ministerial conference which has to meet at least once every two years. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements. Day-to-day work in between the ministerial conferences is handled by three bodies, i.e. the General Council, Dispute Settlement Body, and the Trade Policy Review Body. All three are in fact the same — the Agreement Establishing the WTO states they are all the General Council, although they meet under different terms of reference. Again, all three consist of all WTO members. They report to the Ministerial Conference.

88. The third level is the goods council, services council, and TRIPS council, which deal with their respective specified areas. They comprise all WTO members, and also have their own subsidiary bodies. Two more subsidiary bodies dealing with the plurilateral agreements (which are not signed by all WTO members) keep the General Council informed of their activities regularly.

[53] https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleXV

89. The Plurilateral Agreements (on aircraft and government procurement) have a limited number of signatories.

90. The WTO also contains its own distinct dispute settlement mechanism through the Dispute Settlement Body and the Appellate Body, which covers the agreements under the WTO umbrella framework as well.

91.

Compatibility clauses

92. The WTO Agreement clearly specifies that it prevails In the event of a conflict between itself and a provision of any of the Multilateral Trade Agreements. The WTO system also interacts with regional trade agreements ('**RTAs**').

93. To be legally constituted under the WTO laws, RTAs must comply with the conditions prescribed by the WTO as per GATT Article XXIV, GATS V and the Enabling Clause.[54] The RTAs cover many sectors ranging from goods, services, intellectual property, environment, health to culture and political cooperation among others. These areas go beyond Articles XXIV of GATT, V of GATS and the Enabling Clause. Most of the provisions on trade, goods and intellectual property resemble those of the WTO, except that in areas such as intellectual property, notably, the RTAs have introduced WTO-plus standards.

94. Despite the fact that the WTO allows for the establishment of RTAs and recognises them as such, and despite the general consensus that RTAs are the prominent feature of multilateralism, the relationship between the WTO and RTAs is, in general, not clearly defined leading to overlaps and tension[55]. The WTO has thus resorted to attempting a soft law approach to harmonize the system,[56] and also added a body to determine compatibility of RTAs with the WTO.

95. **Pros and cons**: The system is vague and fails to directly address the issue. The multilateral instrument's approach would need to be clearer in establishing its relationship with existing BITs as well as the ICSID system, in order to avoid such confusion.

Amendment

96. Any party can propose an amendment, which is then placed before the Ministerial Conference, and decisions on whether or not to submit the amendment for approval are taken through consensus, and failing consensus within the specified time period, by 2/3rd majority. Certain provisions mandatorily require the approval of all members for

[54] https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art24_oth.pdf

[55] Malebakeng Agnes Forere, *The Relationship of WTO Law and Regional Trade Agreements in Dispute Settlement,* Global Trade Law Series, Volume 50 (2015) p. 3.

[56] Richard Baldwin and Theresa Carpenter, '*Regionalism: From Fragmentation Towards Coherence'* in Thomas Cottier and Panagiotis Delimatsis (eds), The Prospects of International Trade Regulation: From Fragmentation to Coherence (Cambridge UP 2011), p. 138

amendment. Other provisions, depending on their nature, require 2/3rd majority, 3/4th majority, or consensus to pass. The WTO Agreement deals with its own amendment as well as the amendment of the GATS, GATT, TRIPS, and other conventions under its aegis.

97. **Pros and cons**: Achieving consensus is time consuming and may delay the process, however it has the benefit of greater legitimacy of the system. The differentiated amendment processes may also be useful to prevent basic norms from being modified for the benefit of some states to the detriment of others, however, for protocols and non-fundamental provisions, an ordinary amendment process with a 2/3rd or 3/4th majority vote would be easier operationally.

Withdrawal

98. The WTO Agreement permits withdrawal, which takes effect 6 months after submitting a notification to such effect. The provision also provides that "(w)ithdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."

99. **Pros and cons:** The multilateral instrument ought to address the consequences of withdrawal from the framework treaty and whether the protocols are automatically exited from, in particular, potential protocols on the multilateral court system, appellate system, and advisory committee, which create distinct bodies with their own set of obligations.

Interpretation provisions

100. The WTO system is required to be harmoniously interpreted. In the event of conflict, the framework agreement prevails, in contrast to ordinary *lex specialis* rules. In the event of a conflict between GATT, GATS, TRIPS and a specialized agreement, the latter prevails by way of the *lex specialis* rule. In the event of a conflict between 2 sectoral agreements, the agreement on the sector affected to a greater degree prevails. There may be merit in structuring the multilateral instrument in a similar manner, with the framework convention taking precedence over its protocols and the BITs, which would lead to greater uniformity of application.

101. The WTO laws are interpreted by the Dispute Settlement Body and the Appellate Body, although the latter has resulted in controversy due to a few states' concern that it was acting as a law-making entity rather than a law-interpreting entity.

102. **Pros and cons**: It would be useful for the multilateral instrument to specify its framework and a clear hierarchy of which provisions prevail while interpreting the treaty and its protocols in this manner, clearly setting out in the framework convention whether the framework convention, protocol, or BIT would prevail in the event of conflict, and also optional application in respect of non-parties.

103. It may also be useful to have a commission or committee interpreting the multilateral instrument and resolving procedural conflicts (not providing decisions on the merits of any dispute, merely clarifying which treaty prevails in a given case).

104. However, there is a risk of issues such as those plaguing the Appellate Body of the WTO arising, and also costs involved.

105. There is also a risk of the legitimacy of such a commission being questioned in certain cases. This is because the commission would be created under the aegis of the multilateral instrument itself. Therefore, if there is a case involving whether or not a party is governed by the multilateral instrument, if the treaty is inapplicable to such party, the commission created by this treaty would also not have the legitimacy to determine these questions. Thus, the commission may not be able to address all questions of the applicability of the treaty.

Opt-in/Opt-out – Reservations – Optionality of protocols

106. The WTO Agreement bars reservations unless specifically permitted. Certain subsidiary agreements such as the anti-dumping agreement allow reservations only with the consent of all member states. Others such as the Customs Valuation Agreement allow reservations only in respect of specific provisions thereof. The plurilateral agreement on aircraft also requires consent of all members for reservations, and the plurilateral agreement on government procurement bars reservations entirely.

107. **Pros and cons:** In terms of the multilateral instrument, allowing reservations only in specific protocols would provide flexibility, while also ensuring uniformity by not permitting reservations in the framework convention. These reservations could be allowed through different models, depending on the protocol.

F. Vienna Convention on Diplomatic Relations & Vienna Convention on Consular Relations

Structure & Extension

108. Both, the Vienna Conventions on Diplomatic Relations[57] (**VCDR**) and the Vienna Convention on Consular Relations[58] (**VCCR**) (collectively the "**Vienna Conventions**") are accompanied by an optional protocol on dispute resolution, known respectively as the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (the "**VCDR Protocol**") and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes ("**VCCR Protocol**") (collectively, the "**Vienna Protocols**")

[57] United Nations, Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, April 1961,.

[58] United Nations, Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, April 1963. 596 UNTS 487, 21 UST 325, TIAS 6820

109. The Vienna Protocols were adopted shortly after the Vienna Conventions or simultaneously. Both protocols have the same body of 10 articles.[59] The protocols allow State parties to sue and be sued for diplomatic or consular law violations before the ICJ. At present, the VCDR Protocol has 28 signatories and 70 parties,[60] and the VCCR Protocol has 38 signatories and 52 parties.[61]

110. The preambles to each Vienna Protocols include the following wording:

> *"Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the* ***compulsory jurisdiction of the International Court of Justice****, unless some* ***other form of settlement*** *has been agreed upon by the parties within a reasonable period…"*

111. By article 1, the Vienna Protocols establish the compulsory jurisdiction of the ICJ in relation to any dispute that arises out of the interpretation or application of the Vienna Conventions.

112. As another form of settlement, article 2 establishes that the parties can refer the dispute to an arbitral tribunal. However, the parties have a limited period of time to do so, that is, two months after the initiation of the dispute. If within this time period, the parties do not agree to start arbitral proceedings, they may only bring the dispute before the ICJ.

113. The Vienna Protocols also include the option to address the issue through a conciliation procedure dealt with by a commission from the ICJ, article 3.

114. **Pros:** Introducing the dispute settlement clause through an optional protocol that is legally separate from the main convention is a benefit since it allows more flexibility for States. Moreover, should State parties later wish to denounce the dispute resolution mechanisms set out in a protocol, this would not affect the main obligations set out in the main treaty, as States are still bound by these obligations even if they withdraw from the protocols.

115. Should this model be adopted for the multilateral instrument, the jurisdiction of the dispute settlement mechanism may extend over the main convention as well as the subject matter of other optional protocols.

Compatibility clauses

[59] Protocol to the VCCR https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf; Protocol to the VCDR https://treaties.un.org/doc/Treaties/1964/06/19640624%2010-27%20PM/Ch_III_5p.pdf.

[60] Parties to the VCDR

[61] Parties to the VCCR https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3, consultation May 2, 2022.

116. The Vienna Protocols do not contain compatibility clauses to resolve difficulties which may arise when parties have otherwise agreed to a dispute resolution mechanism other than arbitration (as provided for by Article 2), conciliation (as provided for by Article 3) or litigation before the ICJ (as provided for by Article 2). .[62] This suggests that it is not open to State parties to elect a dispute resolution mechanism other than that provided that for in the Vienna Protocols.

117. If the States parties had a separate agreement, an option would be to look to the Vienna Convention on the Law of Treaties ("**VCLT**"). Since the Vienna Protocols have the status of a treaty, the applicable provision would be article 30 of the VCLT.

118. **Cons**: In the event that the Protocols are interpreted to mean that parties are not permitted to depart from the dispute resolution provisions set out therein, they would be rather inflexible. This is because they permit only three dispute resolution options, that of arbitration (under Article 2), conciliation (under Article 3) and litigation before the ICJ (under Article 2)..

Amendment

119. There is no amendment provision in the Protocols.

120. **Cons:** If a State party proposes an amendment, State parties will need to refer to VCLT or general provisions of international law.

Withdrawal

121. There is no withdrawal provision. It might become a problem since there is a discussion on whether or not States are free to withdraw from a treaty that does not expressly provide for withdrawal in a so-called "denunciation clause".[63] The idea is that denunciation clauses are very common in international treaties, therefore its omission can reflect the intention of not permitting denunciation. Consequently, the possibility of withdrawal from treaties that do not include a denunciation clause would have to be interpreted narrowly.

122. . .[64]

[62] UN Conference on Diplomatic Intercourse and Immunities, Vienna 1961, Official records, A/CONF.20/14/Add.l.

[63] John Quigley, The United States' Withdrawal from international Court of Justice Jurisdiction in consular cases: reasons and consequences, 2009 in Duke Journal of comparative & international law, vol 19:263, pag. 263 and ss.

[64] (1935). *Supplement to the American Journal of International Law, 29,* 653-1228.

123. This theory would also find support in Article 56 of the VCLT. Most provisions of the VCLT are considered to be authoritative codifications of customary international law, even for states that are not parties to that convention.[65]

124. The VCLT establishes that a treaty containing no denunciation or termination provision is not subject to it unless it is understood that it was the intention of the parties to allow it, or the right to denunciate is implied in the nature of the treaty. There is a strong presumption against the possibility of denunciation in treaties that are silent on the subject.[66]

125. It is difficult to establish the intention of the parties because no denunciation clause was proposed, and no delegation mentioned it.[67] Regarding the nature of the protocol, and whether or not denunciation is implied, there is little information.[68]

126. On the other hand, many scholars also defend the sovereignty of States, and their capacity to denounce international treaties, even when the denunciation clause is absent.

Cons: The lack of any provision that regulates the withdrawal of State parties is problematic, as demonstrated by the (purported) withdrawal of the USA from both Vienna Protocols. Furthermore, States may be reluctant to ratify the instrument, since they do not have the tools to withdraw easily from it.

Interpretation provisions

127. There is no specific interpretation clause.

Reservation & variations

128. There is no express provision in the Vienna Protocols which permit State parties to make reservations.

129. **Pros**: By excluding reservations, State parties are bound to accept the full jurisdiction of the ICJ or the arbitral tribunal.

130. **Cons:** This strict approach may be unduly rigid and discourage States from acceding to the Vienna Protocols.

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[65] Frederic L. Kirgis, Addendum to ASIL Insight, President Bush's determination Regarding Mexican Nationals and Consular Convention Rights, March 2005, https://iilj.org/wp-content/uploads/2016/08/U.S.-Withdrawal-from-ICJ-Jurisdiction-over-Vienna-Convention-on-Consular-Relations-March-7-2005.pdf.

[66] Laurence R. Helfer, Exiting Treaties, 91 VA. L. REV. 1579, 1594 (2005) (stating that Article 56 creates "a rebuttable presumption that states may not unilaterally exit from a treaty that lacks a denunciation or withdrawal clause").

[67] United Nations Conference on Consular Relations Official Records, Mar. 4-Apr. 22, 1963, Vienna Conference on Consular Relations, 249-51, U.N. Doc. A/CONF.25/6, (Mar. 26, 1963)

[68] Ibid, John Quigley (2009).

Evaluation

131. The Vienna Protocols are good examples in terms of simplicity and efficacy. Their scope of application is clear and the accession process is not complicated. However, the model adopted by the Vienna Protocols may be too simplistic for the multilateral instrument, where there might be multiple options to pick and choose from. Nonetheless, a positive aspect is the short time limit that parties have to refer their dispute to other means, arbitration or conciliation. This could be an option for the multilateral instrument, to establish a default jurisdiction, alongside other options, which could be chosen within a short time limit.

132. The fact that there is no withdrawal or denunciation provision it's a flaw. Having a withdrawal provision and its effects can prevent situations like the one of the USA.

G. Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration

Structure & Extension

133. The Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration (the "**Mauritius Convention**")[69] was adopted in 2014 in order to extend the *ratione temporis* of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (**UNCITRAL Transparency Rules**).[70] The UNCITRAL Transparency Rules, by themselves, apply in relation to disputes arising out of investment treaties concluded on or after 1 April 2014, in cases where the investor-state arbitration is initiated under the UNCITRAL Model Law. Pursuant to Article 1 of the Mauritius Convention, the *ratione temporis* of the UNCITRAL Transparency Rules is extended to treaties concluded before 1 April 2014. Furthermore, the Mauritius Convention applies not only arbitrations governed by the UNCITRAL Transparency Rules, but also other arbitral rules.

134. When States accede to this Convention, the UNCITRAL Transparency Rules apply directly to all the investment arbitrations arising out of the international investment agreements ("**IIAs**") to which the Mauritius Convention State parties have entered into.

135. **Pros:** By ratifying or acceding to the Mauritius Convention, State parties are able to effectively adopt new rules on transparency without having to individually amend the investment treaties which they have entered into. This is of great utility since the time and effort that would be needed in order to individually amend all the IIAs would render the reform unfeasible.

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[69] Mauritius convention https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf.

[70] UNCITRAL Rules on Transparency https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf.

Compatibility clause

136. The Mauritius Convention includes a compatibility clause in article 2. In its first paragraph, the Mauritius Convention establishes as a mandatory obligation the application of the UNCITRAL Transparency Rules when the respondent is a party to the Mauritius Convention and the claimant is a national from another State party. This obligation replaces already existing obligations under investment treaties, per article 30 of the VCLT.

137. The obligation has exceptions, in case of reservation by the States parties, either the respondent State or the State where the claimant is national. Reservations can be adopted in relation to specific IIAs, or in relation to arbitration rules, article 3. For example, a State party can reduce the scope of application of the Convention to arbitrations governed by the UNCITRAL Model Law, and exclude those arbitrations that are governed by other rules, such as ICSID Rules). This last reservation only applies in cases where the State party that makes the reservation is the respondent, as provided by Article 3.1(b) of the Mauritius Convention.

138. The UNCITRAL Transparency Rules can also be applied in cases where the claimant is not a national from a State party to the Mauritius Convention, but nonetheless, accepts to apply them.

139. The compatibility clause also takes into account possible amendments to the UNCITRAL Transparency Rules, and therefore establishes that the most recent version shall be applied, unless reservations are made by States.

140. Article 1.7 of the UNCITRAL Transparency Rules establish that where there are conflicting provisions between the UNCITRAL Transparency Rules and pre-existing IIAs, the provisions of the IIAs will prevail. This limits the scope of application of the UNCITRAL Transparency Rules. Accordingly, the converse approach is adopted in the Mauritius Convention. Art. 2.4 of the Mauritius Convention provides that the UNCITRAL Transparency Rules will prevail over any conflicting provisions of pre-existing IIAs.

141. Finally, the Mauritius Convention prohibits parties to arbitration from using most-favoured nation clauses ("**MFN Clause**") to circumvent the application of the UNCITRAL Transparency Rules when they are applicable.

142. **Pros:** By specifically establishing when the Mauritius Convention applies, article 2 prevents any dispute over the applicability or interpretation of the applicability of the Mauritius Convention. It reduces potential disputes over this procedural aspect and provides for a stable and clear tool.

143. **Cons:** The Mauritius Convention does not address the compatibility between the UNCITRAL Transparency Rules and national mandatory rules. The outcome of a situation where the UNCITRAL Transparency Rules are applicable and there are mandatory national rules on confidentiality is not foreseen.[71]

[71] Lise Johnson, The Mauritius Convention on Transparency: Comments on the Treaty and Its Role in Increasing Transparency of Investor-State Arbitration, (2014).

Amendment

144. Article 10 establishes the process of proposal, adoption, and entrance into force of amendments in a detailed fashion.

145. An amendment can be proposed by any Party. Each amendment has to be adopted by consensus, and if it is not possible, by a majority of two thirds of the Parties present and voting at the conference.

146. Once an amendment has been adopted, it will enter into force after 6 months of its adoption, and only among the parties that have expressly accepted to be bound by the amendment. If a party to the Mauritius Convention does not accept the amendment it will be bound by the previous version of it.

147. Any party that accedes after the entry into force of the amendment will be bound by it.

148. **Pros:** Adopting such specific amendment procedures reduces the need to resort to the VCLT or customary law.

Withdrawal

149. Under Article 11, parties can denounce the Mauritius Convention at any time. The denunciation will enter into force one year thereafter. Thus, all the arbitrations commenced within this time period will be governed by the UNCITRAL Transparency Rules.

150. **Pros:** Having a specific provision that regulates the procedure and the effects of a withdrawal make the system more reliable and foreseeable.

Interpretation provisions

151. There is no interpretation clause.

152. **Cons:** Not having any interpretation clause or mention can become an issue in the future in regards to the interpretation or application of certain provisions.

Opt in/Opt out – Reservations & variations

153. The parties do not have to expressly communicate to which IIAs dispute resolution proceedings the Mauritius Convention applies. By the mere accession of the State, the Convention applies to all IIAs.

154. **Pros:** easy process to accede and allow efficacy.

155. Article 3 of the Mauritius Convention permits State parties to make reservations to limit the application of the UNCITRAL Transparency Rules. The Mauritius Convention is formulated in a negative fashion where it applies to all disputes arising out of **all treaties** that a State party has ratified, unless there is a reservation.

156. State parties can also formulate a reservation in relation to the amendments of the UNCITRAL Transparency Rules. However, there is a time limit of six months after the adoption of the amendments. If they do not declare any reservation within the time limit, the new version of the UNCITRAL Transparency Rules will be applicable. This approach is different from the amendment of the Mauritius Convention, which has to be expressly accepted by the parties.

Pros: by acceding to the Mauritius Convention it directly applies to all IIAs, which broadens its scope of application and increases its efficacy. States can limit the scope of application, which is an appealing aspect for them.

Evaluation

157. The Mauritius Convention is also a very effective and simple mechanism. In comparison to the Vienna Protocols discussed earlier, the Mauritius Convention is more complete. Clear benefits of the Mauritius Convention are: the simple way to accede and have effect over other IIAs; the provision in regards to amendments; and the withdrawal. Furthermore, the compatibility clause foresees different situations which simplifies its application.

H. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

Structure & Extension

158. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "**MLI**")[72] was created to swiftly implement the tax treaty-related base erosion and profit shifting measures. The general purpose of the MLI is to reduce opportunities for taxpayers to benefit from gaps and mismatches in the tax rules that are applicable to international transactions and shift taxable income from high-tax to low-tax jurisdictions.

159. The MLI is applied to tax treaties between two or more State parties when those tax treaties have been listed by those State parties as agreements which are to be subject to the MLI.[73]

[72] MLI BEPS https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf

[73] Note by the OECD Directorate of Legal Affairs. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI"). The Organization for Economic Cooperation and Development (OECD). https://www.oecd.org/tax/treaties/legal-note-on-the-functioning-of-the-MLI-under-public-international-law.pdf.

160. The MLI does not function as an amending protocol to a single existing treaty, which would directly amend the text of the tax treaties. Instead, the MLI applies alongside existing tax treaties, modifying their application in order to implement the measures to address domestic tax base erosion and profit shifting.[74] The MLI must be read together with the covered tax agreement.

161. However, there is a debate on whether or not the MLI modifies the covered tax agreements.[75] The majority of the scholars, as well as the *travaux préparatoires*, defend the aforementioned idea. However, other scholars understand that the MLI is a sort of protocol that modifies and amend the covered tax agreements.[76]

162. In relation to the scope of application, Article 1 establish that the MLI applies to all "Covered Tax Agreements", which article 2 defines as any agreement for the avoidance of double taxation with respect to taxes on income, which is in force and with respect to which, each party to the agreement has notified to the Depositary of the MLI as an agreement that wishes to be covered by the Convention.

163. **Pros:** It allows States to decide specifically which IIAs should be governed by this instrument, which allows for more flexibility.

Cons: The debate concerning the nature and effect of the instrument should be addressed beforehand to avoid disputes regarding the interpretation and application. Furthermore, the fact that all the parties to the Covered Tax Agreement have to accept in order to make the Convention applicable might become an arduous task in cases of multilateral agreement.

Compatibility clause

164. The treaty incorporates different compatibility clauses. The policy adopted is that, in cases where the MLI cannot be reconciled with tax agreements' provisions, the provisions of MLI have priority. To this extent, MLI might remove or replace already existing provisions, add new provisions or change the application of these already existing provisions.

Articles that include such changes:

- 3.6
- 4.4
- 7.17 a) and e)
- 9.8
- 10.6
- 11.4
- 14.4
- 16.6 a) and b)
- 17.4

[74] Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The Organization for Economic Cooperation and Development (OECD). https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

[75] N. Bravo, *Tax Treaties for the Avoidance of Double Taxation on Income and Capital*, in *A Multilateral Instrument for Updating the Tax Treaty Network* sec. 2.2. (IBFD 2020), Books IBFD.

[76] P.J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?*, 71 Bull. Intl. Taxn. 3/4, sec. 3.1. (2017), Journal Articles & Papers IBFD.

165. There is also a compatibility clause in relation to the dispute settlement clause (Part VI. Arbitration), the clause is established in article 26.

166. In addition, the Explanatory Statement (see below *interpretation*), explains that the approach adopted with these compatibility clauses is the one provided by the VCLT in its article 30.3: *lex posterior* approach.

167. **Pros:** It has been clarified that the default rule is article 30.3 VCLT, in case of dispute or lack of regulation

168. **Cons:** Could be useful to have a general rule in just one provision, rather than multiple provisions regarding specific questions.

Amendment

169. Article 33 of the MLI regulates the amendment of the Treaty. However, it is a very simple provision that establishes how the amendments have to be proposed. No mention of the adoption process or entrance into force.

170. **Pros:** the possible amendment of the text is foreseen.

171. **Cons**: there is no complete regulation of the process, therefore, in case the parties want to amend the text, recourse to the VCLT or other application international law rules would still be necessary.

172. The MLI also foresees the modification of the Covered Tax Agreements, article 30. In the Explanatory Statement, it is clarified that:

> *'This reflects the fact that the Convention is not intended to freeze in time the underlying agreement and that Contracting Jurisdictions may of course decide to further amend the underlying agreement after it has been modified by the Convention'.*

173. However, it is unclear what the result of entering into a later agreement or amending an existing agreement such that it is contrary to the MLI would be.

Withdrawal

174. Article 37.1 of the MLI allows the withdrawal from the MLI, but insofar as the MLI, before the withdrawal, has entered into force with respect to a tax agreement, it follows from Article 37.2 MLI that the tax treaty remains modified by the MLI.[77]

175. The Explanatory Statement states as follows:

> *Accordingly, the effects of withdrawal are forward-looking only. That is, where the Convention has already modified a Covered Tax Agreement (and regardless of whether those modifications have come into effect pursuant to Article 35), a unilateral decision*

[77] Kleist,D.(2018).The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS—Some Thoughts on Complexity and Uncertainty. Nordic Tax Journal,2018(1) 31-48. https://doi.org/10.1515/ntaxj-2018-0001

to withdraw from the Convention would not reverse the modifications already made to that Covered Tax Agreement. Instead, any further change to the Covered Tax Agreement following withdrawal from the Convention would be at the discretion of the Contracting Jurisdictions. This approach replicates the approach taken in amending protocols to bilateral tax treaties in which the bilaterally agreed amendments cannot be unilaterally reversed by means of withdrawal from the protocol.

Interpretation

176. Article 2 establishes the definitions of the terms: Covered Tax Agreement, Party, Contracting Jurisdiction, and Signatory. Regarding the terms not defined in article 2.1, paragraph 2 dictates that any term not defined shall, *unless the context otherwise requires*, *have the meaning that it has at that time under the relevant Covered Tax Agreement.* This provision is not very clear, and there is no further definition of what is the *context*. This provision is rather vague and not as helpful as it should be.[78]

177. Article 33 provides for the interpretation guidelines. Any question arising as to the interpretation or implementation of this Convention may be addressed by a Conference of the Parties.

178. Nonetheless, the OCDE also issued the Explanatory Statement to the Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting.[79] The Explanatory Statement refers to previous works of the OCDE and provides a general explanation of the purpose of the articles.

179. The Explanatory Statement refers to ordinary principles of treaty interpretation.

180. **Pros:** The existence of the Explanatory Statement is a significant value for interpretative purposes.

181. **Cons:** The relevant articles of the MLI are vague and are framed in a way that results in a more complex system. Even though the Explanatory Statement is useful, its drafting might be complex and extend the process of adoption of the multilateral treaty.

Opt in/Opt out – Reservations & variations

182. The MLI requires each State party to indicate the tax treaties to which the MLI applies. In addition, the MLI provides alternatives to comply with those provisions that represent minimum standards, without giving a preference to a particular way of meeting such standards. In case a substantive provision does not reflect a minimum standard, a Contracting Party may opt out of that provision. The MLI incorporates a number of alternatives or optional provisions which each Contracting Party can choose to apply.

[78] Gaetano Manzi, (2020) The Autonomous Interpretation of the Multilateral Instrument with Particular Relevance to Article 2(2), in Bulletin for international taxation, 742-756.

[79] Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The Organization for Economic Cooperation and Development (OECD). https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

183. Article 28 of the MLI makes a closed list of the reservations permitted, as well as of the process to notify or withdraw each reservation.

184. **Pros:** The flexibility of the MLI and its detailed provisions on reservations are good points which may be adapted for the multilateral instrument.

185. **Cons:** The MLI's system is a rather complex one. However, this may not necessarily discourage States from becoming State parties, given that 97 States have signed the MLI and 72 of them have deposited the instruments of ratification, acceptance, or approval.[80]

Evaluation

186. The MLI instrument is overall a complex instrument. While it has many positive traits, it may not be well suited to be adapted for the contemplated multilateral instrument. One particular difficulty is that it requires all parties to a treaty to agree that the new instrument is applicable to that treaty in order for the new instrument to have an effect on the treaty. It may be difficult to obtain such a degree of consent in the investment arbitration context.

187. The nature of the instrument and its effect on other treaties has to be well defined and explained in order to avoid mistakes. Nonetheless, the Explanatory Statement is a recommendable tool. It can be used in the multilateral instrument in order to avoid interpretative disputes.

I. GENERAL CONCLUSIONS

Structure

188. The proposed multilateral instrument is anticipated to implement a wide-ranging set of reforms, not all of which may be acceptable to each party. Thus, in order to secure the widest possible participation on core matters, flexibility should be permitted wherever possible. As such, inspiration may be drawn from environmental treaties such as **UNFCCC**, where states' obligations are organised into a core convention (setting out parties' broad obligations and establishing the necessary bodies) and optional protocols (setting out additional or more detailed obligations).[81]

189. Next, **Part XV of the UNCLOS** may provide a model for how to organise the different possible dispute resolution mechanisms contemplated under the new multilateral instrument, such that State parties are permitted the freedom of choice.[82] However, it is crucial to remember that a default option must be stipulated. Here, it would also be useful to refer to the **Vienna Convention on Diplomatic Relations** and the **Vienna Convention on Consular Relations** where the compulsory jurisdiction of the ICJ is established, but parties are also

[80] Ministry of Finance of Japan, https://www.mof.go.jp/english/policy/tax_policy/tax_conventions/mli.htm.
[81] See paragraph 53 above
[82] See paragraph 30 above

granted a 2-month window to decide whether to refer the dispute to arbitration instead.[83] Adopting a similar rule in the new multilateral instrument may be desirable.

190. Another issue to consider is whether or not it would be more suitable for detailed rules on the conduct of proceedings under each mechanism to be contained in optional protocols, rather than annexures to the core convention. We have not come across any treaties where this has been done, but notionally this would make the treaty amendment process more streamlined as only States who have actively adopted the mechanism (by signing the optional protocol) would be able to participate in the amendment of the optional protocol.

191. In the event that the multilateral instrument also contains reforms relating to ethical issues and minimum standards, the **MLC** may also be useful as a model, as it contains both mandatory obligations and non-mandatory guidelines.[84]

Reservations, variations and optionality

192. The **MLI** and **Mauritius Convention** are treaties which create, by way of a new instrument, rights and obligations which affect pre-existing bilateral and multilateral treaties. As such, they provide some useful ideas on the mechanisms which may be adopted to determine the extent to which the new multilateral instrument can cover pre-existing investment treaties.

193. The difference between how the **MLI** and **Mauritius Convention** operate is that the **MLI** requires State parties to submit a list of treaties which it will take effect over (opt-in mechanism), while the **Mauritius Convention** takes effect over all treaties by default, unless State parties have made a reservation in respect of a particular treaty (opt-out mechanism).

194. For the purposes of the contemplated multilateral instrument, an opt-out mechanism such as the one contained in the **Mauritius Convention** would be more efficient, and is likely to encourage State parties to subject a larger number of BITs and MITs to being governed by the new regime.

195. In relation to other rights and obligations, given that the content and structure of the multilateral instrument is yet to be determined, it is difficult to conclude on whether it is desirable for reservations to be permitted or not. Regardless, we would propose that clear provisions be included on whether *inter se* variations are permitted, especially when the effect of such variations is to derogate from obligations which are otherwise applicable under the multilateral instrument. In this regard, reference may be made to the **UNCLOS** provisions where variations are permitted subject to certain conditions.[85]

Compatibility clauses

196. It is self-evident that it is desirable for the new multilateral instrument to explicitly set out its relationship with existing treaties governing the same subject matter. Clarity may be provided by listing the existing treaties which the new instrument is intended to modify, as was

[83] See paragraph 108 above
[84] See paragraphs 9 and 10 above
[85] See paragraph 14 above

done in the **MLC**. Furthermore, subordination and supremacy clauses such as those adopted by the **UNCLOS**,[86] the **Antarctic Treaty**[87] or the **Mauritius Convention**[88] should be included.

197. Apart from resolving the conflict by adopting a "ranking" of treaties, we came across two other potential solutions. The solution adopted by the **Cartagena Protocol** was to apply the rule establishing a higher level of environmental protection.[89] Adapting this solution for the present context, the rule could be, for example, that the conflict should be resolved in favour of permitting the investor greater protection. As for the **MLI**, it adopts a *lex posterior* approach.[90]

198. A unique and potentially useful clause in the **Mauritius Convention** provides that the MFN clause cannot be applied to circumvent the application of certain standards (on transparency) which the convention seeks to impose on parties.[91] The new multilateral instrument could similarly provide that the MFN clause cannot be used to import new dispute resolution mechanisms into investment treaties.

Amendment clauses

199. It would be appropriate that clear rules on the amendment of treaty provisions be included, as is the practice for most modern treaties. Examples to be referred to include the **WTO** and the **MLC**, which contain differentiated procedures for amendment based on whether the proposed amendment affects fundamental matters or not.[92] The **Mauritius Convention** is an example of a treaty with clearly drafted clauses on the amendment procedure, including clauses which set out the manner in which reservations to amendments can be made.[93]

200. It is also suggested that the effects of an amendment be made clear. The **MLI** acknowledges the possibility of amending the Covered Tax Agreements, however, there is no information regarding the compatibility approach to be applied in case of conflict between the amendment and the **MLI**.

Interpretation

201. The practice of adopting Explanatory Statements, as was adopted in the **MLI** and the **MLC**, is a simple and effective way of providing interpretive guidance. It would make sense to adopt this practice in the new multilateral instrument.

Withdrawal/denunciation

[86] See paragraph 37 above
[87] See paragraph 61 above
[88] See paragraph 136 above
[89] See paragraph 65 above
[90] See paragraph 164 above
[91] See paragraph 137 above
[92] See paragraphs 19, 20 and 95 above
[93] See paragraph 142 above

202. It is crucial to include withdrawal and denunciation clauses. The absence of such clauses from the **Vienna Convention Protocols** has resulted in unnecessary uncertainty on whether withdrawals can be permitted, and the effect of certain State parties' purported withdrawals.[94]

203. In this regard, it is also important to specify the consequences of withdrawal, in particular, whether the withdrawal results in negation of the convention's effect on existing treaties or whether it also ceases to have effect on future treaties. Here, the **Mauritius Convention** and the **MLI** are useful points of reference.[95]

[94] See paragraphs 117 and 121 above
[95] See paragraphs 145 and 171 above

Comments on Points of Treaty Law (document WP.194)

Treaty establishing a Standing First Instance and Appellate Court

1. General Observations

The form of a treaty and its architecture largely depends on the will of States negotiating the treaty. The provisions of the VCLT are mostly customary international law (CIL) but it is widely accepted view that States can contract out of norms of CIL. Law of treaties is very flexible, and States are masters of the treaty. Thus, they can adopt any solutions they wish (with constrains imposed by peremptory norms of international law-norms *jus cogens*).

The next question which merits attention is what the added value for States is deriving from adopting a treaty rather than relying of 'soft law' obligations. The adoption of a treaty has many benefits and in general is considered a preferable form of establishing relationships and obligations between States to 'soft law'. First, it establishes firm commitments for States based on the principle *pacta sunt servanda* unlike 'soft law, which lacks such an authority. Even widely adhered to "Guiding Principles on Business and Human Rights', which are considered the most authoritative international statement regarding the responsibilities of businesses with respect to human rights, are not binding.

A treaty also inspires confidence in States as it sets out clearly, logically and in detail obligations of States-parties, and is a result of long negotiations during which States express their views and arrive at a compromise solution. A treaty also assures transparency, brings together all shareholders and accords legitimacy to obligations of States. It also helps to establish uniformity in States' obligations and thus protects against fragmentation in this area.

2. The Form: A Single Treaty Approach *versus* a 'Suite' Approach

A 'Suite' Approach's objective is to offer a menu of relevant solutions, which may vary in form, which States according to their wishes would incorporate one or more of the proposed provisions either in their entirety or in the combination preferred by States into their investment treaties.

In my view, a single treaty solution would be preferable, for the above-mentioned reasons para.1) as well as to ensure a unform approach, in contrast to A 'Suite' Approach, which would result in an inevitable fragmentation of obligations and approaches. Reservations and declarations ensure the flexibility of treaty regimes, offering to States a choice in undertaking legally binding obligations.

The model of the Mauritius Convention on Transparency is very flexible, thus recommended. Below are examples of other flexible regimes for consideration, especially regarding amendment procedures.

Cumbersome procedures connected to treaties, such as the amendment of a treaty, can be avoided through a special architecture of global treaties such as the International Convention for the Prevention of Pollution from Ships , so -called the MARPOL Convention and the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) . The architecture of MARPOL is as follows. The main obligations of States are set out in so-called 'an umbrella treaty' or a' framework treaty'. However, the core of States obligations and a substance of the MARPOL is establishes in six Annexes: Annex I Regulations for the Prevention of Pollution by Oil; Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk; Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form; Annex IV Prevention of Pollution by Sewage from Ships; Annex V Prevention of Pollution by Garbage from Ships; Annex VI Prevention of Air Pollution from Ships (https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx). Only the framework treaty and two first Annexes are compulsory when a States becomes a party to the MARPOL, thus ensuring flexibility. The regime of amendments of the Annexes are an example how to avoid a lengthy and cumbersome procedure, it is so-called tacit acceptance procedure, which is a core of the legal regie of the many conventions adopted under the auspices of the International Maritime Organisation (IMO). Instead of requiring that an amendment shall enter into force after being accepted by, for example, two thirds of the Parties, the 'tacit acceptance' procedure provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of Parties. In the case of the 1974 SOLAS Convention, an amendment to most of the Annexes, which constitute the technical parts of the Convention, is `deemed to have been accepted at the end of two years from the date on which it is communicated to Contracting Governments...' unless the amendment is objected to by more than one third of Contracting Governments, or Contracting Governments owning not less than 50 per cent of the world's gross merchant tonnage. This period may be varied by the Maritime Safety Committee with a minimum limit of one year. (https://www.imo.org/en/About/Conventions/Pages/Default.aspx) Both MARPOL and SOLAS framework Conventions are subject to a classical amendments, which have never been triggered off.

A very flexible system of amendments is incorporated in the 1973 Convention on International Trade in Endangered Species of Animals and Plants (CITES) which combines and classical amendment of the framework Convention (Article XVII0) with a simplified form of amendment of Appendices I (the most endangered-no trade) and II (limited trade) to the Convention which are listing species due to their ecological status, i.e., 'If the proposed amendment is adopted it shall enter into force 90 days after the date of the notification by the Secretariat of its acceptance for all Parties except those which make a reservation in accordance with paragraph 3 of this Article.3. During the period of 90 days provided for by sub-paragraph (c) of paragraph 1 or sub-paragraph (l) of paragraph 2 of this Article any Party may by notification in writing to the Depositary Government make a reservation with respect to the amendment. Until such reservation is withdrawn the Party shall be treated as a State not a Party to the present Convention with respect to trade in the species concerned'.

Thus, any changes of the status of a species such as moving to the most endangered status (Appendix I) can be subject to a reservation by a State, which results in the provision that the

‘Party shall be treated as a State not a Party to the present Convention with respect to trade in the species concerned’.

Thus, an architecture of a treaty comprising an ‘umbrella ‘ (framework) treaty and annexes (appendices) system is very flexible and susceptible to changes. It might be considered for structure for a treaty in question.

Finally, International environmental law has also an architecture of treaties which is based on a main treaty such as the 1985 Vienna Convention on the Protection of Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer . The Vienna Convention is a treaty which mostly elaborated main rights and obligations of States (such as the cooperation); whilst the Montreal Protocol includes concrete obligations, which are not static but developing through its amendments and adjustments. Both are independent treaties. Article 14 of the Montreal Protocol states as follows on the mutual relationship: ‘Except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol’, such as the common procedure of amendments (see also as the examples of the same architecture the 1992 United Nations Framework Convention on Climate Change; the 1997 Kyoto Protocol; and the 2015 Paris Agreement, all independent treaties).

3. Core Provisions /Minimum Standards

In my view, the core provisions/ minimum standards should be included in the main treaty. Such an approach will make a proposed treaty more attractive for States as they would feel more confident in knowing what to expect from a treaty, which includes clearly defined core provisions/minimum standards. Core provisions/minimum standards, from a procedural point of view, should be exempt from the facility of ‘opting out’ in a reform treaty. it may even be considered whether such provisions should not subject to reservations/declarations.

Thus, e.g., if the format of the main the ‘framework ‘ or ‘umbrella’ treaty with Annexes or Appendices is adopted (see above para.2), such reform core provisions/minimum standards should be the incorporated in the body of the ‘framework ‘ or ‘umbrella’ treaty, such as in the MARPOL, wherein State-parties cannot opt out from the core provisions/minimum standards (the only changes possible of the framework/umbrella treaty are in the way of a formal amendment). If, however, the architecture of the reform treaty would acquire a system of framework Convention and Protocol (s) as independent treaties (see above e.g., Vienna Convention and the Montreal Protocol), then core/minimum provisions should be drafted in a framework Convention and also bind protocol(s.)

4. The Scope of Application / Temporal Questions

The new instrument will be definitely applicable to existing treaties. In my view, there is no significant reason why the new instrument should not be extended in its application to new investment treaties. Such a solution would guarantee a greater uniformity of settlement of dispute regime. The application of new settlement regime to the future treaties could also be achieved through a direct reference clause in an investment treaty to a new instrument.

The main question is the temporal relationship between new instrument and the existing investment treaties. The best option is to treat the new instrument and existing treaties as subsequent treaties with the same subject-matter, in which case Article 30 of the 1969 Vienna

Convention on the Law of Treaties would apply (VCLT). However, general rules provided under Article 30 of the VCLT are default rules

In accordance with Article 30(3) of the VCLT, when all the parties to the earlier IIA are also parties to the Opt-in Convention and the rules apply to the same matter, the later-in-time treaty will prevail (*lex posterior derogat legi priori*). Thus, previously concluded investment treaties would continue to apply only to the extent that their provisions are compatible with those of the later new treaty. In accordance with Article 30(4)(b), '[w]hen the parties to the later treaty do not include all the parties to the earlier one […] as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations'. A party to a treaty cannot be affected by an agreement which other parties to the treaty conclude with third States (t*ertiis nec nocent nec prosunt* rule). There are many variations of conflict clauses, for example whether they relate generally to all earlier or future treaties, or whether they only apply in relation to specific treaties (Art. 311 (1) UNCLOS). The establishment of a preference over certain earlier agreements, as an explicit formulation of a *lex posterior* rule, is chosen if the contracting parties act with the intent to adopt a new and comprehensive regulatory regime for a certain issue (Nele Matz-Lück, 'Treaties, Conflict Clauses', https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1466?prd=EPIL) The qualified conflict contain a particular temporal element concerning the relationship with earlier or later treaties but qualify this notion by reference to its objectives such as Art. 22 (1) Convention on Biological Diversity (see Biological Diversity, International Protection): 'The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity'. 'Qualifications in conflict clauses make them more difficult to apply, since they will necessarily require particular interpretation effort' (Matz- Lück).

Document 194 has foreseen various scenarios of the relationship between respondent investor home State and the investor home State; (i) the respondent host State but not the investor's home State is a party to the multilateral instrument; (ii) the respondent host State but not the investor's home State is a party to the multilateral instrument; (iii) neither the respondent host State nor the investor's home State are parties to the multilateral instrument. Under scenario ii document 194 has recommended Article 2(2) of the Mauritius Convention, which seems to be a sensible solution.