Jean Monnet Chair

EU Constitutional Framework for International Dispute Settlement and Rule of Law

JEAN MONNET PAPERS

04/2023

Implementation of Reform Options for Investor-State Dispute Settlement

Andrés E. Alvarado-Garzón and Leonard Funk

EUROPA-INSTITUT
SAARLAND UNIVERSITY
SINCE 1951

Co-funded by the Erasmus+ Programme of the European Union

The Jean Monnet Paper Series is a project of the chair of Prof. Dr. Marc Bungenberg LL.M. at Saarland University in its capacity as Jean Monnet Chair under the title "EU Constitutional Framework for International Dispute Settlement and Rule of Law". The European Commission, which recognises exceptional excellence in teaching and research on the European Union by awarding Jean Monnet Chairs, co-funds this program.

More Jean Monnet Papers can be found at

https://www.uni-saarland.de/lehrstuhl/bungenberg/jean-monnet-papers.html

ISSN: 2752-2512 (online)

Chair of Public Law, Public International Law, European Law and International Economic Law and Jean Monnet Chair of EU Constitutional Framework for International Dispute Settlement and Rule of Law

Prof. Dr. Marc Bungenberg, LL.M.

Saarland University

66123 Saarbrücken

Germany

Publications in the Series should be cited as:

AUTHOR, TITLE, JEAN MONNET PAPER NO./YEAR [URL]

Abstract

Over the last years, delegates at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III have been discussing possible reform options for investor-State dispute settlement (ISDS). This process has demonstrated that States have very different attitudes regarding ISDS, which entails the possibility of implementing a multitude of reform options. The risk of further fragmentation appears inevitable. In this context, the instrument of implementation of ISDS reforms becomes crucial. Not only would the means of implementation ensure the effectiveness of any reform option of ISDS, but they might also reduce fragmentation (to a certain extent) by centralising the outcome of the reform process into a single instrument. Flexibility and coherence thus appear as the cornerstones of an instrument implementing ISDS reforms.

Keywords

UNCITRAL Working Group III - Investor-State dispute settlement (ISDS) – ISDS Reform – Opt-in Convention - Multilateral Instrument on ISDS Reform - Framework Convention on ISDS Reform - Means of implementation of ISDS reform – Implementation of ISDS Reform Options

Biography of the authors

Andrés E. Alvarado-Garzón is a research assistant in the Disputes Team at Herbert Smith Freehills LLP based in Frankfurt am Main, Germany. His focus is international commercial arbitration and investment arbitration.

Leonard Funk is Research Fellow at the International Investment Law Centre Cologne (IILCC).

Table of contents

Implementation of Reform Options for Investor-State Dispute Settlement

Andrés E. Alvarado-Garzón and Leonard Funk[*]

This research paper deals with the implementation of possible investor-State dispute settlement (ISDS) reforms into the given system of international investment law. It explores whether to develop for this purpose a multilateral treaty, the so-called *Multilateral Instrument on ISDS Reform* (MIIR). Similar to the discussion of this topic within United Nations Commission on International Trade Law (UNCITRAL) Working Group III,[1] this paper will not address the desirability of any of substantive reform options by themselves.

A. Structural Challenges

There are at least 2,558 international investment agreements (IIAs) in force, mostly of a bilateral nature.[2] Those treaties generally govern not only the substantive standards of investment protection, but also the procedural remedies available to investors.[3] Typically, IIAs provide for investor-State arbitration according to a specific set of procedural rules.[4]

While IIAs are structurally similar to each other, they are also independent treaties which may differ widely from each other in detail. As a matter of political realities, a replacement of the fragmented treaty foundations of the ISDS system through a single cohesive multilateral agreement is unrealistic. Past experiences such as the Organisation for Economic Co-operation and Development (OECD) Multilateral Agreement on Investment[5] as well as the ongoing reform discussions within the UNCITRAL Working Group III demonstrate that States have very different attitudes regarding investment protection in general and ISDS in particular. To accommodate these differences, States prefer the conclusion of bilateral or regional treaties over truly multilateral solutions. Hence, investor-State disputes arise and will continue to arise under a fragmented network of IIAs. Consequently, if States wish to multilaterally reform ISDS – as currently being discussed within the Working Group III –, they need to implement the envisaged changes within the given (self-imposed) systemic constraints. This is the core difficulty of the implementation of reform options. Considerations about the means of implementation of reform options will become relevant at some time, no matter what the outcome of the UNCITRAL reform process will be.

---

* Andrés E. Alvarado-Garzón is a research assistant in the Disputes Team at Herbert Smith Freehills LLP based in Frankfurt am Main, Germany. His focus is international commercial arbitration and investment arbitration. Leonard Funk is Research Fellow at the International Investment Law Centre Cologne (IILCC).

1 See UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, available at: https://undocs.org/en/A/CN.9/WG.III/WP.194 (7/3/2023), para. 3; UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, available at: https://undocs.org/en/A/CN.9/1044 (7/3/2023), para. 103.

2 UNCTAD, World Investment Report 2022, International tax reforms and sustainable investment (9 June 2022), UN Doc. UNCTAD/WIR/2022, p. 65.

3 *Jacob*, in: Wolfrum (ed.), para. 45.

4 *Jacob*, in: Wolfrum (ed.), para. 50.

5 On the Multilateral Agreement on Investment see OECD, Multilateral Agreement on Investment, available at: https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm (7/3/2023).

B. Options Discussed at UNCITRAL

In their IIAs, States consent to the settlement of investor-State disputes under specific procedural rules. It follows that two ways of implementing reforms are conceivable in principle: the incorporation of reforms at treaty level (I.) and/or at the level of applicable institutional or procedural rules (II.).

I. Incorporation at Treaty Level

The terms of the IIA, under which a dispute arises, primarily govern the modalities of the respective ISDS proceedings. Hence, to implement ISDS reforms, treaty provisions governing reform options may be incorporated in IIAs. It can be distinguished between an incorporation on a treaty-by-treaty (1.) and a multilateral basis (2.).

1. Treaty-by-Treaty Approach

States may incorporate reforms treaty-by-treaty by renegotiating existing IIAs or concluding new IIAs. If this route to implementation is followed, reform options discussed at UNCITRAL could take the form of model treaty provisions, which would become binding once States adopt them as part of their future or existing IIAs.[6] The severe disadvantage of this approach, however, is its inefficiency. Considering the fragmentation of the IIA network, it is not suitable to quickly (if at all) achieve a widespread and uniform application of any reform option. This in turn would undermine all the efforts undertaken to reform ISDS.

2. Multilateral Instrument on ISDS Reform (MIIR)

Discussions at UNCITRAL are understandably focused on whether to develop an MIIR aimed at the incorporation of reform options into IIAs.[7] The MIIR would be an opt-in convention. Its scope may encompass future, existing, or future and existing IIAs. In terms of content, the substantive provisions of the MIIR would govern the reform options. An MIIR could also set-up a new multilateral "umbrella" institution for the administration of reformed ISDS. Accordingly, this section explores the features of an opt-in convention (a.) as well as its content and structure (b.).

---

6 By way of an example, this approach is discussed at UNCITRAL with respect to the implementation of a code of conduct, see UNCITRAL WG III, Draft code of conduct: Means of implementation and enforcement, Note by the Secretariat (2 September 2021), UN Doc. A/CN.9/WG.III/WP.208, available at: https://undocs.org/en/A/CN.9/WG.III/WP.208 (7/3/2023), paras. 8–10.

7 The discussions at UNCITRAL are reflected in the following documents: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019) (23 October 2019), UN Doc. A/CN.9/1004, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/104/76/PDF/V1910476.pdf?OpenElement (7/3/2023), paras. 100–104; UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194; UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, paras. 102–111; UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat (22 July 2022), UN Doc. A/CN.9/WG.III/WP.221, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/221/065/8E/PDF/2210658E.pdf?OpenElement (7/3/2023); UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022) (7 October 2022), UN Doc. A/CN.9/1124, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/222/285/3E/PDF/2222853E.pdf?OpenElement (7/3/2023); paras. 66–88.

a) Opt-in convention

By binding themselves to the MIIR, States would consent (i.e. opt in) to apply reform options provided for by the MIIR to disputes arising under their existing IIAs.[8] This mechanism permits to extend the application of reform options to existing IIAs.[9] It was utilised, for instance, with regards to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (UNCITRAL Transparency Rules)[10] where first, the UNCITRAL Transparency Rules were developed and second, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)[11] was concluded to ensure their application to existing IIAs.[12] Another example is the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).[13] The MLI modifies existing double taxation treaties to implement measures that were developed during the course of the OECD's Base Erosion and Profit Shifting (BEPS) Project.[14]

The legal effect of the MIIR as an opt-in convention would be that IIA treaty relationships between the parties to the MIIR are altered according to the terms of the MIIR.[15] An MIIR would coexist with the IIA network[16] and hence would not change that IIAs would still be concluded on a bilateral or regional basis.[17] Nonetheless, it would allow for a swift implementation of reforms, as there would be no necessity for an individual renegotiation of IIAs.[18] Furthermore, the MIIR would be a single and coherent treaty which would determine the conditions and modalities of the incorporation of reforms into a potentially large number of IIAs. Hence, while necessarily having to give its contracting parties a considerable degree of flexibility concerning their individual treaty commitments to achieve a wide participation, it allows for a harmonised implementation of reforms into IIAs. As IIA treaty relationships are altered only between the contracting parties to the MIIR, the effect of the MIIR to disputes arising under IIAs depends on whether host State and/or home State have bound themselves to the MIIR.

If both host and home State have bound themselves to the MIIR, their treaty relationship is consensually modified according to the terms of the MIIR.[19] For this scenario, the MIIR could

8 For the notion of an opt-in convention see *Kaufmann-Kohler/Potestà*, paras. 69–79 and 212–273; *Alschner*, BJIL 2019/45, pp. 47–48 and 54–56; *Bungenberg/Reinisch*, paras. 577–579 and 667–673; *Amado/Kern/Rodriguez*, pp. 93–97 and 182–184.

9 *Kaufmann-Kohler/Potestà*, paras. 76, 212 and 215.

10 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (UNCITRAL Transparency Rules) (2013) 52 ILM 1303.

11 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) (2014) 54 ILM 751.

12 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, paras. 26–28; *Kaufmann-Kohler/Potestà*, paras. 57–68.

13 OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, available at: https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (7/3/23).

14 See Article 1 MLI.

15 For an analysis of the legal relationship between existing IIAs and an opt-in convention see *Kaufmann-Kohler/Potestà*, paras. 222–236.

16 *Kaufmann-Kohler/Potestà*, paras. 214 and 222.

17 Regarding the MLI see *Alschner*, BJIL 2019/45, pp. 47–48.

18 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 24.

19 Ibid., para. 33.

stipulate that reformed ISDS either supplements or replaces the dispute settlement options under the respective IIA. Thereby, the MIIR could determine to what extent the investor may choose between original and reformed modes of ISDS.

If only the host State is a party to the MIIR, the treaty relationship between host and home State remains unaffected by the MIIR.[20] Nonetheless, reform options could be made applicable to disputes arising under IIAs on the basis of a unilateral offer for reformed modes of ISDS contained in the MIIR.[21] This offer would merely supplement the original dispute settlement options and would be dependent on the investor's acceptance.[22] Critics to a unilateral offer mechanism note that such option would grant additional procedural rights to investors (e.g. the option to resort to a multilateral investment court in addition to investor-State arbitration as provided by the IIA) even if their respective home States do not accede the MRI, which might decrease the incentive for States to join an a multilateral investment court (e.g. in order to save costs).[23] Despite these concerns, reform-minded States might just as well see a unilateral offer mechanism as being advantageous to them as it can avoid traditional ISDS claims being initiated against them.[24] On the other hand, a unilateral offer mechanism would not affect, directly or indirectly, States which are reluctant to ISDS reform. Hence, these States have no reason to object such mechanism.[25] However, one may certainly question whether investors in practice would consent to resort to reformed ISDS if they can also resort to traditional investor-State arbitration. While it is still not clear which reform options will ultimately be agreed upon, it appears that the outcome will be a more restricted or at least a more regulated mode of dispute settlement which – from an investor's perspective – may be less attractive.

If only the home State is a party to the MIIR, the treaty relationship between host and home State remains unaffected by the MIIR.[26] Reform options could, however, be made applicable to disputes arising under IIAs on the basis of an *ad hoc* consent between the investor and the host State.[27] The same applies if neither the host nor the home State are parties to the MIIR.[28] However, the issue arises whether an investor should be able to resort to reformed ISDS in reliance on an *ad hoc* consent given by the host State. Critics of this option argue that any incentive to accede to an MIIR would be taken away if States could decide on a case-by-case basis whether they wish to apply a specific reform option or not.[29] If States nonetheless wish to promote the use of (one or more) specific reform options, they could insert a provision in an MIIR, whereby the instrument is without prejudice to the application of the reform option(s) whenever the disputing parties agree.[30] As explained above, in the absence of incentives for investors to reach an agreement to resort to

20 Ibid., para. 35.

21 Ibid., paras. 34-35.

22 Ibid., para. 35.

23 *Bungenberg/Reinisch*, para. 202.

24 *Bungenberg/Reinisch*, para. 204.

25 *Kaufmann-Kohler/Potestà*, para. 253.

26 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 36.

27 Ibid.

28 Ibid., para. 37.

29 *Bungenberg/Reinisch*, par.a 206.

30 *Kaufmann-Kohler/Potestà*, para. 258; UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 37.

reformed modes of ISDS instead of traditional ISDS, it is questionable whether such an agreement will be concluded in practice.

The reform options provided in the MIIR could principally apply to investor-State disputes arising under future, existing, or future and existing IIAs.[31] In the near and mid-term future, most investor-State disputes will arise under existing IIAs. Hence, if the MIIR would cover future IIAs only, its relevance would be limited.

b) Content and Structure

The MIIR's content could be limited to a specific reform option (e.g. a multilateral investment court, or a stand-alone multilateral investment appeals mechanism), but it could also encompass several or even all reform options discussed at UNCITRAL simultaneously.[32] The reform options could be governed in the MIIR itself in specific clauses or annexes[33] or outside the MIIR in other treaty or soft law instruments.

The success of an MIIR in altering the IIA network would depend on the number of States binding themselves to the MIIR. Hence, considering the differing policies States have regarding ISDS, the MIIR would have to foresee that its contracting parties may flexibly adapt their individual commitments to a significant degree.[34] The MIIR could, for example, allow States to choose (i) to which of their IIAs the provided reform option(s) apply, (ii) which reform options apply to their IIAs (if more than one reform option is provided), and (iii) whether the reform options apply only in case of reciprocal consent by host and home State.[35] As a result, the substantive content of the MIIR would amount to a multiple configuration of options or *à la carte* design.[36] Technically, this may be achieved by using opt-in or opt-out provisions.[37]

Certainly, an MIIR completely *à la carte* and the pursuance of individualised reform options would greatly differ, unless States find it desirable that certain core elements or minimum standards need

31 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 23. See also UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, para. 109.

32 UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, para. 105; UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 13.

33 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 14.

34 See UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, paras. 106–108; UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, paras. 15–22.

35 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 19.

36 For the notion of ISDS *à la carte* see *Schill/Vidigal*, RTA Exchange, 2018/1, pp. 1 ff.; *Schill/Vidigal*, Law Pract. Int. Court. Trib., 2019/18, pp. 314 ff..

37 According to the International Law Commission, opt-in provisions "may be defined as provisions stipulating that the parties to a treaty may accept obligations which, in the absence of explicit acceptance, would not be automatically applicable to them". In contrast, an opt-out provision "is a treaty provision by which a State will be bound by rules contained in the treaty unless it expresses its intent not to be bound, within a certain period of time, by some of those provisions". While starting from different presumptions, unilateral statements made under such clauses both purport to modify the application of the effects of the treaty see UN General Assembly, Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011), Sixty-sixth Session, Supplement No. 10, UN Doc. A/66/10/Add.1, 2011, pp. 55, 101 f.

to be implemented by all participating States to the MIIR.[38] A useful model to consider is the MLI which in general allows its contracting parties to exclude the application of BEPS measures by way of a reservation unless a specific BEPS measure constitutes a minimum standard.[39]

c) Institutional Framework

Finally, the MIIR could establish a new institutional framework to administer the reformed modes of ISDS, including a possible multilateral investment court.[40] The idea is that a new institution striving for universal membership may further enhance coherence and consistency of ISDS despite its fragmented treaty basis, and irrespective of States choosing different reform options to adhere to.

II. Incorporation in Procedural Rules

Reforms may also be implemented by incorporating them into procedural rules. This possibility is considered at UNCITRAL with respect to a range of reform options.[41] However, standing bodies such as a multilateral investment court, or a stand-alone multilateral investment appeals mechanism cannot be created through procedural rules. For those reforms that could be implemented via procedural rules (e.g. a code of conduct), this may take two forms. *First*, a novel set of procedural rules may be developed. *Second*, an existing set of procedural rules may be amended.

38 UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, para. 107.

39 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194, para. 30.

40 Ibid., paras. 14 and 40. For specific proposals in this regard see *Roberts/St John*, EJIL:Talk! 24 October 2019; *Schill/Vidigal*, RTA Exchange, 2018/1, pp. 1 ff.; *Schill/Vidigal*, Law Pract. Int. Court. Trib., 2019/18, pp. 314 ff.

41 See for a code of conduct UNCITRAL WG II, Investor-State dispute settlement (ISDS) reform, Draft code of conduct: Means of implementation and enforcement – Note by the Secretariat, (2 September 2021), UN Doc. A/CN.9/WG.III/WP.208, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/064/63/PDF/V2106463.pdf?OpenElement (7/3/2023), paras. 13–28; UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), Background information on a code of conduct – Note by the Secretariat, (31 July 2019), UN Doc. A/CN.9/WG.III/WP.167, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/082/09/PDF/V1908209.pdf?OpenElement (7/3/2023), paras. 63–64. For a framework addressing frivolous claims in ISDS see UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), Security for cost and frivolous claims, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.192, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/003/85/PDF/V2000385.pdf?OpenElement (7/3/2023), para. 31; UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), (30 July 2019), UN Doc. A/CN.9/WG.III/WP.166, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/081/95/PDF/V1908195.pdf?OpenElement (7/3/2023), para. 48. For expedited ISDS procedures see UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), (30 July 2019), UN Doc. A/CN.9/WG.III/WP.166, para 52. For a reform addressing multiple proceedings see UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), Multiple proceedings and counterclaims, (22 January 2020), UN Doc. A/CN.9/WG.III/WP.193, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/006/03/PDF/V2000603.pdf?OpenElement (7/3/2023), para. 31. For a framework allowing counterclaims by respondent States in ISDS see UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), Multiple proceedings and counterclaims, (22 January 2020), UN Doc. A/CN.9/WG.III/WP.193, para. 45. For reforms related to security for costs in ISDS see UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), Security for cost and frivolous claims, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.192, para. 18. For a reform related to third-party funding in investment disputes see UNCITRAL WG II, Possible reform of investor-State dispute settlement (ISDS), Third-Party funding – possible solutions, (2 August 2019), UN Doc. A/CN.9/WG.III/WP.172, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/083/90/PDF/V1908390.pdf?OpenElement (7/3/2023), para. 42.

Importantly and regardless of whether a novel set of procedural rules or an amended version of existing procedural rules is concerned, the disputing parties' consent is always required for their applicability. Therefore, in disputes under existing IIAs, the respective procedural rules when the IIA was originally concluded apply, unless the treaty language indicates otherwise (i.e. a reference to the most recent version of procedural rules). Empirical studies indicate that this is rarely the case. An option to overcome this limitation would be to conclude an opt-in convention to extend the application of new procedural rules to existing IIAs as mentioned above with respect to the UNCITRAL Transparency Rules.

C. Stakeholders and their Position

In principle, there is a disagreement among delegations to the Working Group III regarding the appropriate time for the discussion on the means of implementation of any reform option. While some delegations find the deliberations on the means of implementation premature, others consider them pertinent as they could influence or impact the formulation of the reform options.[42] Irrespectively, the UNCITRAL Secretariat prepared a working paper on an MIIR for the discussion of all delegations.[43] The paper highlights the delegations' goal of guaranteeing coherence and flexibility on the overall reform process.[44] Furthermore, there are some issues for consideration, which have already received attention from the delegates during the meetings of 5–9 October 2020, as explained below.

I. Core Provisions or Minimum Standards

With respect to the content of the instrument, some delegations suggested that some core elements, upon which all parties ought to agree should be devised. Other delegations have considered that this would be neither necessary nor feasible or that in any case it was premature to determine what could constitute those core elements, as no agreement on reform options has been reached.[45] However, some examples of possible core elements to be agreed by all contracting States are the investor's procedural rights (possibility to raise claims), transparency and efficiency of the proceedings, State's right to regulate, or the goal of sustainable development.[46] To prevent that such core provisions are circumvented, it is considered that minimum standards should not be subject to reservations.[47]

Some institutional support, for instance, in the form of ministerial conference, appears desirable as a core element.[48] Such body should carry functions such as the monitoring of the treaty actions, overseeing compliance by States Parties, or serving as a forum for possible negotiations or amendments within the MIIR framework.

42 UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, paras. 103 f.

43 UNCITRAL WG III, Multilateral Instrument on ISDS Reform – Note by the Secretariat, (16 January 2020), UN Doc. A/CN.9/WG.III/WP.194.

44 Ibid., para. 6.

45 UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, para. 107.

46 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat (22 July 2022), UN Doc. A/CN.9/WG.III/WP.221, para. 16.

47 Ibid., para. 26.

48 Ibid., para. 18.

II. Application to Existing and Future Treaties

With respect to the temporal scope of application, delegations seem to prefer the application to both existing and future treaties as the entire purpose of an MIIR was to render some or all reform options available for existing treaties. A minor disagreement nevertheless exists as to the inclusion of State-to-State dispute settlement mechanisms within an MIIR.[49] It appears necessary to delineate the interaction of the MIIR with existing and future IIAs, as well as with other treaties such as the ICSID Convention.[50] In the same vein, a conflict clause might be devised to address possible conflicts between the MIIR and certain aspects of existing or future IIAs.[51]

III. Underlying Purpose of an MIIR

The underlying purpose of an MIIR would be the promotion of legal certainty in ISDS by responding to the concerns on consistency and coherence. Further, an MIIR should clearly set out the objective of achieving sustainable development through international investment.[52]

IV. Opt-In Elements and Combination of Reform Options

Flexibility was praised as a core feature of an MIIR: it should permit States to choose the reform options they find suitable and the possibility of joining the instrument at later stage.[53] With respect to the possibility of including optional elements that the participating States could opt in or out, some doubts were raised considering that such optional elements would contribute to further fragmentation in investment law and possibly to forum shopping.[54] However, no discussion on the possibility of combining different reform options has been fully held.

V. User-friendliness of the Convention

Additionally, the Working Group III is concerned with the use-friendliness of the MIIR as the disputing parties are the ultimate users of such instrument.[55] In this regard, one may consider the use of technology to navigate the contents of the MIIR, as well as drafting such instrument in a simple manner.[56] Yet, no specific guidelines have been elaborated in this aspect.

49 UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, para. 109.

50 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat (22 July 2022), UN Doc. A/CN.9/WG.III/WP.221, paras. 33 ff.

51 Ibid., paras. 42 ff.

52 UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-ninth session, (10 November 2020), UN Doc. A/CN.9/1044, para. 106.

53 Ibid.

54 Ibid., para. 108.

55 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat (22 July 2022), UN Doc. A/CN.9/WG.III/WP.221, para. 14

56 Ibid., para. 29.

D. Framework Convention on ISDS Reform

The Working Group III is continuing its work on possible reforms to be implemented. Considering the desired goals of coherence and flexibility, the structure of the MIIR has been subject of discussions. In this line, two options have been explored: either a Framework Convention with Protocols or a Single Convention with Annexes.[57]

A Framework Convention is a treaty setting out legally binding objectives and principles, the institutional or governance design, and any further general commitments by all contracting States.[58] However, specific aspects of the treaty are not governed by the Framework Convention as such, but rather by Protocols. These Protocols are treaties on their own but operating under the umbrella of the Framework Convention, which provides certain flexibility to adhering States when deciding which Protocols to join or not.[59] A paradigmatic example of such system is the United Nations Framework Convention on Climate Change (UNFCCC)[60] and its subsequently adopted protocols namely the Kyoto Protocol[61] and the Paris Agreement.[62] While these instruments enjoy wide recognition, not all parties to the UNFCCC have adhered to the Kyoto Protocol and the Paris Agreement.[63] The major risks with this approach are the possibility of deepening fragmentation in international investment law and the applicability of such Framework Convention to existing and future treaties.[64]

A Single Convention with Annexes has a similar functioning as Framework Convention with Protocols i.e. general aspects are regulated by the Single Convention whereas the Annexes govern specific aspects of the treaty.[65] An example in this regard is the United Nation Convention on the Law of the Sea (UNCLOS), which has nine annexes.[66]

The Working Group III envisages a Framework Convention with both Protocol and Annexes, which provides further flexibility when implementing the different reform options. Illustratively, the structure of such convention is the following:

57 Ibid., paras. 8ff.

58 For the notion of a framework convention see *Matz-Lück*, in: Wolfrum (ed.).

59 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat (22 July 2022), UN Doc. A/CN.9/WG.III/WP.221, para. 8.

60 United Nations Framework Convention on Climate Change (adopted 09 May 1992, entry into force 21 March 1994) 1771 UNTS 107.

61 Kyoto Protocol to United Nations Framework Convention on Climate Change (adopted 11 December 1992, entry into force 16 February 2005) 2303 UNTS 162.

62 Paris Agreement to United Nations Framework Convention on Climate Change (adopted 12 December 2015, entry into force 04 November 2016) 3156 UNTS.

63 The UNFCCC has 197 contracting parties, the Kyoto Protocol has 192 contracting parties and the Paris Agreement has 193 contracting parties.

64 UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat (22 July 2022), UN Doc. A/CN.9/WG.III/WP.221, para. 10.

65 Ibid., para. 11.

66 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) 1833 UNTS 3

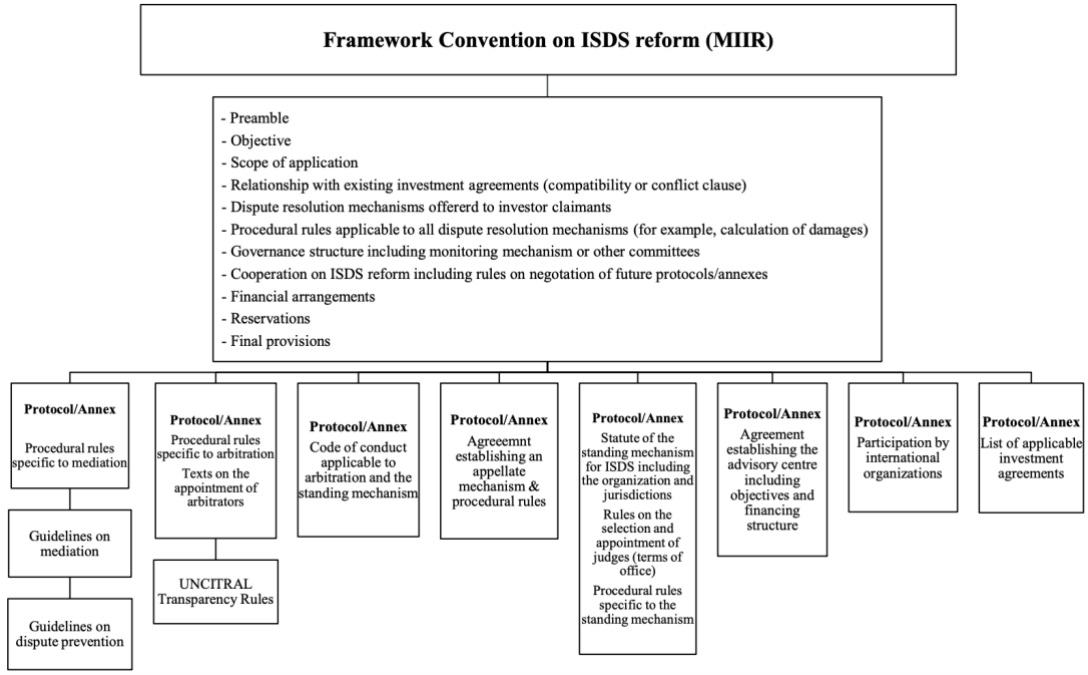

Table 1: UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS), Multilateral Instrument on ISDS Reform – Note by the Secretariat (22 July 2022), UN Doc. A/CN.9/WG.III/WP.221, para. 49.

Whilst this proposed structure is still in its infancy, it achieves the main goals for an effective implementation of ISDS reform options: flexibility for contracting States, a set of common/core provisions and objectives, rules on the applicability to existing and future treaties, and elements to opt-in/opt-out. In principle, this structure may adapt to any decisions the delegations take with regards to the different reform options under discussion, but its ultimate design depends highly on the outcome of all deliberations at the Working Group III and the inclinations of each State towards ISDS.

E. Conclusions

The means of implementation are decisive with regards to the effectiveness of any reform option of ISDS. Considering the diverging points of view of the various delegates to UNCITRAL Working Group III as to the changes to be made, the cornerstone of an MIIR should be the flexibility to choose the reform options each State considers appropriate. Therefore, fragmentation appears inevitable to a certain degree. Yet, centralising the outcome of the reform process into a single instrument seems the best option to reduce fragmentation to certain extent. From the outset, the idea of implementing reforms through a single and cohesive multilateral treaty might be the most promising option to ensure both coherence and flexibility. The delegations continue discussing the substance of the reform options, which for now puts a hold on the ultimate design choices to be made regarding the MIIR.

Bibliography

ALSCHNER, WOLFGANG, *The OECD Multilateral Tax Instrument: A Model for Reforming The International Investment Regime?*, Brooklyn Journal of International Law, 2019(45), pp. 1-73,

AMADO, JOSE DANIEL/KERN, JACKSON SHAW/RODRIGUEZ, MARTIN DOE, *Arbitrating the Conduct of International Investors*, Cambridge, 2018

BUNGENBERG, MARC/REINISCH, AUGUST, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement, 2nd edition, Berlin, 2020.

JACOB, MARC, *Investment, Bilateral Treaties*, in: Wolfrum, Rüdiger (ed.), Max Planck Encyclopedia of Public International Law, Oxford, 2014.

KAUFMANN-KOHLER, GABRIELLE/POTESTÀ, MICHELE, *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?*, 2016, available at https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf (07/03/2023).

MATZ-LUCK, NELE, *Framework Agreements*, in: Wolfrum, Rüdiger (ed.), Max Planck Encyclopedia of Public International Law, Oxford, 2011.

ROBERTS, ANTHEA/ST JOHN, TAYLOR, *UNCITRAL and ISDS Reform: Visualising a Flexible Framework* (EJIL:Talk! 24 October 2019) available at: https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/ (07/03/2023)

SCHILL, STEPHAN W./VIDIGAL, GERALDO, *Cutting the Gordian Knot: Investment Dispute Settlement à la Carte*, RTA Exchange, 2018, available at: https://uncitral.un.org/sites/uncitral.un.org/files/rta_exchange_-_investment_dispute_settlement_-_schill_and_vidigal.pdf (07/03/2023).

SCHILL, STEPHAN W./VIDIGAL, GERALDO, *Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis*, The Law & Practice of International Courts and Tribunals, 2019(18), pp. 314-344.