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The Proposed Multilateral Instrument on ISDS Reform(MIIR): An Update after the Conclusion of the 43rd Session of UNCITRAL Working Group III

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Among the items on the agenda of the 43rd session of UNCITRAL Working Group III (“WGIII“) was the multilateral instrument on investment reform (the “MIIR“). This instrument is being developed as a mode for delivering the reforms to ISDS that are agreed upon by WGIII. Although the Secretariat was instructed to do further work on the MIIR at the end of the 43rd session, including to produce draft provisions of the proposed instrument, much of the detail of the MIIR remains to be agreed upon.

As a preliminary remark, WGIII is facing a “chicken and egg” problem in relation to its discussions on the individual reform elements vis-à-vis its discussions on the MIIR that should implement such elements. Already at the 39th session of WGIII in October 2020, differing views were expressed by delegations as to whether (i) the various individual reform options should first be decided upon, before the form of their implementation is worked out, or whether (ii) the form of implementation should be discussed in parallel to the development of the individual reform options (¶¶ 103-104). Similar concerns were noted at the 43rd session (¶ 67).

It was further noted at the 43rd session that the MIIR may only constitute a partial vehicle for implementing the reforms, as certain reform elements may be better implemented through means other than a multinational instrument, for example through “arbitration rules, guidance texts or model clauses” (¶ 70). Accordingly, it may form one of a range of means of implementation for the discussed reforms.

With the scope and content of the MIIR still unclear, the discussions in the 43rd session centred on two broad aspects of the MIIR, namely (i) its possible structure and how coherence and flexibility might be reflected, and (ii) its scope of application with regard to future and existing treaties. These three areas are addressed below.

Structure and Securing Coherence and Flexibility

There appears to have been a general consensus among the delegates at the 43rd session that the MIIR could operate as a “single legal instrument that could include core provisions along with optional protocols and/or annexes” (¶ 68). States would be able to sign up to core provisions and then have the flexibility to opt into protocols and/or annexes. In its [Note on the MIIR prepared for the 43rd session](#), the Secretariat discusses two possible models for the instrument: (i) the [1992 UN Framework Convention on Climate Change](#) (“UNFCCC”) as an example of a convention with protocols (the [1997 Kyoto Protocol](#) and the [2015 Paris Agreement](#)), noting that protocols can operate as treaties in their own right, i.e., without the need to sign up to the overarching framework convention, and (ii) the [International Convention for the Prevention of Pollution from Ships](#) (the [MARPOL Convention](#)), which operates as a “single convention with annexes” (¶¶ 9, 12). The Secretariat concludes that the MIIR could have both protocols and annexes (for example, the code of conduct as a protocol, and the list of treaties to which the reform elements apply as an annex) (¶ 13), but the possibility for States to opt into a protocol or annex without signing up to the instrument appears to have been [rejected](#) (¶ 69).

Potential “core provisions” of the MIIR were discussed at the 43rd session, which should serve to “achieve coherence” (¶ 72). The initial discussions as to which kinds of provisions may constitute potential “core provisions” covered (i) objectives of the MIIR (transparency, efficiency and sustainable development), (ii) modes of ISDS that may be selected by parties to the MIIR, (iii) governance of and amendments to the MIIR, and (iv) the interaction between the MIIR and its protocols/annexes (¶¶ 73-77). It was also suggested that generic rules that apply to all dispute resolution mechanisms might comprise the core provisions (e.g. definition of terms, entry into force and termination, scope of application) while rules specific to these different dispute resolution mechanisms (any agreement and rules on the appellate mechanism, the draft code of conduct, the multilateral investment court) could be placed in the respective protocols or annexes (¶ 78).

The need for flexibility was also highlighted, i.e., that the MIIR should be drafted in such a way as to permit future developments to be taken into account. In this context, the use of reservations as a primary means for this was viewed with caution, “as that could lead to legal uncertainties” (¶ 79).

Scope of Application to Investment Treaties

I. Existing Treaties

There appears to have been a consensus at the 43rd session that the application of any agreed reforms to existing investment agreements should be one of the objectives of the MIIR, but that such application should still remain the decision of the State Parties to the MIIR (¶ 82). It was noted that the manner of applying the MIIR to existing treaties may need to be explicitly set out, as not all States are parties to the [Vienna Convention of the Law of Treaties](#) (“VCLT”), which would otherwise serve as “a starting point for reflection on these issues” (¶ 83). Suggested options for the MIIR to interact with existing treaties were “amendment, *inter se* modification and suspension (whole or in part) of those agreements (¶ 84). In its [Note prepared for the 43rd session](#), the Secretariat discusses potential models for the application of the MIIR to existing treaties, i.e., (i) the [Mauritius Convention](#), (ii) the [OECD Multilateral Convention to Implement Tax Treaty](#)

Related Measures to Prevent Base Erosion and Profit Shifting, and (iii) the 1957 European Convention on Extradition (¶¶ 38-39).

As explained in the [Report on the 43rd session](#), a compatibility/conflicts clause would be needed for each reform option in order to clarify the relationship with prior investment agreements by specifying which provision(s) would prevail and under which circumstances. In this context, it was noted that there should little room for interpretation in this regard (¶ 86). The Secretariat [was asked](#) to develop standardised language for a compatibility or conflict clause that could apply in different situations while considering the issues that could arise in implementing reform elements into existing investment agreements (¶ 87).

II. Future Treaties

No consensus appears to have been reached in relation to the application of the MIIR to future treaties. The [Report on the 43rd session](#) merely notes that (i) on the one hand, doubts were expressed as to whether States should be prohibited from derogating from the MIIR in their future treaties and whether the MIIR could provide a complete set of dispute resolution provisions, while (ii) on the other hand, the view was expressed that a complete set of dispute resolution provisions could ensure coherence (¶ 80). The Report also notes that the general view was taken that States' freedom to negotiate and agree on their investment obligations must be preserved (¶ 80). In its [Note prepared for the 43rd session](#), the Secretariat remarks that WGIII “may also wish to consider” the interaction of the MIIR with future investment treaties entered into by parties to the MIIR “that address the same procedural aspects but in an inconsistent manner” (¶ 32).

Finally, according to the [Report](#), the question was raised as to whether the provisions of the MIIR could apply in the context of State-to-State dispute settlement mechanisms to resolve investment disputes (¶ 81). No responses or further discussions of this are noted.

Outlook

As part of its preparatory work, the Secretariat has been [asked](#) to update its Note in light of the discussions at the 43rd session, to *inter alia*:

- Prepare draft provisions on various reform elements for “inclusion in the MIIR, when appropriate”, as well as “draft provisions on the possible governance of the MIIR (including options for institutional support)” (¶¶ 71, 76);
- Elaborate on those principles that could potentially constitute objectives of the MIIR (¶ 73) ([including](#) “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” (¶ 16));
- In the context of modes of ISDS, “consider the underlying issues (including the relationship with the consent already provided by States under existing treaties and mechanisms) and examine whether such a provision would need to be developed” (¶ 74); and
- Set out the relevant issues in relation to existing investment agreements and “develop a

standardised language that could apply in different situations” (¶ 87).

Notably, issues of sustainable development and associated broader concerns (expressed for example [here](#) and [here](#)) continue to be largely absent from WGIII’s discussions on the MIIR. It remains to be seen whether the [previously mentioned](#) “holistic approach” to ISDS reform, “clearly setting forth the objective of achieving sustainable development through international investment” (¶ 106), will materialise.


With [public comments](#) by UNCITRAL Secretary Anna Joubin-Bret suggesting that a multilateral framework convention with an opt-in protocol for the multilateral investment court will be delivered by WGIII in 2026, there remains much to be discussed, not least the concerns of fragmentation [identified by the Secretariat](#) in the context of the use of protocols (¶ 10). Moreover, there is still no consensus on how each reform element might best be implemented or on how the development of the MIIR might dovetail with the development of the individual reforms. WGIII’s work plan indicates it will be focusing on other reform elements at its upcoming sessions, leaving these critical issues to be resolved later.

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This entry was posted on Friday, December 9th, 2022 at 8:01 am and is filed under [Multilateral Investment Court](#), [Multilateral Investment Treaties](#), [UNCITRAL](#), [UNCITRAL WG III Series](#), [UNCITRAL WG3 Series](#)

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