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An Overview of the First Draft of the Multilateral Instrument on ISDS Reform

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Since 2019, a multilateral instrument on investor-State dispute settlement ("ISDS") reform ("MIIR") has been under discussion by UNCITRAL Working Group III ("WGIII") as a potential mechanism for implementing a suite of reforms to ISDS. The MIIR is envisaged to serve as the framework by which States may apply various innovative features in their investment disputes. A chief advantage and driving force behind the proposed MIIR is the potential to streamline and inject some uniformity into the current landscape of investment protection and dispute settlement, which has faced long-standing criticisms of fragmentation and inconsistency.

As detailed in our earlier post, discussions on the MIIR previously focused on the form that the instrument might take (such as an instrument with protocols which could be adopted without signing up for the instrument or a single convention with optional annexes). Following the 43rd session of WGIII in September 2022, the UNCITRAL Secretariat was tasked with preparing a draft MIIR featuring possible core provisions and outlining the relevant issues that could arise with regard to the MIIR's relationship with existing investment agreements and its application to future investment agreements (A/CN.9/1124, paras. 80-88). Accordingly, and in advance of the 49th session of WGIII which is to take place in September 2024, the Secretariat has prepared a first draft of a multilateral instrument on international investment dispute resolution (the "Convention"). This post examines the structure of the draft MIIR and the mechanism for applying the different reform options and offers some brief observations.

The Opt-In Structure and Protocols of the Draft MIIR

The draft is structured as a framework convention with optional protocols (the "Protocols"), which provides for the legal effect of the Protocols containing the reforms. The draft provisions of the Convention cover: (i) the objectives and scope; (ii) the parties to, and entry into force of, the Convention; (iii) the opt-in mechanism for the application of the Protocols to investment treaties, including provisions on the scope of application, cases of incompatibility, and reservations; and (iv) "final provisions," covering the depository of the Convention, additional protocols and amendments, and denunciation. Examples described as "illustrative" (para. 10) are captured in the Protocols to the Convention; additional Protocols may be adopted in accordance with the procedure detailed under Article 10.

Article 2 sets out the six Protocols—A, B, C, X, Y, and Z—currently under consideration, grouping them into two categories. The first category (Protocols A, B, and C) comprises the code of conduct for arbitrators, model provisions on mediation, and draft provisions on procedural and cross-cutting issues (the latter still under discussion). (It should be noted that Protocols A and B are already available to parties to disputes for application by party consent, without signing up for the Convention or the Protocols.) The second category (Protocols X, Y, and Z) comprises matters "that might require the creation of an institution . . . which may also require financial commitment" (para. 10), i.e., the statute for an advisory centre, the statute for a standing mechanism for the resolution of disputes, and the statute for an appeals mechanism. This second category encompassing Protocols X, Y, and Z involves much more far-reaching reform (and expense) and remains under discussion.

The Mechanism for Application of Reforms Under the MIIR

In essence, the Convention and the Protocols are intended to operate as a mechanism for States to make *inter se* amendments to their existing investment treaties (future treaties are currently outside of scope, para. 33). It is envisaged that States can adopt the Protocols individually or in combination and apply these to existing investment treaties through a dual opt-in mechanism. First, States must choose the Protocol(s) which they wish to apply and then submit, by way of a "notification," a list of the investment treaties to which the Protocol(s) shall apply (Article 6(1)). Then, once all parties to a particular investment treaty have adopted a specific Protocol and included that treaty in their notifications, that treaty is deemed to have been modified in accordance with the Protocol(s) (Article 7(2)). When only one of the parties to an investment treaty has included that treaty in their notification, then the notification is deemed to constitute an offer to the other party/parties to that treaty to modify the treaty by adopting that Protocol (Article 7(3)). Both the application of any most-favoured nation clause to these matters (Article 7(7)) and reservations (Article 8) are expressly prohibited.

In order for such a system of agreements and notifications to function effectively, there would need to be an authoritative source of information, easily available to all stakeholders, as to which treaties have been amended and how. One option for this could be the approach taken by the OECD with its Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("BEPS MLI"). The BEPS MLI features a "matching database" that shows which agreements have been made between which parties on which amendments. However, some critical issues remain to be worked out: specifically, (i) how the currently proposed framework may be applied to future treaties (para. 33), (ii) what the consequences of an incorrect or incomplete notification by a State are (para. 36), and (iii) how the open question of State responsibility for "actively clarifying how their investment treaties are to be modified" (para. 34) should be answered, taking into account the requirements of the Vienna Convention on the Law of Treaties. Altogether, this suggests a new layer of complexity for practitioners of ISDS, who will need to verify multiple sources to ascertain the full scope of the parties' procedural rights and obligations in the event of an investment dispute, and any amendments thereto.

Concluding Remarks on the Draft MIIR

Indeed, it will be for States to determine whether the additional efforts required to participate in the undoubtedly complex proposed new regime are worth the benefits of being able to apply the proposed options for reform. For States interested in only the first category of reforms (two out of three of which are already available for use separately to the Convention or the Protocols) rather than far-reaching systemic change, it may simply not be attractive to sign up. It is also not to be overlooked that Protocols A and B, which are already available by disputing party agreement (investor-State), would via the MIIR also be available by treaty party agreement (State-State), thus opening a new route to their application that circumvents the consent of the investor disputing party.

There is a clear contrast between Protocols A and B (code of conduct and model provisions on mediation, which may be utilised without any MIIR) and Protocols X, Y, and Z, which would lead to the creation of new institutions and far-reaching reforms. Protocol C, which concerns the draft provisions on procedural and cross-cutting issues, is under discussion. With respect to Protocols X, Y, and Z, much remains to be discussed, going beyond the more preliminary issue of how such reforms, if agreed, might be applied. In addition, States have expressed concerns (para. 22) that the burdens may outweigh any benefits.

While the Convention represents a major advance in WGIII's discussions concerning the MIIR, the upcoming 49th session of WGIII will be instructive as to how the draft Convention is received and what direction its development takes from there. Many issues remain open, including whether States would be required to become a party to all of the Protocols, which may necessitate an opt-out mechanism (para. 11), whether Protocols should have their own separate procedure for taking effect (para. 20), whether parties may provisionally apply a Protocol (para. 28), how the proposed procedure would interact with treaties that contain provisions governing their amendment (para. 42), and how conflicts with treaty provisions might be managed (para. 47). A more critical open question is whether and if so how the MIIR would apply to future investment treaties (para. 33), a concern that has been raised in the discussions (para. 32) but has not yet been resolved.

The MIIR appears to be the first concrete step towards the implementation of the more sweeping and substantive reforms of WGIII, namely the establishment of the multilateral investment court and appellate mechanism, which are still undergoing debate and deliberation. These reform elements, if implemented, would see the establishment of new institutions (whether *ad hoc* or standing) that could significantly impact the means and mechanisms by which investor-State disputes are resolved. Yet, the discussions on the MIIR form part of what seems to be a piecemeal process (para. 15), with discussions on the different elements of reform progressing at different speeds, depending on the degree of consensus as to their necessity. Only if sufficient consensus can be found for both the MIIR and its Protocols can things truly move forward. In this sense, given the scepticism expressed by some States regarding far-reaching reform, a lot is riding on the 49th session: the MIIR's ultimate scope of influence is dependent on its outcome.

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