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Possible reform of investor-State dispute settlement (ISDS)

Multilateral instrument on ISDS reform

Note by the Secretariat

Contents

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I. Introduction

1. At its thirty-eighth session in 2020, the Working Group requested the Secretariat to undertake preparatory work regarding the means to implement the reform options (referred to in this Note as "reform elements") and in that context to prepare a paper on a multilateral instrument on ISDS reform (the "MIIR") (A/CN.9/1004, paras. 101 and 104). Accordingly, a document outlining the key issues relevant to designing the MIIR (A/CN.9/WG.III/WP.194) was presented to the Working Group at its thirty-ninth session in 2020.

2. At that session, it was said that the MIIR should provide a framework for implementing multiple reform elements, and that a coherent and flexible approach to the different reform elements would allow States Parties to choose whether and to what extent they would adopt the relevant reform elements (A/CN.9/1044, para. 105).

3. Furthermore, it was suggested that the MIIR should have the following characteristics: (i) respond to identified concerns (in particular consistency and coherence) and promote legal certainty in ISDS; (ii) establish a flexible framework, whereby States could choose the reform elements – including the mechanism for ISDS and relevant procedural tools, also accommodating future developments in the field of ISDS; (iii) provide temporal flexibility to allow continued participation by States Parties; (iv) allow for the widest possible participation of States to achieve an overall reform of ISDS; and (v) provide for a holistic approach to ISDS reform clearly setting forth the objective of achieving sustainable development through international investment (A/CN.9/1044, para. 106).

4. Given the need to thoroughly analyse the form of the MIIR as well as its legal implications on the existing ISDS framework, support was expressed for continuing work on the MIIR, including through intersessional work performed by interested delegations (A/CN.9/1044, para. 111).

5. Since the thirty-ninth session in 2020, two informal meetings were held on the topic.[1] The Secretariat also sought the assistance of the Treaty Section of the United Nations Office of Legal Affairs as well as of public international law and treaty law experts, who were invited to provide their views on document A/CN.9/WG.III/WP.194 and to identify issues requiring further consideration.[2]

6. According to the work plan (A/CN.9/1054, annex I), the Working Group is scheduled to provide instructions to the Secretariat with regard to the MIIR at the current session. Therefore, this Note supplements document A/CN.9/WG.III/WP.194 and poses a number of issues for consideration by the Working Group with the aim to obtain guidance on the work to be carried out by the Secretariat on the topic. It also contains an illustrative example of how the MIIR could be structured.

[1] Informal meetings on the topic were held on 9–10 December 2021 and 10 June 2021. The summary of the informal meetings are available respectively at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/summary_informal_meetings_6-10_december_final.pdf and https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wg_iii_-_summary_informal_meetings_7-10_june_2022_final.pdf.

[2] The Secretariat would like to express its appreciation to Ms. Danae Azaria (University College London, Faculty of Laws), Mr. Duncan Hollis (Temple University, Beasley School of Law), Mr. Jan Klabbers (University of Helsinki, Faculty of Law), Mr. Makane Mbengue (University of Geneva, Faculty of Law) and Ms. Malgosia Fitzmaurice (Queen Mary University of London, School of Law) for their comments and contributions. The Secretariat would welcome further inputs by other interested public international law and treaty experts.

II. Multilateral instrument on ISDS reform

A. Possible structure of a multilateral instrument

7. As mentioned, calls had been made that the MIIR should provide a coherent and flexible approach to the different reform elements (see para. 2 above). The Working Group may wish to consider how the MIIR should be structured to balance coherence of the ISDS reform and the flexibility to be provided to States Parties of the MIIR.

Framework convention with protocols

8. One possible structure of the MIIR could be a framework convention accompanied by one or more protocols. A framework convention is a legally binding treaty that establishes the objectives, basic principles, the institutional or governance structure, broader commitments for its States Parties, while leaving specific aspects to more detailed protocols. Protocols can operate as treaties on their own and can carry out a number of functions.[3] Such a structure can provide flexibility as a State can become a party to the framework convention without becoming a party to its protocols.[4]

9. An example of this structure can be found in the 1992 United Nations Framework Convention on Climate Change (UNFCC) along with the 1997 Kyoto Protocol and the 2015 Paris Agreement, both of which set more specific rules and targets.[5] Other prominent examples of framework conventions include the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 Convention on Biodiversity, and the Convention on International Interests in Mobile Equipment (Cape Town Convention).

10. While protocols may be a convenient vehicle for setting forth the ISDS reforms and for States to consent to their application, some safeguards might be required to ensure a coherent ISDS regime. This is because a framework convention with protocols with each having different States Parties may result in further fragmentation and could pose complexities, particularly when the reforms therein are to apply also to existing investment agreements involving those State Parties.

Single convention with annexes

11. Another possible structure of the MIIR would be a single convention with one or more annexes. Similar to protocols, annexes could address different aspects relating to the convention, including substantive obligations as well as the

[3] Protocols can amend earlier treaties. For example, the 1972 Protocol amended the 1961 Single Convention on Narcotic Drugs and the 1921 Convention for the Suppression of the Traffic in Women and Children was amended by a 1947 Protocol. Protocols can also supplement existing treaties. For example, the 1989 Montreal Protocol on Substances that deplete the Ozone Layer elaborates the 1985 Vienna Convention's general obligation to protect the ozone layer. Protocols can supersede prior treaty commitments and can also include provisions on reservations, opt-in or opt-out declarations, amendment procedures or entry into force requirements different from the framework convention. For instance, a protocol could list the prior or existing treaties which the new instrument intends to supersede or modify.

[4] It is also possible for a State to become a party to a protocol without becoming a party to the framework convention. For example, 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)). Most framework conventions however do not allow a State to accede to the protocols without being a Parties to the framework convention.

[5] For instance, the Kyoto Protocol commits industrialized countries and economies in transition to limit and reduce greenhouse gases emissions in accordance with agreed individual targets, while the Paris Agreement sets forth more stringent obligations in respect of combating climate change. Article 17 of the UNFCC provides that decisions under any protocol shall be taken only by the Parties to the protocol concerned.

institutional structure. When becoming a party to the convention, it would be possible for the State to determine whether it would be bound by the annexes.

12. By way of illustration, the International Convention for the Prevention of Pollution from Ships (MARPOL Convention) sets out the parties' main obligations in the main convention, while more specific obligations are contained in the six technical annexes, two of which are compulsory for all States Parties.[6] The United Nation Convention on the Law of the Sea (UNCLOS) has 9 annexes, with annex V providing for conciliation, annex VI containing the Statue for the International Tribunal on the Law of the Sea (ITLOS), and annex VII providing for arbitration.

Summary

13. While a distinction has been made between the two types of structures, it is possible that depending on the contents of the MIIR, it could have both protocols and annexes. For example, the Code of Conduct could be included as a protocol, while the list of investment agreements with regard to which the reform elements apply could be included in the annex. It may also be possible that additional protocols are negotiated following the conclusion of the main convention and that the list of investment agreements in the annex are updated as more States become parties to the MIIR. The Working Group may wish to take advantage of the flexibility provided in the two types of structures.

B. Coherence and flexibility

14. The Working Group had identified two characteristics that could guide the work on the MIIR – coherence and flexibility. Another characteristic that deserves the attention of the Working Group is user-friendliness, considering that it would be the disputing parties that would be utilizing the MIIR.

Coherence and MIIR operation

15. Coherence in the application of the ISDS reforms would be achieved by ensuring that a set of core provisions would be binding on all States Parties.

16. *Objectives* – Such core provisions could address the objective and principles underlying the MIIR and record the commitment of the States Parties to reform the ISDS mechanism under both the existing and future investment agreements. The Working Group may wish to identify some of the principles that would need to be captured, for example, the protection of investor's rights, including the procedural right to raise claims, transparency and efficiency of the proceedings, State's right to regulate, sustainable development goals and so forth.

17. *Modes of ISDS* – The Working Group may wish to consider whether a provision whereby the States Parties would determine the mode of ISDS that they would accept, or consent to, should form part of the core provisions.[7] This could be modelled based on the generic provision found in investment agreements offering investors recourse to a range of dispute resolution mechanisms. This could include, for example, recourse to mediation, domestic remedies, international arbitration as well as any new mechanism to be developed by the Working Group, such as the first instance standing mechanisms or an appellate mechanism. Generic rules that would apply to all such mechanisms could form part of the core provision whereas rules specific to the

[6] The MARPOL Convention was adopted on 2 November 1973. The Protocol of 1978 was adopted in response to a spate of tanker accidents in 1976 and1977. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument entered into force on 2 October 1983. In 1997, a Protocol was adopted to amend the Convention and a new annex VI was added which entered into force on 19 May 2005. MARPOL has been updated by amendments through the years.

[7] See UNCLOS, article 287(1).

different dispute resolution mechanisms (for example, appeal, annulment or correction of an award) could be placed in the respective protocols.

18. *Governance/institution* – The governance of the MIIR could form part of the core provisions as the proper functioning of the MIIR would likely require some institutional support. In treaty practice, this is usually achieved by mandating a body or a specific institution to manage the treaty operation. This could take the form of a Conference of the Parties (COP), composed of all States Parties to the MIIR.[8] A COP could offer a permanent forum for communication between all States Parties, which could allow the exchange of views and experience in implementing reform elements therein. It could also take the form of an administrative body or a secretariat, which could be either an existing or a new institution.[9] Whatever the form, the functions to be carried out by the body could include the monitoring of the treaty actions, overseeing compliance by States Parties, handling any amendments including the possible negotiation of new protocols or annexes, interpretation of the MIIR,[10] and consolidation and clarification of the reform elements in the MIIR applicable to ISDS proceedings.

19. Rules on the amendment of the MIIR (including any protocol or annex) could form part of the core provisions. Should the MIIR require the provision of any financial resources (for example, the establishment and operation of a treaty monitoring body, an advisory centre, or a standing mechanism), such aspects could also form part of the core provisions.

20. In light of the above, the Working Group may wish to consider how the MIIR would operate and which relevant aspects should form part of the core provisions.

Flexibility

21. Another characteristic that was emphasized by the Working Group was the flexibility to be embedded in the MIIR. This was highlighted when proposals were made to adopt a "suite" approach aimed at developing a menu of relevant solutions for States to choose from (A/CN.9/WG.III/WP.194, para. 10)[11] as well as to develop a single instrument containing "blocks" of reform elements (A/CN.9/WG.III/WP.194, paras. 3 and 8). Indeed, there are a number of ways to provide such flexibility to States as they become Parties to the MIIR, which should be distinguished from the flexibility to be provided to disputing parties when utilizing the MIIR (see para. 27 below). The MIIR should also be sufficiently flexible to accommodate future developments and at the same time, endure the passage of time.

22. While States Parties to the MIIR would be bound by the core provisions, the MIIR could contain optional elements, with regard to which States could make a choice whether to be bound, by either opting-in or out of such elements (A/CN.9/1044, para. 108). As mentioned in section A, such elements could be contained in a protocol or an annex.

23. In an opt-in mechanism, States would need to take a positive step in order to express their consent to be bound. The opt-in mechanism has the advantage of preserving flexibility of the State, but it requires an additional step to be taken by the State to positively express their consent to be bound by the optional elements, beyond its initial consent to be bound by the core provisions. For example, a State Party to

[8] Conference of the Parties of the UNFCC, or the States Parties to UNCLOS.

[9] International Maritime Organization in administering the MARPOL Convention. Another option could be to formulate a committee of independent legal experts similar to that of the International Law Commission (ILC). The monitoring functions with regard to the International Convention on the Elimination of All Forms of Racial Discrimination are performed by the Committee on the Elimination of Racial Discrimination.

[10] The ability of such body to issue general interpretative comments or recommendations over time (contextual interpretations) would ensure for instance that the provisions of the MIIR remain relevant in a modern context and continue to fulfil their object and purpose.

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

the framework convention will need to make a declaration to be bound by the protocols to the framework convention.

24. In an opt-out mechanism, States would not need to express further consent to the optional elements, rather they would express their intention not to be bound by them, usually within a prescribed period of time after they become Parties to the main convention. This mechanism has the advantage of not requiring additional steps for consent and would ensure efficiency when signalling broad commitment to the reform elements.[12]

25. Another mechanism to provide flexibility is through reservations, which can accommodate specific interests or concerns of States as they become Parties (A/CN.9/WG.III/WP.194, para. 18). While the use of reservations is firmly established in international treaty law, caution should be taken in utilizing reservations as the primary vehicle for achieving flexibility, as they could also lead to legal uncertainty. For example, pursuant to the VCLT, reservations must be compatible with the object and purpose of the treaty, which may not be so clear or obvious.[13] This, in hand, could complicate the determination of whether a reservation is permissible under the treaty. The consequences of non-permissible reservations would also need to be addressed.[14]

26. If reservations are to be permitted in the MIIR, the Working Group may wish to consider prescribing the types of reservations to be permitted and with regard to which provisions, protocol or annex.[15] For example, while core obligations or minimum standards should not be the subject of reservation,[16] it may be possible for a State to make a reservation about the applicability of a certain provision or a dispute resolution method elaborated in one of the protocols.

27. Another aspect to be considered by the Working Group is the extent to which flexibility would be provided to disputing parties, more specifically, claimant investors under the MIIR, for example, whether they would be allowed to choose from the dispute resolution mechanisms provided therein or vary some of the provisions of the MIIR (see paras. 24–26 of A/CN.9/WG.III/WP.216 on the extent to which disputing parties could vary the application of the Code of Conduct).

User-friendliness

28. While means to provide flexibility have been outlined above, ensuring full flexibility could make the operation of the MIIR difficult as it might not be clear whether and how the reform elements would apply to a specific dispute. This is particularly so in light of the fact that parties to the investment agreement might take different stances with regard to the optional elements of the MIIR and more so if the MIIR were to allow for unilateral offer of application as provided for in the Transparency Rules (see A/CN.9/WG.III/WP.194, paras. 32–37). This may lead to reduced coherence or inconsistent application of the reform elements.

[12] See WHO Constitution, article 22. The adoption of WHO regulations comes into force after due notice has been given to the members, except for those members notifying rejection within the period stated in the notice.

[13] VCLT, articles 19–23.

[14] For instance, pursuant to article 21 of the VCLT, States that object to a reservation can deny treaty relations with the reserving State, but when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

[15] See article 3 of the Mauritius Convention. Paragraph 4 provides that no reservations are permitted except those expressly authorized in the article. See also the Budapest Convention on Cybercrime article 42 and UNCLOS, article 309.

[16] In the context of international investment law, see for instance the list of reservations allowed under article 3 of the Mauritius Convention on Transparency. The reservations provide for the exclusion of a specific investment agreement, the exclusion of arbitration conducted under specific arbitration rules, and the exclusion of the “unilateral offer” mechanism in article 2(2) of the Convention.

29. Considering the anticipated complexity in applying the different reform elements and the intricacy arising from applying those reform elements to a vast number of existing investment treaties, it would be necessary for the MIIR to provide clarity and to ensure user-friendliness. Disputing parties, adjudicators and other participants in the proceedings should be able to fully understand their rights and obligations under the MIIR and how disputes are to be resolved. While technology could be employed to assist in the navigation of the core provisions and the different reform elements as well as whether and how they apply to certain investment agreements, the MIIR itself may need to be drafted in a manner which would make its application simple. This could address some of the concerns expressed by the civil society and other stakeholders with regard to ISDS.

Summary

30. In summary, the Working Group may wish to consider how best to achieve coherence and flexibility in designing the MIIR and at the same time, provide clarity and legal certainty to the disputing parties (user-friendliness).

C. Scope of application and relationship with existing treaties

31. Preference had been expressed that the MIIR should apply to both existing and future investment agreements and that one of the key objectives of the MIIR would be to make some or all of the reform elements being developed by the Working Group applicable to existing investment agreements (A/CN.9/1044, para. 109). This could bring some uniformity to the ISDS regime.

Application to future investment agreements

32. As to the possible application of the MIIR to future investment agreements, the Working Group may wish to consider whether the MIIR should provide an entire set of provisions governing disputes between investors and States, which would make it easier for States to refer to the MIIR in any future investment agreement that they negotiate. Alternatively, it would be possible to design the structure of the MIIR, so that the provisions therein would operate alongside such ISDS provisions found in future investment agreements. The Working Group may also wish to consider the possible interaction of the MIIR with future investment agreements that address the same procedural aspects but in an inconsistent manner, particularly when the agreements were negotiated by States Parties to the MIIR.

Relationship with existing investment agreements

33. During the deliberations in the Working Group, more attention had been given to the application of MIIR to existing investment agreements. The Vienna Convention on the Law of Treaties (VCLT) should be the starting point for any further reflection on this issue (A/CN.9/1044, para. 95).

34. The VCLT is a versatile instrument that provides States with great flexibility in organizing their treaty relations. Most of its provisions are considered to be authoritative codifications of customary international law and thus apply even to States that are not parties to the VCLT. It is based on two overarching principles: the consent of States and *pacta sunt servanda*. This means that only where a State has specifically consented to a treaty, it crystallizes into a firm commitment to which that State is bound. The VCLT also enshrines the principle of *res inter alios acta*, according to which a treaty is effective only with respect to the parties. It is commonly observed that States are the masters of their treaties and that they can adopt solutions to organize and control their treaty relations as they see fit.

35. Accordingly, the VCLT offers a wide range of options for States to design the relationship between a new treaty and a prior treaty. In the context of ISDS reform, this would be the relationship between the MIIR and existing investment agreements containing provisions on settlement of claims between investors and States, mainly

the first- and second-generation investment agreements. Such agreements may have more than one States Parties, one or some of which are a party to the MIIR and the Working Group may wish to consider how the MIIR would interact under such circumstance.

36. There are a number of ways that the MIIR could have an impact on prior investment agreements, subject to certain conditions being met. One of the conditions would be that the States Parties to the MIIR and those of existing investment agreements would need to be identical or at least overlap. As to possible impact on prior investment agreements, the MIIR could:

- Constitute an agreement between the parties regarding the interpretation of the prior investment agreement or the application of its provisions (article 31(3)(a) of the VCLT);
- Amend prior investment agreements (articles 39 and 40 of the VCLT);
- Modify prior multilateral investment agreements between some of the parties only but under restrictive conditions (*inter se* modification, article 41 of the VCLT);[17]
- Suspend the operation of a prior investment agreement, in whole or in part (articles 57, 58 and 59 of the VCLT);
- Terminate prior investment agreements (article 54 and 59 of the VCLT);[18] or
- Supersede prior investment agreements (article 30(3) of the VCLT).[19]

37. It should also be noted that the options listed above are not mutually exclusive. For instance, the MIIR could amend an existing investment agreement, terminate, or suspend the operation of another, and constitute a subsequent interpretative agreement of such agreements.[20]

38. With regard to the possible application of the MIIR to existing investment agreements, reference had been made to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency") and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") (see A/CN.9/WG.III/WP.194, paras. 25–30 and A/CN.9/1044, para. 102). In short, the Mauritius Convention on Transparency provides States with an efficient mechanism to apply the Transparency Rules to investment agreements concluded before the entry into force of the Transparency Rules. Investment agreements concluded afterwards often include a reference to the Transparency Rules. The MLI applies alongside

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[17] Article 41 of the VCLT provides that such *inter se* modifications are only permissible if "(a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole." Although article 41 of the VCLT has not been used in practice, *inter se* modifications have been included in multilateral treaties, for example, UNCLOS, article 311(3) and (4).

[18] This can be done expressly by consent of all the parties after consultation with the other contracting States (article 54) or implicitly if either the later treaty or the parties' intentions suggest that the latter treaty should so operate and the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time (article 59).

[19] This would logically occur as a result of the *lex posterior* principle, provided that the prior investment agreement and the MIIR address the same subject-matter. Whether the prior investment agreements and the multilateral instrument have the same subject-matter and to what extent their provisions are compatible are questions sometimes open to contestation and might create legal uncertainty. A treaty may, however, contain specific clauses related to its relations with other prior or later treaties, for instance conflict clauses, saving clauses or compatibility clauses (see paras. 42–48). In such case, the *lex posterior* principle would not apply.

[20] See for instance the United States–European Union Air Transport Agreement of 30 April 2007, article 22.

existing tax treaties and modifies their application in order to implement the measures to address domestic tax base erosion and profit shifting.

39. The Working Group may wish to consider other examples of multilateral agreements amending existing bilateral treaties. For instance, the 1957 European Convention on Extradition provides that it supersedes prior bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties, and that any new undertakings by the Contracting Parties can only supplement the Convention or facilitate the application of the principles therein.[21] While the Convention is constrained to a specific geographical area with similar domestic legal systems, earlier bilateral agreements are superseded by a new multilateral instrument, while also allowing for supplementary agreements.

Relationship with other treaties

40. Whereas the above focused on the applicability of the MIIR to existing investment agreements, another aspect to be considered is how the MIIR would interact with other exiting treaty regimes, possibly involving multiple parties.

41. One example would be the interaction between the MIIR and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), particularly where a reform option envisaged in the MIIR would not be compatible with the ICSID Convention (for example, the award being the subject of appeal).[22] Considering that the ICSID Convention contains rules for its amendment, which requires all Contracting States to agree to the amendment,[23] one approach would be to consider the possibility of an *inter se* modification in accordance with article 41 of VCLT (see A/CN.9/WG.III/WP.202, paras. 45–55).

Compatibility or conflict clause

42. In order for the reform elements to be implemented properly, the relationship between the MIIR containing the reform elements and prior investment agreements might need to be clarified. While the VCLT provides States with great flexibility in organizing their treaty relations, little should be left for interpretation. This is particularly so when a provision of the MIIR is in conflict or is not compatible with a provision in a prior investment agreement,[24] which can be resolved through treaty tools. For example, article 1(7) of the UNCITRAL Transparency Rules and article 2(4) of the Mauritius Convention on Transparency address the conflict between the Transparency Rules and the applicable arbitration rules as well as exiting treaties.

43. The so-called compatibility or conflict clause addresses the situation by indicating which provision(s) would prevail and under which circumstances. However, in order to properly draft the clause, the Working Group may wish to indicate whether the intention is that the provisions in the MIIR would replace the relevant provisions in existing investment agreements as part of the reform process. Alternatively, it may wish to apply the MIIR provisions only to the extent that they are compatible with existing treaty provisions.

44. The Working Group may wish to note that the MIIR could be considered to supersede existing treaties relating to the same subject-matter in accordance with article 30 of the VCLT and that existing investment agreements may have a compatibility or conflict clause of their own.

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[21] European Treaty Series (ETS), No. 24, article 28 (available at https://rm.coe.int/1680064587). See also 1959 European Convention on Mutual Assistance in Criminal Matters, article 26 (ETS, No. 30) and 1970 European Convention on Repatriation of Minors, article 27 (ETS, No. 71).

[22] See article 53(1) of the ICSID Convention, which reads: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."

[23] The ICSID Convention, article 66.

[24] The same issue may arise with regard to provision in any future investment agreements.

45. A similar aspect is being discussed in the context of article 2(2) of the draft Code of Conduct (A/CN.9/WG.III/WP.216, para. 18).[25] The Working Group may wish to consider the issue more broadly as it has yet to determine whether and how the Code of Conduct could be implemented through the MIIR, including whether it would be an optional element for States to choose from. It may be the case that the MIIR is the "instrument upon which the consent to adjudicate is based" referred to in article 2(2) of the draft Code.

46. The regulation of third-party funding could be another example (see A/CN.9/WG.III/WP.219, section E). It may be the case that different conflicting rules are provided for in the existing investment agreement, in the MIIR and in the rules applicable to the proceeding. While the treaty provision would generally override the provision in the applicable rules, whether the provision in the existing investment agreement or that in the MIIR would apply to the dispute could be clarified through a conflict clause. For example, the MIIR could provide that the provisions therein only apply to the extent that there is no provision addressing the same issues in the existing treaty (A/CN.9/WG.III/WP.194, para. 31). However, such an approach would limit the extent to which reform efforts would apply. Alternatively, the MIIR could provide that the provisions therein shall prevail over those in existing treaties or prevail only in the extent of an inconsistency.[26]

47. Further clarity could be achieved by listing the existing investment agreements which the MIIR would modify, as was done in the 2006 Maritime Labour Convention.[27] The MIIR could also provide that its provisions shall not prejudice the rights and obligations of State Parties under other specific agreements.[28]

48. In summary, compatibility or conflict clauses could prove essential considering the diversity and complexity of the reform elements to be agreed and the significant number of potential overlapping treaties.

[25] Article 2(2) currently reads: "If the instrument upon which consent to adjudicate is based contains provisions on the conduct of an Adjudicator or a Candidate in an IID proceeding, the Code shall [be construed as complementing] [complement] such provisions. In the event of any inconsistency between the Code and such provisions, the latter shall prevail to the extent of the inconsistency."

[26] For instance, article 311(1) of UNCLOS provides that the Convention "shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958", while article 311(2) clarifies that the Convention "shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention." The MLI also contains a clause that in case of incompatibility with the provisions of a tax agreement, the provisions of the MLI have priority.

[27] The list of 36 maritime conventions and 1 protocol revised by the MLC is available at https://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_150389/lang--en/index.htm.

[28] See for instance the United Nations Fish Stock Agreement, article 4: "[n]othing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the [UNCLOS]. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the [UNCLOS]." See also the Antarctic Environmental Protocol, annex IV, which provides for compatibility with regard to the MARPOL Convention.

D. Illustrative example of a possible structure

49. The following provides an illustration of how the MIIR could be structured. It is only an example for consideration by the Working Group.