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Possible reform of investor-State dispute settlement (ISDS)

Draft multilateral instrument on ISDS reform

Note by the Secretariat

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I. Introduction

1. The Working Group discussed the preparation of a multilateral instrument on ISDS reform at its thirty-ninth session in October 2020 (A/CN.9/1044, paras. 102–111) and its forty-third session in September 2022 (A/CN.9/1124, paras. 66–88), respectively based on documents A/CN.9/WG.III/WP.194 and A/CN.9/WG.III/WP.221. In the preparation of those documents, the Secretariat sought the assistance of public international law and treaty law experts[1] as well as the Treaty Section of the United Nations Office of Legal Affairs. A number of informal meetings were held on the topic.[2]

2. At its forty-third session in September 2022, the Working Group requested the Secretariat to prepare a draft of the multilateral instrument on ISDS reform (A/CN.9/1124, para. 88). In particular, it was suggested that the multilateral instrument should be structured to achieve coherence in the application of the reform elements being developed by the Working Group, while also being sufficiently flexible to accommodate future developments and to endure the passage of time (A/CN.9/1124, para. 79). The Secretariat was requested to elaborate on possible core provisions (A/CN.9/1124, paras. 72–79) and to outline the relevant issues that could arise with regard to the relationship of the multilateral instrument with existing investment agreements and with regard to the application of the multilateral instrument to future investment agreements (A/CN.9/1124, paras. 80–88).

3. Accordingly, this Note provides the first draft of a multilateral instrument structured as a framework convention with protocols (referred to below as the "Convention"). As a first draft, the aim is to obtain guidance from the Working Group on the way forward on a wide range of policy issues that arise in preparing an international instrument. To facilitate the discussions, the draft articles have been categorized to address: (i) objectives and scope; (ii) parties to, and entry into force of, the Convention; (iii) opt-in mechanism for the application to existing investment treaties; and (iv) final provisions.

II. Draft convention on international investment dispute resolution and annotations thereto

A. Objectives and scope

Preamble

The Parties to this Convention,

Noting the great number of treaties, which contain provisions on the protection of investments and investors and mechanisms to address disputes arising therefrom,

Recognizing the importance of the rule of law and the need for a fair and effective system to prevent and resolve disputes arising from investments,

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,

[1] Comments by experts on document A/CN.9/WG.III/WP.194 are available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_experts_0.pdf.

[2] The summaries of the informal meetings held on 9–10 December 2021 and 10 June 2022 are available at https://uncitral.un.org/en/content/uncitral-working-group-iii-isds-reform-informal-online-meeting-6-10-december-2021 and https://uncitral.un.org/en/content/uncitral-working-group-iii-isds-reform-informal-meeting-7-10-june-2022. Additional information available at https://uncitral.un.org/en/reformimplementation.

Recognizing the need to take public interest into account in preventing and resolving disputes arising from investments,

Reaffirming the right of States to regulate and to introduce measures relating to investments in their territories in order to meet policy objectives as well as the sovereign right of States to commit to international standards and agreements in this regard,

Mindful of the desire to undertake reforms in investor-State dispute settlement, which consist of a wide range of reform elements,

Desiring to build on efforts undertaken by States in treaties to improve investor-State dispute settlement and similar efforts by international and regional organizations,

Desiring to compile and integrate a range of reforms relating to investor-State dispute settlement into an international instrument, which would allow for a holistic and coherent approach,

Desiring also to develop an efficient and flexible tool for States to implement such reforms as embodied in the Protocols to this Convention,

Duly recognizing the diversity of legal systems and policy choices of States with regard to investor-State dispute settlement,

Have agreed as follows:

4. The preamble aims to provide the rationale for preparing the Convention and illustrate the negotiation process. It does not make any reference to the Commission or the Working Group, which is better placed in the resolution of the General Assembly adopting the Convention.

5. The preamble highlights that the key objective of the Convention is to provide a mechanism for States[3] to implement the reforms developed by the Working Group. The preamble further recognizes that a wide range of reform elements may be embodied as Protocols. While the word "reform" is mentioned in the preamble, it is not used in the body to ensure that the Convention maintains its relevance over time. The Working Group may wish to consider whether any of the preambular language should be placed in the Convention or in a Protocol (see, for example, draft provision 19 on right to regulate in A/CN.9/WG.III/WP.244).

6. The preamble further emphasizes that the application of the reform elements is entirely left to States. This highlights that the Convention provides a flexible mechanism without creating any expectation that a State would adopt any or all of the reform elements. This also ensures that the adoption of any reform element is tailored based on the State's needs and priorities and aligned with their legal and policy frameworks.

Article 1 – Objectives and scope

1. This Convention provides a framework for the Parties to apply or to be bound by Protocols relating to international investment dispute resolution.

2. Each Protocol may specify its scope of application.

7. Considering that the key objective of the Convention is to provide a mechanism for States to apply or to be bound by the reform elements, its name and objective stipulated in paragraph 1 is generic. Reference is made to "international investment dispute resolution" understood broadly to encompass the different legal bases of such disputes as well as the different means to resolve them. The Working Group may wish to note that as an international instrument between States, the focus is to modify

[3] Reference to a "State" or "States" in the annotations includes regional economic integration organizations where the context so requires (see article 4(4) of the Convention).

existing "investment treaties" between them, given the inherent limitations of the Convention in modifying domestic legislation and investment contracts involving private parties.[4]

8. The Convention currently does not contain any substantive obligation binding on the Parties and has been drafted as a "framework" convention with optional protocols. An alternative would be to formulate it as a convention with annexes, although the two approaches may not be so distinct (A/CN.9/1124, para. 68). The former approach was taken as some of the protocols, particularly those relating to institutional reforms, may need to operate more independently from the Convention.

9. Paragraph 1 indicates the general scope of the Convention and its Protocols to be relating to international investment dispute resolution. Paragraph 2 reflects the understanding that the reform elements may have a narrower scope of application and as such, the respective Protocol may specify or clarify its own scope (see, for example, article 2 of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (the "Code of Conduct for Arbitrators")).

Article 2 – Protocols

1. This Convention includes the following Protocols:

- Protocol A: UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023);
- Protocol B: UNCITRAL Model Provisions on Mediation for International Investment Disputes (2023)
- Protocol C: [Draft provisions on procedural and cross-cutting issues – subject to possible categorization];[5]
- Protocol X: [Statute of an advisory centre on international investment dispute resolution];[6]
- Protocol Y: [Draft statute of a standing mechanism for the resolution of international investment disputes];[7] and
- Protocol Z: [Draft statute of an appeal mechanism for the resolution of international investment disputes].

2. In accordance with article 10, additional protocols may be included to this Convention.

3. The Protocols shall constitute an integral part of the Convention.

4. Unless expressly provided otherwise, references to "the Convention" or "this Convention" shall include all Protocols.

10. Article 2 lists texts which have been prepared or are being prepared by the Working Group as optional protocols to the Convention. As the texts have taken different forms, they have been categorized into those that might require the creation of an institution (protocols X to Z, which may also require financial commitment by its Parties) and those that do not (protocols A to C). The list is illustrative and is without prejudice to any decision by the Working Group with regard to the reform element (for example, whether provisions on procedural and cross-cutting issues

[4] States wishing to amend their domestic legislation to apply any of the protocols or contents thereof could enact new laws or amend existing laws, without the need to make any international commitment through this convention. Similarly, States wishing to apply any of the protocols will need to renegotiate and amend investment contracts that they have concluded with private entities, as the convention would not be able to capture the consent of private parties.

[5] See A/CN.9/WG.III/WP.244.

[6] See A/CN.9/1184, which contains the draft statute presented to the fifty-seventh session of the Commission.

[7] See A/CN.9/WG.III/WP.239.

contained in A/CN.9/WG.III/WP.244 would be presented as one protocol and whether the standing mechanism would be a two-tier mechanism).

11. Offering a "suite" of reform options,[8] the Protocols can be adopted by the States individually or in combination. The Working Group may wish to consider whether the Convention shall require States to become a Party to at least one (or more) Protocol(s) or to become a Party to some of the Protocols as a "package". As currently drafted, all of the Protocols require an additional opt-in by the Parties to the Convention (see paras. 19–21 below).[9] The Working Group may wish to consider whether any of the Protocols should apply automatically, which may then require an opt-out mechanism possibly through a reservation (see paras. 51–53 below).

12. As illustrated in the sample notification form (presented after para. 38), the interaction between each Protocol and existing investment treaties is quite different. This also impacts the consequences that a ratification or accession by a State of that Protocol has. For example, accession to the Code of Conduct for Arbitrators would reflect that the State wishes to apply the Code to arbitrators and candidates tasked with handling disputes under its existing investment treaties. Accession to the UNCITRAL Model Provisions on Mediation for International Investment Disputes would indicate the State's willingness to incorporate those provisions into their investment treaties, thus offering mediation as an option. Lastly, accession to a standing mechanism may reflect the State's willingness to confer jurisdiction to such a mechanism.

13. It should, however, be noted that while the statute of the advisory centre on international investment dispute resolution (the "Advisory Centre") is listed as one of the Protocols, accession to that Protocol would not entail any effect on existing investment treaties. It would indicate the intention of the State to become a member of the Advisory Centre in accordance with that statute.

14. The Working Group may wish to consider whether the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") should be added to the list of Protocols. It should be noted that the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) provides a pathway for States to apply the Rules on Transparency to existing treaties.[10]

15. The Working Group may wish to note that the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution[11] was not included in the list of Protocols as it would be likely that the statute of a standing mechanism (presented as Protocol Y) would include that Code by reference and it would not be necessary to provide the means for States to apply the Code separately (for example, to an existing standing mechanism). The Working Group may wish to confirm this understanding.

16. Paragraph 2 refers to the possibility of including additional protocols to the convention, the process of which is outlined in article 10.

17. Paragraph 3 confirms that the Protocols shall form an integral part of the Convention and paragraph 4 clarifies that references to the Convention should generally be understood to include both the main body of the Convention as well as the Protocols.

[8] See A/CN.9/WG.III/WP.163, submission from the Governments of Chile, Israel and Japan and A/CN.9/WG.III/WP.182, submission from the Governments of Chile, Israel, Japan, Mexico and Peru.

[9] For instance, the United Nations Framework Convention on Climate Change or the Convention on Biological Diversity permit its Contracting Parties to join the framework convention without joining any of its protocols.

[10] Additional information including status available at https://uncitral.un.org/en/texts/arbitration/conventions/transparency.

[11] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944e-coc_judges_ebook-11june.pdf.

B. Parties to the convention and its entry into force

Article 3 – Signature, ratification, accession

1. This Convention is open for signature by all States in [date and location], and thereafter at [United Nations Headquarters in New York].

2. This Convention is subject to ratification by the signatories.

3. This Convention is open for accession by all States, which are not signatories as from the date it is open for signature.

4. Instruments of ratification or accession are to be deposited with the depositary.

5. When depositing the instrument of ratification or accession, a State shall indicate the Protocol(s) that it ratifies or accedes to in the same instrument.

6. A Party may subsequently deposit an instrument of ratification or accession to any other Protocol(s).

7. If a Protocol contains provisions on ratification or accession with regard to that Protocol, a Party shall also comply with the requirements therein to ratify or accede to that Protocol.

18. Article 3 provides that States may become parties to the Convention by signing and ratifying it, or by acceding to it. Participation by regional economic integration organizations is dealt with in article 4. For the sake of simplicity, the word "ratification" is used throughout the current draft to encompass "approval" and "acceptance" by States. Both terms will be added when the text is finalized.

19. Paragraphs 5 and 6 address the timing and procedure for becoming a party to the Protocols, which shall be done in the instrument of ratification or accession to the Convention or subsequently. The Working Group may wish to consider whether a State should be required to make a provisional indication of the Protocols that it wishes to join when signing the Convention.[12]

20. Paragraph 7 foresees that Protocols may have a separate procedure for becoming a party to that Protocol, which should also be complied with in order for the State to become a party.[13] The Working Group may wish to consider whether Protocols should include such separate procedure.[14] If article 3 sufficiently addresses the issue, paragraph 7 may not be necessary.

21. The draft currently foresees that a State would need to become a party to the Convention in order to become a party to the Protocols. One of the reasons for this approach is that there is no substantive obligation arising from becoming a party to the Convention and that the legal effect of the Protocols modifying existing investment treaties is provided for in the Convention. The Working Group may wish

[12] When jurisdictions sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") at the Organisation for Economic Co-operation and Development (OECD), they submit a provisional list of expected reservations and notifications, then a final list when they deposit the instrument of ratification, acceptance, or approval. See https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

[13] See article 12 of the statute of the Advisory Centre and article 41 of the draft statute of a standing mechanism for the resolution of international investment disputes in A/CN.9/WG.III/WP.239.

[14] If such an approach is taken, the protocol should further indicate that it is open for signature, ratification or accession by any State that has ratified or acceded to the convention (see also para. 21).

to consider whether it should be possible for a State to become a party to a Protocol without becoming a party to the Convention.[15]

Article 4 – Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that the organization has competence over matters governed by this Convention.

2. Unless specified otherwise in a Protocol, where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

3. The regional economic integration organization shall, at the time of signature, ratification or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred, fully or in part, to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

4. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

5. Unless specified otherwise in a Protocol, a regional economic integration organization, on matters within its competence, may exercise its right to vote with a number of votes equal to the number of its member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right to vote, and vice versa.

22. Article 4 outlines the participation of regional economic integration organizations (REIOs) to the Convention, which largely follows article 12 of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention").

23. As implied by the phrase "unless specified otherwise in a Protocol" in paragraphs 2 and 5, the Working Group may wish to consider whether issues concerning the participation of REIOs and associated voting rules should be addressed in the respective Protocols or collectively in this article (A/CN.9/1167, para. 21).

24. For example, the statute of the Advisory Centre foresees that a REIO could be a member with its own rights and obligations, including the right to vote and the obligation to pay contributions (A/CN.9/1167, para. 21). Article 5(9) of the statute further provides that all Members shall have one vote. In that context, the Working Group may wish to consider paragraph 5, which provides a different voting rule modelled on existing treaties.[16]

[15] For example, the two Protocols to the 1990 United Nations Convention on the Rights of the Child (UNCRC) allow States Parties to join even if they are not a party to the UNCRC 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); and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2173 UNTS 222)).

[16] Article 64(2) of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction and article 28 (2) of the Minamata Convention on Mercury.

Article 5 - Entry into force

1. This Convention shall enter into force [three] months after the date of deposit of the [third] instrument of ratification or accession.

2. Unless specified otherwise in the Protocol, each Protocol shall enter into force [three] months after the date of deposit of the [third] instrument of ratification or accession.

3. When a State ratifies or accedes to this Convention after the deposit of the [third] instrument of ratification or accession, this Convention enters into force in respect of that State [three] months after the date of the deposit of its instrument of ratification or accession.

4. Unless specified otherwise in the Protocol, when a State ratifies or accedes to a Protocol after the deposit of the [third] instrument of ratification or accession, that Protocol enters into force in respect of that State [three] months after the date of the deposit of its instrument of ratification or accession.

25. Article 5 addresses the entry into force of the Convention and the Protocols. The period of time and the number of instruments indicated in this article are purely illustrative. The Working Group may wish to consider whether it wishes for a quicker entry into force for those States that wish to modify their investment treaties or whether it wishes to achieve enhanced harmonization by requiring a higher number of ratifications or accessions.

26. Considering that the entry into force of some of the Protocols may require the consideration of other aspects (such as the budgetary requirement), paragraph 2 makes it possible for Protocols to impose a different requirement (see, for example, article 13 of the statute of the Advisory Centre). Paragraph 2 provides the default rule when the Protocol does not contain any such provision.

27. It should be noted that some of the texts listed as Protocols will already be in force regardless of this article (for example, the UNCITRAL Code of Conduct for Arbitrators, which was adopted in 2023). Paragraph 2 addresses their entry into force as a Protocol to the Convention.

28. The current draft foresees that the timing of the entry into force of the Convention and of the Protocols may not coincide as they are subject to different requirements. In this regard, the Working Group may wish to consider whether it should be possible for a Protocol to enter into force before the Convention (for example, if the number of instruments required in paragraph 2 or in the respective Protocol is less than that required in paragraph 1 or when the instrument had already entered into force and subsequently was included as a Protocol).[17] The Working Group may wish to also consider whether the Convention should also address the

[17] While it is not typical for a protocol to enter into force before a framework convention, there are examples of agreements or arrangements that function much like protocols being created to address specific issues and then later brought together under a broader framework. For instance, the Schengen Agreement was originally an independent treaty established outside the framework of the European Economic Community and was later integrated into the European Union legal framework through a subsequent treaty, the Amsterdam Treaty. Various regional sea agreements were agreed at the United Nations Environment Programme and then later integrated into framework conventions. For instance, the Mediterranean Action Plan was established in 1975 and folded into the Barcelona Convention in 1976. Another example is from the Antarctic Treaty System; a narrower agreement, the Convention for the Conservation of Antarctic Seals, was adopted in 1972 and entered into force in 1978, preceding the broader conservation framework in the Convention on the Conservation of Antarctic Marine Living Resources, which was adopted in 1980 and entered into force in 1982.

provisional application among the Parties to the same Protocol without necessarily awaiting the entry into force of the Convention or of that Protocol.[18]

29. Paragraphs 3 and 4 address a situation where a State ratifies or accedes to the Convention or the Protocols after the number of instruments required under paragraphs 1 or 2 has been deposited. This allows those States to make any necessary arrangements.

C. Opt-in mechanism for the application to existing investment treaties

Article 6 – Submission of a list of investment treaties (notification)

1. Within [three] months after its deposit of instrument of ratification or accession, the Party shall submit to the secretariat a list of investment treaties to which each Protocol shall apply (referred to as the "notification").

2. The notification shall relate only to the Protocol(s) that the Party has ratified or acceded to and list only investment treaties to which the Party is a party.

3. A Party shall detail how the Protocol(s) would modify the investment treaties listed in the notification to the extent possible. It may provide additional information in its notification.

4. The notification shall take effect [three] months after [the date of the notification to the secretariat] [the notification is made available to the public by the secretariat]. A Party may modify its notification by submitting an amendment notification to the secretariat.

5. A Party shall ensure that its notification(s) and the list therein is up to date and submit an amendment notification if there are any changes in the status of the treaties listed therein.

6. The secretariat shall maintain and make publicly available the notifications made by the Parties, including the investment treaties listed therein.

30. Whereas article 3 addresses how a State becomes a Party to the Convention and its Protocols, article 6 introduces the procedure for a Party to apply the Protocols to its investment treaties.[19] As provided for in paragraph 1, this is done by submitting a list of the investment treaties to a body designated for that purpose (referred to as the "secretariat", see para. 38 below). The term "investment treaty" is used to refer to any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors. The Working Group may wish to consider whether the scope of treaties might need to be expanded to tailor for any inter se modifications of those treaties.

31. Upon or after depositing the instrument of ratification or accession, a Party shall provide a list of investment treaties to which each Protocol shall apply (referred to as a "notification"). This approach requires active identification by the Parties of the treaties that will be modified, with the aim of enhancing legal certainty and

[18] The Working Group may wish to also consider provisional application in the context of a multilateral treaty where only some of the parties have included that treaty in their notification, thus not amounting to a modification of the treaty per se (see para. 43 below).

[19] The term "Parties" refers to States that have ratified or acceded to the Convention and the term "parties" refers generally to those that have concluded the respective investment treaty.

user-friendliness.[20] A similar approach was taken in articles 14(2) and 18(2) of the draft statute of a standing mechanism in A/CN.9/WG.III/WP.239.[21]

32. Parties are required to submit the notification within a short period of time after their deposit of the instrument of ratification or accession. The Working Group may wish to consider whether for States that deposited their instrument prior to the entry into force, that period should instead commence with the entry into force of the Convention or the respective Protocol. Additionally, the Working Group may wish to consider whether States should be required to submit a provisional notification at the time of signature or ratification, which will be subject to subsequent approval (see para. 19 above).

33. The Working Group may wish to consider whether the Convention should allow a State to apply any of the Protocols to its future investment treaties, which could ensure coherent application of the reform elements (A/CN.9/1124, paras. 80–81). In the current draft, it is foreseen that notifications can only list existing investment treaties.

34. Paragraphs 2 and 3 specify the contents of the notification, mainly that it should relate only to a Protocol to which the State is a Party and only list investment treaties that the State is a party to. Paragraph 3 requires the State to specify how the investment treaty would be modified by applying the Protocol (for example, the articles in the treaty that will be replaced by the Protocol) and allows States to include any additional information (for example, a separate conflict clause). In other words, the Parties are responsible for actively clarifying how their investment treaties are to be modified.

35. Paragraph 5 requires a Party to ensure that its notification(s) and the list of investment treaties therein are up to date by promptly submitting any changes (for example, if a treaty on the list was terminated) in their status to the secretariat. Parties may do so by submitting an amendment notification, which may also be utilized to add investment treaties to the list (or remove treaties) in accordance with the second sentence of paragraph 4.

36. The Working Group may wish to consider whether that period of time for the notification to take effect in paragraph 4 should commence upon receipt of the notification by the secretariat or when the notification is made public. The consequences of errors in the notifications, inconsistent notifications by the parties to the same investment treaty and inclusion of information that is not compatible with the Convention or the Protocols will need to be considered.

37. The Working Group may wish to confirm the approach taken in article 6 based on which the required contents of, and the procedure for submitting, notifications can be further developed (for example, whether notifications should list investment treaties and indicate for each the Protocols that would apply, whether it would be possible for a Party to indicate that all of its investment treaties are to be modified

[20] See A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States, para. 35 and A/CN.WG.III/WP.173, Submission from the Government of Colombia. An alternative approach was taken in the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention"), as it applies the Rules on Transparency to all investment treaties of the Party concluded before 1 April 2014, unless the Party has excluded an investment treaty through a reservation.

[21] The Working Group may wish to note that the articles 14(2) and 18(2) of the draft statute of a standing mechanism was prepared to retroactively modify the consent provided by States in their investment treaties. As this convention could achieve the same result, those articles may be redundant if the statue of a standing mechanism becomes a protocol to this convention. On the other hand, if the draft statue is developed to have a different notification system, article 6 may need to defer to those rules ("unless specified otherwise in a protocol").

without specifying each treaty, whether the Parties should be able to make joint notifications). A sample notification is provided below for reference.[22]

38. Article 6 foresees a designated body that shall compile and maintain the notifications and the lists therein as well as make them publicly available in accordance with paragraph 6. Considering that these are not the typical functions carried out by the Secretary-General of the United Nations as the depositary of treaties, reference is made to a "secretariat" as an administrative body to carry out these non-depositary functions.[23] However, this does not imply that a new institution will necessarily need to be set up under the Convention, as the functions could be carried out by an existing body or institution to leverage available resources (A/CN.9/1124, para. 76).

Notification (SAMPLE)

In accordance with article 6 of the Convention, State L submits this notification with regard to Protocols A, B and Y, to which the State has deposited its instrument of ratification on DD/MM/YYYY.

☒ Protocol A*

* For greater certainty, when an investment treaty is modified to include Protocol A, the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution shall apply to an arbitrator in, or a candidate for, an international investment dispute proceeding initiated pursuant to that investment instrument, or a former arbitrator of such a proceeding.

- Agreement between the Government of State L and the Government of State N for the Encouragement and Reciprocal Protection of Investments
- Free Trade Agreement with State O
- [List other treaties]

☒ Protocol B**

** For greater certainty, when an investment treaty is modified to include Protocol B, the UNCITRAL Model Provisions on Mediation for International Investment Disputes shall form part of that investment treaty.

- Free Trade Agreement with State O
- Agreement on Promotion and Protection of Investments with State M
- [List other treaties]

☐ Protocol C

☐ Protocol X

☒ Protocol Y***

*** For greater certainty, when an investment treaty is modified to include Protocol Y, claims and disputes under the investment instrument may be brought to the [standing mechanism] for their resolution.

[22] When States sign and ratify the OECD MLI, they submit a Position Document that shows which treaties they will apply the MLI to, reservations, and notifications. Texts available at: https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf. In addition, a tool kit with model text for instruments of ratification and notifications could be prepared (see for example, UNCITRAL, "Guidance on signature, ratification, acceptance, approval and accession for the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration" https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mauritius_convention_accession_kit.pdf).

[23] Providing up-to-date information in a format that is easy for all users to access and understand is important for making this convention user-friendly. The OECD maintains an informative matching database that enables any user to see the choices that treaty parties made when joining the MLI and how these choices modify the text of existing bilateral tax treaties (see MLI Matching Database, https://www.oecd.org/tax/treaties/mli-matching-database.htm).

- Agreement on Promotion and Protection of Investments with State M
- [List other treaties]

☐ Protocol Z

39. The way in which each Protocol applies to an existing treaty differs (see para. 12 above). The text following each Protocol in the sample notification (with the asterisk(s)) attempts to explain the effect to bring certainty. The Working Group may wish to consider whether such text should be provided in the body of the Convention or in the Protocol.

Article 7 – The effect of the notification and application of the Protocols

1. The submission of a notification by a Party pursuant to article 6 indicates its intent to modify the investment treaties listed therein.

2. When all parties to an investment treaty include that treaty in their notification to the secretariat, that treaty is deemed to have been modified to include the respective Protocol as of the date that all such notifications take effect in accordance with article 6, paragraph 4.

3. When not all the parties to an investment treaty have included that treaty in their notification to the secretariat, the notification by one or more of the Parties listing that treaty is deemed to constitute an offer to the other party or parties to modify the investment treaty to include the respective Protocol.

Rules on application in a Protocol

4. Paragraphs 2 to 3 are subject to any provision in the respective Protocol that provides a separate rule on its application or relating to notifications.

Conflict clause

5. If the investment treaty listed in the notification contains provisions on aspects covered by the respective Protocol, the Protocol shall complement those provisions. In the event of any incompatibility between such provisions and the Protocol, the Protocol shall prevail in the circumstances outlined in paragraph 2.

Temporal scope of application

6. Unless specified otherwise in the Protocol or in the notification by a Party, a Protocol shall apply only to international investment dispute proceedings that are commenced after the date when the Protocol enters into force or takes effect in respect of each Party concerned.

Most favoured nation provision

7. Disputing parties may not invoke a most favoured nation provision to seek to apply or avoid the application of the Protocols.

40. Article 7 clarifies the legal effect of notifications made by the Parties and when and how the Protocols apply to modify investment treaties listed in the notifications. Article 7 outlines how actions by States as envisaged by the Convention function to modify international treaties that they had concluded.

41. Paragraph 1 gives meaning to the notification submitted by a Party – that it captures the intent of that Party to modify the investment treaties therein with regard to the respective Protocols.

42. Paragraph 2 addresses the situation where all of the parties to an investment treaty become Parties to the Convention and the respective Protocol and include that treaty in their respective notification. In such a circumstance, the treaty is deemed to have been modified accordingly. The Working Group may wish to consider the circumstances when the investment treaty contains rules on its amendment.

43. Paragraph 3 addresses the situation where only one of the parties to a bilateral investment treaty (and in the case of a multilateral treaty, some of the parties) has become a Party to the Convention and included that treaty in its (their) notification. In that case, since the other parties to the investment treaty have not expressed consent to the modification, the action by the Party to the Convention is deemed to be an offer to modify that treaty. Modelled after article 2(2) of the Mauritius Convention, paragraph 3 notes that it would constitute an offer to the "other party or parties", understood to mean the parties to the investment treaty listed in the notification and not potential claimants under the said treaty. Alternatively, the notification may be construed as a unilateral offer by the Party to apply a Protocol to a claim/dispute under that treaty.[24] In that case, whether the other State party to the treaty would need to consent or can object to such application would need to be addressed (with regard to the jurisdiction of the standing mechanism, see A/CN.9/1167, para. 99). The approach may differ depending on the Protocols.

44. For example, if State L submits the sample notification provided above and State O is not a Party to the Convention or is a Party to the Convention but not Protocol A, the notification would constitute an offer to State O to apply the Code of Conduct for Arbitrators. If the notification is understood more broadly to constitute an offer to an investor raising a claim under the Free Trade Agreement with State O, that investor may accept the offer and agree to apply the Code of Conduct for Arbitrators in the proceedings. Whether the application requires the consent of State O and whether State O can object needs to be considered.

45. The Working Group may wish to consider how the other party or parties to the investment treaty could accept the offer, whether the only way would be by becoming a Party to the Convention and listing the treaty in the notification or if they could accept through a mechanism outside the Convention. In the latter case, detailed provisions on acceptance and its effect would be required.

46. Paragraph 4 clarifies that if a protocol provides separate rules on how it modifies or how a notification by a State modifies investment treaties listed therein, those rules shall prevail. For example, it could be envisaged that paragraph 3 allows for a unilateral offer to both treaty and non-treaty parties, whereas Protocol Y provides a rule that nationals of non-Parties to Protocol Y cannot consent to a unilateral offer of consent to the jurisdiction of a standing mechanism without the approval of the relevant treaty party (A/CN.9/1167, para. 99).

47. Paragraph 5 addresses the situation where the existing investment treaty modified by a Protocol contains rules governing aspects addressed in the Protocol. Similar to the approach taken in article 2(2) of the Code of Conduct for Arbitrators, the Protocol complements any such rules. However, in the case of incompatibility, paragraph 5 provides that when all parties to the investment treaty have included that treaty in their notifications, the Protocol would prevail as there is express consent by the treaty parties to modify the treaty. In all other circumstances (considering that the other treaty party has yet to consent to the modification), the provisions in the existing investment treaty shall prevail (A/CN.9/1124, para. 86). The Working Group may wish to consider whether this approach is appropriate and each protocol could have its own conflict clause.

48. Paragraph 6 clarifies that the Convention and the Protocols apply prospectively – that they apply to proceedings commenced after the Convention or the Protocol entered into force or took effect for the Parties.

49. Paragraph 7 is modelled after article 2(5) of the Mauritius Convention – that the most favoured nation (MFN) clause in the existing investment treaty cannot be used by a claimant to apply or avoid the modifications achieved through the Protocol. For example, if State L has modified its investment treaties to incorporate the procedural reform in Protocol C, a national of a State M, which has not incorporated the procedural reform, may not invoke the MFN clause to apply the procedural reforms

[24] See article 1(6) of the Rules on Transparency.

in its proceeding. Similarly, if States L and M have both included Protocol Y in their notification indicating that the standing mechanism would have exclusive jurisdiction over claims arising from the investment treaty between States L and M, a national of State M cannot invoke the MFN clause to argue that it wishes to pursue arbitration against State L based on another treaty concluded by State L. The Working Group may wish to consider this question in conjunction with paragraph 3 relating to the unilateral offer.

50. The Working Group may also wish to consider how to address possible revisions or updates to UNCITRAL texts set forth as protocol. One approach would be to provide that the most recent version of those texts would apply unless the Party makes a reservation to not apply the revised or updated version (see articles 2(3) and 3(2) of the Mauritius Convention).

Article 8 – Reservations

1. No reservations may be made with respect to the Convention.

2. Reservations with respect to any of the Protocols may only be made to the extent permitted in that Protocol and in accordance with the provisions of that Protocol.

51. Article 8 states that no reservations are permitted with regard to the Convention. Paragraph 1 provides a default rule regarding the articles of the Convention and Protocols that do not include provisions on reservations. Since the Convention has a dual opt-in mechanism (first, Parties choosing the Protocols and second, indicating the investment treaties that shall be modified), States have a high level of discretion in choosing how and when the Convention and the Protocols apply and which investment treaties are to be included or excluded. Therefore, it seemed unnecessary to allow for reservations, which aim to provide such flexibility. The Working Group may wish to confirm this approach. If reservations should be foreseen, the types of permissible reservations should be identified.

52. Article 8 would generally not preclude a State, when signing, ratifying or acceding to the Convention, from making declarations or statements with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions in that State.

53. Paragraph 2 allows for Protocols to permit reservations. The statute of the Advisory Centre does not foresee any reservations (article 10 in A/CN.9/1184), whereas the draft statute of the standing mechanism foresees the possibility of making reservations relating to the jurisdictional scope (article 39 in A/CN.9/WG.III/WP.239).

D. Final provisions

Article 9 – Depositary

The [Secretary-General of the United Nations] is hereby designated as the depositary of this Convention.

54. As a convention to be prepared by the Commission and presented to the General Assembly, article 9 assumes that the Secretary-General of the United Nations would function as the depositary of the Convention and all of its protocols. Inclusion of this article in the Convention would make the relevant provisions in the statute of the Advisory Centre (article 11) and the standing mechanism (article 40) unnecessary.

Article 10 – Additional protocols and amendments

1. A Party to the Convention may propose the adoption of an additional protocol or an amendment to the Convention by submitting it to the secretariat. The secretariat shall thereupon communicate the proposal to the Parties to the Convention with a request that they indicate whether they favour a conference of the Parties for the purpose of considering and adopting the proposal. In the event that within [three] months from the date of such communication at least [one-tenth] of the Parties favour such a conference, the secretariat shall convene the conference.

2. The conference of the Parties shall make every effort to achieve consensus on each proposal. If all efforts at consensus are exhausted and no consensus is reached, the proposal shall be submitted to a vote, which requires the presence of a majority of the Parties to the Convention.

3. An additional protocol shall be adopted by a [majority] vote of the Parties present and voting. An amendment to the Convention shall be adopted by [two-thirds majority] vote of the Parties present and voting. If the amendment concerns a Protocol, the amendment shall require [two-thirds majority] vote of the Parties to that Protocol present and voting.

4. Any adopted additional protocol or amendment to the Convention shall be submitted by the depositary to all the Parties for ratification.

5. The additional protocol enters into force [three] months after the deposit of the [third] instrument of ratification or accession, unless otherwise provided. The adopted amendment enters into force [three] months after the deposit of the [third] instrument of ratification.

6. When a State ratifies an amendment after its entry into force that has already entered into force, the amendment enters into force in respect of that State [three] months after the deposit of its instrument.

7. Paragraphs 1 to 6 shall not apply to the amendment of a Protocol, which specifies a separate procedure for its amendment.

8. Any State which becomes a Party to the Convention after the entry into force of the amendment shall be considered Parties to the Convention as amended.

55. Article 10 outlines the procedure for adopting additional protocols and the default procedure for amending the Convention and its Protocols in the absence of specific rules in a Protocol (para. 7). The Working Group may wish to note that for example, article 15 of the statute of the Advisory Centre contains detailed rules on amending the statute and its annexes (A/CN.9/1124, para. 77). The article ensures flexibility to accommodate future developments and to make adjustments as necessary (A/CN.9/1124, para. 79).

56. In short, any Party to the Convention may propose the adoption of a new protocol or an amendment to the Convention and the Protocols. Such a proposal is submitted to the secretariat, which is tasked with communicating the proposal to other Parties. With the support of one-tenth (to be determined also in conjunction with the number of instruments required for entry into force) of the Parties, the secretariat will convene a conference of the Parties to consider and adopt the proposal. Similar to article 10 of the Mauritius Convention, this article does not foresee the institutionalization of the conference of the Parties as the need to convene such a conference is limited. The Working Group may wish to confirm this approach.

57. Paragraph 2 provides that proposals shall be adopted in principle by consensus and only after all attempts to reach consensus fail, a vote shall be taken on the proposal. Paragraph 3 provides the voting rules, with amendments requiring a higher threshold (two-thirds) than additional protocols (simple majority), as Parties would have full discretion in determining whether to become a party to the new protocol.

58. The article does not address how the texts of the amendments or additional protocols would be prepared giving the discretion to the conference of the Parties. The Working Group may wish to consider if the article should explicitly mention the possibility of the conference of the Parties establishing subsidiary bodies for that purpose[25] or requesting other bodies (for example, UNCITRAL) to prepare the texts. It may also wish to consider whether more detailed guidance on the adoption of additional protocols should be provided in the Convention.[26]

59. Paragraphs 4 to 6 and 8 address the procedure following the adoption of the proposed additional protocol or amendment and their entry into force. It provides for a less stringent threshold compared to article 15(2) of the statute of the Advisory Centre, which requires unanimous ratification by the Parties for an amendment to enter into force. The Working Group may wish to consider the paragraphs in conjunction with article 5.

Article 11 – Denunciation

1. A Party may denounce this Convention at any time by means of a formal communication to the depositary. The denunciation shall take effect [twelve] months after the communication is received by the depositary.

2. Unless specified otherwise in a Protocol, a Party may denounce a Protocol to this Convention at any time by means of a formal communication to the depositary. The denunciation shall take effect [twelve] months after the communication is received by the depositary.

3. This Convention and its Protocols shall continue to apply to international investment dispute resolution proceedings that are commenced before the denunciation takes effect.

60. Article 11 outlines the procedure for denouncing the Convention. Similar to article 10, it provides the default rule for denouncing a Protocol, subject to any rules in the respective protocol (see article 16 of the statute of the Advisory Centre on withdrawal and termination).

61. The Working Group may wish to consider whether a Party may be allowed to denounce the Convention, while retaining its status with regard to a Protocol (see para. 21 above). This may arise, for example, where the Party complies with paragraph 1 but does not comply with the termination requirements in the Protocol.

[25] Many Conferences of the Parties have the ability to establish working groups or subsidiary bodies. For example, article 10(2)(b) of the 1979 Convention on Long-range Transboundary Air Pollution provides the Executive Body with the right to establish working groups related to the implementation and development of the Convention, while article 7(2)(i) of the United Nations Framework Convention on Climate Change provides the Conference of the Parties with the right to establish subsidiary bodies.

[26] See article 51 of the Convention on International Interests in Mobile Equipment available at https://www.unidroit.org/instruments/security-interests/cape-town-convention/.