INTERNATIONAL AND COMPARATIVE LAW RESEARCH CENTER

Comments on the Draft multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.246)

February 2025

1. The following comments have been prepared in relation to document A/CN.9/WG.III/WP.246[1] with the purpose to assist the discussions in the Working Group III of the first Draft multilateral instrument on ISDS reform (**Draft convention; Draft instrument**). They reflect solely the views of the International and Comparative Law Research Center as an observer in the Working Group III of UNCITRAL.

Structure

2. The Draft instrument has been prepared in the form of a "'framework' convention with optional protocols" containing elements of reform.[2]

3. The structure of the Draft convention covers the following issues: (A) objectives and scope (Articles 1 to 2); (B) parties to the Convention and its entry into force (Articles 3 to 5); (C) opt-in mechanism for the application to existing investment treaties, including provisions on scope, incompatibilities and reservations (Articles 6 to 8); and (D) final provisions covering the depositary of the Convention, additional protocols and amendments, and denunciation (Articles 9 to 11). Article 10 provides a separate procedure for the adoption of additional protocols.

4. At this stage, the Secretariat has proposed that six protocols are "included" in the Draft convention (Article 2), namely: (1) UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023), (2) UNCITRAL Model Provisions on Mediation in International Investment Disputes (2023), (3) [Draft provisions on procedural and cross-cutting issues], (4) [Statute of an advisory centre on international investment dispute resolution], (5) [Draft statute of a standing mechanism for the resolution of international investment disputes], (6) [Draft statute of an appeal mechanism for the resolution of international investment disputes].

Preamble

5. According to the general rule of interpretation under the 1969 Vienna Convention on the Law of Treaties (Article 31), the preamble, as part of the text of a treaty, is used, along with the rest of the text representing "the context for the purposes of interpretation", to interpret the treaty. The preamble may, inter alia, explain the "motivation" that guided the authors in concluding the convention.[3]

6. The proposed wording of the preamble of the Draft convention provides some explanation of the reasons for the ISDS reform that the convention is intended to address ("*Mindful* of concerns regarding investor-State dispute settlement, which include, among others, those relating to coherence and consistency of decisions, the independence and impartiality of adjudicators, the cost and duration of proceedings as well as the overall legitimacy of the dispute settlement system").

7. The description of the background and reasons for the elaboration and adoption of an international treaty is a valuable element of the preamble, as it serves to better understand the object and purpose of the treaty and to provide a fuller context for the purposes of its future interpretation and application. This requires careful and balanced formulation of the preambular provisions, bearing in

[1] Draft multilateral instrument on ISDS reform. Note by the Secretariat. A/CN.9/WG.III/WP.246. URL

[2] Ibid. Para 8. URL

[3] Mbengue, M. (2006). Preamble. Max Planck Encyclopedias of International Law, para. 1.

mind also that they will have implications for the future treaty as a whole, including its annexes (or protocols).

8. For this reason, it seems important that particular attention should be paid to the provision on concerns that have been raised in regard to the ISDS system. The proposed draft notes the existence of concerns such as about "coherence and consistency of decisions, the independence and impartiality of adjudicators, the cost and duration of proceedings as well as the overall legitimacy of the dispute settlement system". While the preamble does not explicitly assess these concerns, such reference to them may be seen as, to some extent, validating these concerns or even endorsing them. In this context, concerns about the *overall legitimacy of the ISDS system* appear particularly serious. Based on previous discussions about the desirability of the reform, a more accurate way to reflect the intention to address the question of legitimacy could be, in our view, to state the objective of strengthening the legitimacy of the ISDS regime.[4]

Draft convention and elements of reform

9. Under the umbrella of the future Convention, as the draft suggests, it is envisaged to bring together all developed elements of ISDS reform in the form of "protocols", encompassing a range of different types of documents.

10. Although the difference between "protocols" and "annexes" may not always be of a substantive nature, in practice protocols are usually documents that have the characteristics of an international treaty and often possess an autonomous or semi-autonomous character, even if they are adopted in accordance with another international treaty, such as a *framework convention*, or as a follow-up to it and are related to it in content. Among other things, this usually means the possibility of differences in the composition of the parties, in the procedure for entry into force and termination, etc., including between different protocols to the same framework convention. On the other hand, annexes are usually governed by the rules of the parent treaty and are in force for all its parties, although it is not uncommon to envisage special conditions for acceptance/non-acceptance of individual annexes by the parties, which may lead to divergence in the number of participants bound by specific annexes. Nevertheless, usually *annexes* do not have autonomy and cannot operate in isolation from the treaty to which they are annexed.

11. The choice of a framework convention with "protocols" in the proposed draft appears to reflect a desire to grant greater autonomy to individual elements of the reform by allowing Parties not to accede to each protocol while ensuring a coordinated implementation of the reform. To make the proposed solution effective, it is important to assess whether it is appropriate for each of the reform elements to be "appended" or "included" in the Convention as a protocol and whether any of them have features requiring special provisions in the text of the future Convention.

12. ***UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution*** *(proposed Protocol A to the Convention).* The Code is a set of rules applied to arbitrators, former arbitrators, and candidates in connection with international investment disputes (IIDs). UNCITRAL, at its 56th session, adopted the Code of Conduct for Arbitrators, recommending that addressees apply the Code and that States and other relevant stakeholders make reference to it in international investment instruments

[4] Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS). Note by the Secretariat. A/CN.9/917, para. 12. URL; Possible reform of investor-State dispute settlement (ISDS). Note by the Secretariat. A/CN.9/WG.III/WP.142, para. 20. URL

and legislation.[5] Similar recommendations were subsequently made by the UN General Assembly.[6] Thus, the Code is already an applicable instrument.

13. In addition, the Code itself does not contain provisions that could be regarded per se as creating international legal obligations for States. In these circumstances, adopting it the form of an international treaty (as a protocol to the Convention) would not, in our view, align with its nature. Moreover, doing so could complicate the revision of the Code. Under normal circumstances, revisions could follow the same procedure as its adoption (i.e. by UNCITRAL). However, if the Code were "included" or "attached" to the Convention – or even made an integral part of it, as currently envisaged in Article 2(3) of the draft – amendments would generally require the conclusion of a new treaty.

14. These difficulties can be partially overcome, for example, by transforming the Code from a "protocol" into a "technical" annex to the Convention and establishing special – facilitated – procedures for amending it (up to automatic replacement of the current Code with a new version if it is adopted under the usual UNCITRAL procedure – on *opt-in* or *opt-out* terms). However, this could unnecessarily complicate the Convention mechanism.

15. To avoid this complication, it is worth considering an approach to the Code similar to that already used in the 2014 UN Convention on Transparency in Treaty-based Investor-State Arbitration (the **Mauritius Convention on Transparency**), which provides for the application of the UNCITRAL Rules on Transparency without making them part of the Convention. In case of revision of the Rules on Transparency, the Mauritius Convention on Transparency provides a special rule for determining the applicable version (Articles 2(3) and 3(2)).

16. Unless there is a desire to attach any additional legal force to the Code of Conduct for Arbitrators by inclusion of its full text in the Convention (Protocol), the approach of the Mauritius Convention on Transparency is, we believe, applicable here. Such an approach would also be consistent with the recommendation of the UN General Assembly in paragraph 4 of resolution 78/105 to "make reference to the Code of Conduct for Arbitrators …, as appropriate", in international investment instruments and legislation governing foreign investments.

17. ***UNCITRAL Model Provisions on Mediation for International Investment Disputes*** *(proposed Protocol B to the Convention)*. Model Provisions on Mediation have been adopted by UNCITRAL at its 56th session. The Commission recommended the States and other relevant stakeholders involved in the negotiation of international investment instruments to consider including the Model Provisions on Mediation into the respective instrument.[7] The Model Provisions are thus available to States for use in their investment treaties without further approval by way of inclusion into the future Convention (Protocol). However, should there be an agreement to make possible entering amendments to multiple existing investment treaties in order to introduce the Model Provisions therein, these provisions will need to be included in the respective Protocol.

18. ***Draft provisions on procedural and cross-cutting issues*** *(proposed Protocol C to the Convention)*. Working Group III is still working on this element of the reform and the form of the final document has not yet been determined. Three categories of provisions are currently under discussion.[8] The first category

[5] UNCITRAL. "Adoption of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and adoption in principle of the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, both with accompanying commentary". Decision adopted on 7 July 2023. P.p. 19-20. Paras 1, 5. URL

[6] UNGA Resolution 78/105 "Code of Conduct for Arbitrators in International Investment Dispute Resolution and Code of Conduct for Judges in International Investment Dispute Resolution with respective commentary of the United Nations Commission on International Trade Law", 7 December 2023. URL

[7] UNCITRAL. "Adoption of the UNCITRAL Model Provisions on Mediation for International Investment Disputes". Decision adopted on 7 July 2023. P. 8. Paras 1-2. URL

[8] Possible reform of investor-State dispute settlement (ISDS). Draft provisions on procedural and cross-cutting issues. Note by the Secretariat. A/CN.9/WG.III/WP.244, para. 2. URL

of provisions is intended to supplement or clarify the procedural rules applicable in disputes – primarily the UNCITRAL Arbitration Rules. The second category of provisions is expected to make their way into the relevant investment treaties. The third category is of the so-called cross-cutting nature, and the format of implementation of such provisions has not yet been precisely determined.

19. Without prejudice to the continued discussion on the topic of procedural and cross-cutting issues, for the purposes of analyzing the structure of the future multilateral instrument, the following points are worth attention. Insofar as the provisions to be developed imply amendment of the current UNCITRAL Arbitration Rules, we believe that the Convention does not need to address this issue. The relevant amendment to the Rules can be made in the usual way – by decision of UNCITRAL.

20. At the same time, the applicability of such updated rules may need to be envisaged for disputes based on agreements referring to the UNCITRAL Arbitration Rules in previous editions. In such cases the relevant (bilateral and/or multilateral) treaties would need to be amended accordingly. In addition, States may decide that it is appropriate to apply such provisions in cases where the dispute is subject to resolution under different rules. This, in turn, may require the inclusion in a future Convention (Protocol) of special conditions to ensure the integration of the new procedural provisions into ISDS procedures under existing and future investment treaties. However, depending on the content of the individual treaty, changes may not be necessary, for example, if the treaty already contains the provisions in question (or similar ones) or establishes that the most current version of the UNCITRAL Arbitration Rules or other arbitration rules that already contain such procedural provisions apply.

21. Other procedural and cross-cutting provisions under consideration of the Working Group III (belonging to the second and third categories) will likely be similar – they may involve amendments to concluded investment treaties, but the need and modalities of the amendments will depend on the specifics of the treaty to be amended.

22. In view of the above, if a general approach of adopting protocols on individual elements of the reform is followed, *procedural and cross-cutting issues*, as an element of independent importance and allowing for useful improvements independently of other elements of the reform, could be the subject of a separate Protocol to the Convention. It would be advisable to carefully reflect in it all parameters of amendments to already concluded investment treaties and the effect on future investment treaties.

23. ***Statute of an advisory centre on international investment dispute resolution, Draft statute of the standing mechanism for the resolution of international investment disputes, Draft statute of an appeal mechanism for the resolution of international investment disputes*** (*proposed Protocols X, Y, Z to the Convention*). Each of these documents, it appears, could be incorporated either as Protocols to the Convention or concluded as separate, independent international treaties. The Protocols would need to provide for the parameters of recourse to the newly established bodies for the resolution of disputes under existing investment treaties, including possible modification of these investment treaties by expanding (adjusting) the list of available means of settlement of investor-State disputes.

Interaction with investment treaties

24. According to the Note by the Secretariat, "the interaction between each Protocol and existing investment treaties is quite different".[9] This makes it important to carefully consider all possible parameters of such interaction and to carefully address these issues in the developed instrument.

25. Examples of instruments that are specifically applied to a significant number of other, primarily bilateral, international treaties and that were taken into account in the preparation of the Draft convention are the Mauritius Convention on Transparency and the 2016 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (**MLI**).[10] The latter, in particular, applies in parallel with existing international tax treaties, modifying their

[9] Draft multilateral instrument on ISDS reform. Note by the Secretariat. A/CN.9/WG.III/WP.246. Para. 12. URL

[10] See ibid.

application in order to implement measures to prevent tax base erosion and profit shifting. Among other things, it can serve as an example of detailed regulation of various parameters of amendments to individual treaties.

26. Currently, the Draft convention does not contain detailed provisions on how investment treaties already concluded will be amended. It is only envisaged that States Parties will submit a list of investment treaties to which each of the protocols will apply and that, to the extent possible, they will specify in detail how the relevant treaties will be modified (Article 6 of the Draft convention). The Draft also proposes some general conditions for the application of the Protocols to treaties being amended, in particular the "conflict clause", the temporal scope of application (to proceedings commenced after the entry into force of the Protocols), and the inapplicability of most-favored-nation clauses to seek to apply or avoid the application of the Protocols (Article 7 of the Draft convention).

27. In further discussions of the Draft convention it is important to consider situations where Parties might wish to modify provisions introduced previously through the Convention (Protocols). For example, if the Convention (Protocol) includes an article on the right to regulate, can States Parties to a bilateral investment treaty subsequently amend this provision among themselves? (By comparison, Article 30 of the MLI establishes that its provisions "are without prejudice to subsequent modifications to a Covered Tax Agreement which may be agreed between the Contracting Jurisdictions of the Covered Tax Agreement".) Additionally, given the potentially high number of amended treaties and accompanying difficulties in determining the actual status of any particular treaty, it may be helpful in such cases to require that any subsequent changes be communicated to the Convention secretariat for inclusion in the depositary database.

28. The proposal to leave it to States to determine the details of how a specific investment treaty would be modified (Article 6(3) of the Draft convention) may also raise difficulties. In the first place, different Parties may define these parameters differently with respect to the same investment treaty. In such a case, ascertaining the real intention of the parties may become problematic. In addition, the possibility of amending an earlier notification (Article 6 (4) of the Draft convention) may lead to differences between Parties to the same investment treaty in the understanding of the amendments made, even if there were initially no such differences. These risks, in our view, necessitate that more detailed provisions on the parameters of amendments to investment treaties be elaborated and specified in the Convention (Protocols) itself in order to minimize possible ambiguities and contradictions. The MLI contains multiple elaborate provisions tailored to different varieties of tax agreements that could provide examples of available options for the future multilateral instrument on ISDS reform.

Sunset clauses

29. So called *sunset clauses* (or *survival clauses*), which are widespread in investment treaties, are aimed to protect the legitimate expectations of the investor by preserving the provisions of investment treaties with respect to investments made for a certain period of time after the treaty has been terminated.

30. As a general rule, sunset clauses are aimed at situations of termination of a treaty. However, in certain instances they may also apply to mutually agreed modifications or amendments to a treaty and may provide for transitional provisions.[11] Sunset clauses can be found to be applicable to situations of replacement of a pre-existing treaty by a new investment treaty. For example, the Arbitral tribunal in a decision on jurisdiction in *Bahgat v. Egypt I* noted that it was "unconvinced" by the Respondent's argument that "investors have a legitimate expectation of the continuation of investment protections

[11] See Bahrain-Malaysia BIT (1999), Article 11; Lebanon-Malaysia BIT, Article 11 and other examples listed in Kathryn Gordon & Joachim Pohl (2015), Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World, OECD Working Papers on International Investment 2015/02, OECD Publishing, p. 33, fn 73. URL. See also Kaufmann-Kohler, G., Potestà, M. (2016). Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap. Para. 236. URL

through a survival clause *only* following the unilateral termination of a bilateral investment treaty: the Tribunal considers that the text of Article 9(3) provides that investors, following any kind of termination of investment protections, should benefit from a survival clause".[12]

31. In this light, the relationship between investment treaties and the future Convention (and its Protocols) should be assessed in terms of the practical effects of amendments to investment treaties vis-à-vis sunset clauses contained therein.

32. For example, the question of applicability of sunset clauses might be raised if treaty modifications are considered by claimant investors to narrow treaty protections. Likewise, such question may be raised if a State chooses to terminate the Protocol to which it is Party, leading to termination of amendments made thereby to investment treaties.

33. Therefore, it is important to develop and incorporate more detailed provisions in the Draft convention (or relevant Protocols) regarding the mechanism for amending investment treaties, the impact of amendments on both existing and future investments, their effect on past and future disputes, the potential consequences of withdrawing from the amendments, and related issues.

[12] *Bahgat v. Egypt* (I), PCA, Decision on Jurisdiction, 30 November 2017, para. 313.