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**United Nations Commission on  
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Dispute Settlement Reform)  
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## Possible reform of investor-State dispute settlement (ISDS)

### Multilateral instrument on ISDS reform

#### Note by the Secretariat

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## I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of investor-State dispute settlement (ISDS), based on the mandate given to it by the Commission at its fiftieth session, in 2017.<sup>1</sup> At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.
2. At its thirty-eighth session, the Working Group agreed on a project schedule regarding the consideration of reform options (A/CN.9/1004, paras. 16–27 and 104).<sup>2</sup>
3. In addition, the Working Group requested the Secretariat to undertake preparatory work regarding the possible means to implement the reform options and, in that context, to prepare a paper on a multilateral instrument on ISDS reform (A/CN.9/1004, para. 104). Accordingly, this Note aims at presenting the key issues relevant to designing a multilateral instrument on ISDS reform, outlining how such an instrument could be structured to incorporate different reform options that would be developed by the Working Group (A/CN.9/1004, paras. 101 and 104). The focus of this Note is therefore not on the reform options, but on their implementation through a single instrument that would provide an overall framework.
4. As is the case for other documents provided to the Working Group, this Note was prepared with reference to published information on the topic,<sup>3</sup> and does not seek to express a view on the possible reform options and their implementation, which is a matter for the Working Group to consider.

## II. Multilateral instrument on ISDS reform

### A. Possible structure of a multilateral instrument

#### 1. A framework for implementing multiple reform options

##### *Submissions*

5. The Working Group may wish to recall its decision that, in the third phase of its mandate, it would discuss, elaborate and develop multiple potential reform solutions simultaneously (A/CN.9/970, para. 81). Proposals for reform have been submitted by Governments in preparation for the deliberations on the third phase of the mandate

<sup>1</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264. The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1 and its Addendum, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively.

<sup>2</sup> The deliberations and decisions of the Working Group at the thirty-eighth session are set out in document A/CN.9/1004; document A/CN.9/WG.III/WP.166 provides an overview of reform options.

<sup>3</sup> This Note was prepared with reference to a broad range of published information on the topic, including: the CIDS Research Paper, *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? Analysis and roadmap*, Section VII, pp. 75–93, by Gabrielle Kaufmann-Kohler and Michele Potestà, (the “CIDS report”) available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids\\_research\\_paper\\_mauritius.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf); *Designing Investment Dispute Settlement à la carte: Insights from Comparative Institutional Design Analysis*, by Stephan W. Schill and Geraldo Vidigal, University of Amsterdam, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3519259](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519259); *UNCITRAL and ISDS Reform: Visualising a Flexible Framework*, by Anthea Roberts and Taylor St. John, EJIL: Talk 24 October 2019; see also bibliographic references published by the Academic Forum, available under “Additional resources” at [http://www.uncitral.org/uncitral/en/publications/online\\_resources\\_ISDS.html](http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html) and <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/> and <http://bit.ly/isds-academic-forum>.

(“Submissions”). The reform options covered in the Submissions are varied. They are presented in document A/CN.9/WG.III/WP.166 and its addendum.

6. Some Submissions address not only reform options but also their implementation,<sup>4</sup> highlighting the need for a coherent and flexible approach to the overall reform of ISDS, allowing each State the choice of whether and to what extent it wishes to adopt the relevant reform options.

7. As pointed out in the Submissions, one way of bringing about the reform would be through a multilateral instrument. Such instrument would encompass the various options for reform and integrate them under one multilateral framework.<sup>5</sup> Such instrument would constitute the vehicle by which the various reform options are proposed to States for implementation, thereby seeking to promote legal certainty and coherence in ISDS. A Submission also underlines the need for the reform to apply to disputes under the large stock of existing and future investment treaties by means of a multilateral instrument.<sup>6</sup>

8. Some Submissions suggest an outline of a multilateral treaty containing “blocks” that should be considered as part of minimum standards,<sup>7</sup> as well as core and opt-in elements. In a Submission, it is proposed that such instrument would cover procedural matters only, not substantive ones.<sup>8</sup>

9. A Submission foresees the development of an instrument establishing a standing multilateral first instance and appellate court and a specific notification (“opt-in”) that a particular existing or future investment treaty would be subject to the jurisdiction of the standing mechanism. It further suggests the adoption of an open approach to implement the reform option, allowing States to either use the standing mechanism as such, or limit its use, for instance, by applying it to State-to-State dispute settlement only, or by utilizing only the appellate mechanism.<sup>9</sup>

10. Another Submission proposes to elaborate a “suite” approach, aimed at developing a menu of relevant solutions, which may vary in form. Once developed, States would incorporate one or more of the proposed provisions either in their entirety or in the combination preferred by States into their investment treaties, taking into account their own political and policy concerns and interests.<sup>10</sup>

#### *Possible architecture*

11. Based on the current proposals for reform contained in the Submissions,<sup>11</sup> by way of illustration only, and without prejudging the final outcome of reform options that the Commission will decide to pursue, a multilateral instrument could allow States to opt for the reform options of their choice – including both procedural tools as well as different forms of ISDS mechanisms.

12. The Working Group may wish to consider that the multilateral instrument could be conceived so as to contribute to more consistency and coherence in respect of those norms that are shared. If so, such common norms would need to be determined.

<sup>4</sup> The Submissions that refer to the implementation of multiple reform options include the following: [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its Member States; [A/CN.9/WG.III/WP.173](#), Submission from the Government of Colombia; and [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador; see also [A/CN.9/WG.III/WP.182](#), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, suggesting implementation of reform options through a “suite” approach.

<sup>5</sup> See, in particular, [A/CN.9/WG.III/WP.173](#), Submission from the Government of Colombia.

<sup>6</sup> [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its Member States, para. 35.

<sup>7</sup> [A/CN.9/WG.III/WP.173](#), Submission from the Government of Colombia, para. 29.

<sup>8</sup> [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador, paras. 28–33.

<sup>9</sup> [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its Member States, para. 39; see also paras. 35–37.

<sup>10</sup> [A/CN.9/WG.III/WP.182](#), Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, p. 2 and Annex.

<sup>11</sup> Document [A/CN.9/WG.III/WP.166](#) provides an overview of reform options.

13. The Working Group may wish to decide whether all reform options,<sup>12</sup> regardless of their form, should be covered by the multilateral instrument, taking into consideration that most, if not all, of the proposals for reform may require the development of specific provisions or annexes, such as guidelines, model provisions, instruments of a contractual nature (such as rules) and conventions (such as statutes of permanent bodies).

14. The actual architecture of the multilateral instrument should be considered once there is clarity on the reform options to be pursued. However, the Working Group may wish to already consider that the multilateral instrument would aim at providing the framework for the implementation of various reform options. Indeed, the instrument could include specific provisions and annexes, addressing various reform options, it can also foresee the preparation of protocols for addressing possible developments. A further possibility would be for the instrument to also set-up a multilateral institution for investment dispute settlement that would allow States to choose among different modes of dispute settlement administered by the institution (reformed investor-State arbitration, inter-State arbitration, use of a multilateral standing mechanism, domestic remedies). Proponents of this structure suggests that the existence of such an institution would permit integrating the current fragmented legal landscape into one institutional setting, while preserving States' flexibility in dispute settlement and accounting for different preference in investment dispute settlement design.<sup>13</sup> This might require careful consideration of the relation between the new institution and the existing ones, such as the International Centre for Investment Disputes Settlement (ICSID) and the Permanent Court of Arbitration (PCA).

## 2. A framework with in-built flexibility

15. While States would be party to the multilateral instrument, the framework could also allow to retain the ability to implement the reform of their choice. This approach would permit the proponents of various models to participate in the creation of a reformed ISDS framework, thereby ensuring the widest possible participation of States in such a reform.

16. In that respect, different solutions could be envisaged. If the instrument were to contemplate various modes of settling disputes, for instance, investor-State arbitration, State-State dispute settlement and a multilateral standing mechanism, an open architecture could be designed. For instance, States could be given the choice to adopt for disputes involving them as a party: (i) only investor-State arbitration as reformed; (ii) only certain aspects of a reformed investor-State arbitration (for instance, a code of conduct, or certain new mechanisms for the selection and appointment of arbitrators, their challenge, or certain procedures, such as on dismissal of frivolous claims or expedited proceedings); (iii) only a multilateral standing mechanism; (iv) only inter-State dispute settlement; (v) a multilateral standing mechanism, or certain elements thereof, and investor-State arbitration, or certain elements thereof, mixing various reform options.

17. A useful model to consider in this respect is the United Nations Convention on the Law of the Sea (UNCLOS),<sup>14</sup> which allows Contracting Parties to determine which mode of dispute settlement to accept in principle. Pursuant to Article 287(1), States signing, ratifying, or acceding to UNCLOS are "free to choose" among the following different institutional arrangements for the settlement of disputes: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), or an arbitral tribunal under UNCLOS Annex VII. This last option is also the default mechanism in the absence of a matching declaration by Contracting

<sup>12</sup> A/CN.9/WG.III/WP.166 and A/CN.9/WG.III/WP.166/Add.1.

<sup>13</sup> *Designing Investment Dispute Settlement à la carte: Insights from Comparative Institutional Design Analysis*, by Stephan W. Schill and Geraldo Vidigal, University of Amsterdam.

<sup>14</sup> United Nations Convention on the Law of the Sea, adopted on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS 397 (UNCLOS).

Parties.<sup>15</sup> In the context of the ISDS reform options, a similar approach would result in allowing States to possibly combine different modes of adjudication and make them available to aggrieved investors and to the other Party.

18. The flexibility that would allow States to tailor their level of involvement in the new reforms can also be provided for through reservations or declarations. They would permit to accommodate specific concerns, for example, a State's wish not to abandon investor-State arbitration, while agreeing to also provide alternative options, such as investor-State arbitration combined with an appellate mechanism and/or with the services of an advisory centre.

19. With regard to reservations, a useful illustration would be the list of reservations allowed under article 3 of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency").<sup>16</sup> The reservations provide for the exclusion of a specific investment treaty, the exclusion of arbitration conducted under specific arbitration rules, and the exclusion of the "unilateral offer" mechanism in article 2(2) of the Convention. Applied to the multilateral instrument, similar reservations would allow States Parties to exclude specific investment treaties from the scope of the reforms, exclude certain reform options in the field of investor-State arbitration, and allow a State Party to apply the new dispute settlement options on the basis of reciprocity.

20. Declarations could also be allowed under the multilateral instrument, for instance States Parties could be allowed to make a declaration as to whether any reformed dispute resolution mechanism provides an additional choice (supplementing existing investor-State provisions in their investment treaties) or an exclusive choice (entirely replacing such provisions).

21. A default rule should be provided in case a State Party fails to make such a declaration. For example, it could be provided that a State Party which does not make a declaration will be deemed to have opted for a determined dispute settlement framework. Furthermore, the multilateral instrument would need to provide a default solution in the situation where declarations by States Parties to an investment treaty, also Party to the multilateral instrument, do not match. For instance, it could be established that, if States Parties have made different declarations, a dispute may be submitted to the existing dispute settlement rules. Such an approach would favour the solution that departs least from the current ISDS framework and would also provide legal certainty. The opposite solution of providing that, in case of non-matching declarations, certain reform options would prevail, is of course also conceivable. An alternative to matching declarations of the home and host State for the same mode of dispute settlement would be to give preference to the choice of the host State, as this would permit States to preserve application of their own policies with respect to ISDS.

22. By contrast, in the absence of such possibility of declaration, the reform options in the multilateral instrument would automatically replace the existing dispute resolution procedures.

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<sup>15</sup> UNCLOS, Article 287(1)(a)-(c); article 287(3)-(4) provides that, in case the parties to a dispute have made matching declarations selecting the same mode of adjudication, this mode becomes compulsory between them (without preventing them, however, from agreeing ad hoc to pursue dispute settlement under a different mechanism). In the absence of matching declarations, a default mechanism – arbitration under UNCLOS Annex VII – applies.

<sup>16</sup> See GA Resolution 69/116 of 10 December 2014, available at <https://undocs.org/en/A/res/69/116>. For more information, see <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> and <https://www.uncitral.org/transparency-registry/registry/index.aspx>.

## B. Relation between the multilateral instrument and investment treaties

### 1. Existing and/or future investment treaties

23. The Working Group may wish to consider that a multilateral instrument could cover both existing and future investment treaties. Without distinction in time, this approach would permit to further the uniformity of the new dispute settlement regime.

24. In addition, this approach would relieve States of the burden of pursuing potentially complex and long amendment procedures set forth in their numerous existing investment treaties. Indeed, the instrument could render the reforms directly applicable to existing investment treaties.

### 2. Possible model for application to existing investment treaties

25. The Submissions refer to possible models for the development of an instrument on ISDS reform made applicable to existing investment treaties (see also A/CN.9/1004, para. 101). These models include the Mauritius Convention on Transparency<sup>17</sup> and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“MLI”).<sup>18</sup> These instruments are briefly presented below.

#### *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“Mauritius Convention on Transparency”)*

26. In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (the “Transparency Rules”) together with a new article 1(4) of the UNCITRAL Arbitration Rules (as revised in 2010).<sup>19</sup> The Transparency Rules, which came into effect on 1 April 2014, comprise a set of procedural rules that provides for transparency, and for accessibility to the public of treaty-based investor-State arbitration. The Transparency Rules apply in relation to disputes arising out of investment treaties concluded on or after 1 April 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the Parties to the investment treaty have agreed otherwise.<sup>20</sup> The Transparency Rules apply in relation to disputes arising out of investment treaties concluded prior to 1 April 2014, when the Parties to the relevant investment treaty (i.e. States or regional economic integration organizations),<sup>21</sup> or the parties to the dispute (i.e. an investor and a State or a regional economic integration organization),<sup>22</sup> agree to their application.

27. After the adoption of the Transparency Rules, UNCITRAL prepared a convention designed to facilitate the application of the Transparency Rules to the roughly 3,000 investment treaties concluded before the entry into force of the Transparency Rules, thereby providing States with an efficient mechanism to apply the Transparency Rules to their existing investment treaties, should they wish to do so.<sup>23</sup> Indeed, the Mauritius Convention on Transparency is an instrument by which

<sup>17</sup> See GA Resolution 69/116 of 10 December 2014, available at <https://undocs.org/en/A/res/69/116>. For more information, see <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> and <https://www.uncitral.org/transparency-registry/registry/index.jsp>.

<sup>18</sup> For more information, see <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>.

<sup>19</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chapter III and annexes I and II.

<sup>20</sup> Transparency Rules, Article 1(1).

<sup>21</sup> Transparency Rules, Article 1(2)(b). For multilateral investment treaties, it is sufficient that the State of the claimant and the respondent State have reached an agreement to this avail.

<sup>22</sup> Transparency Rules, Article 1(2)(a).

<sup>23</sup> *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17 (A/68/17)*, para. 127.

Parties to investment treaties concluded before 1 April 2014 express their consent to apply the Transparency Rules to arbitrations arising out of those treaties.

28. The Mauritius Convention on Transparency allows the Transparency Rules to be applied to all existing bilateral, regional, and multilateral investment treaties, and in all available arbitral fora, if both the respondent State and the investor's home State are Contracting Parties to the Mauritius Convention or, alternatively, if the investor (as claimant) accepts the unilateral offer of the respondent State to apply the Transparency Rules. In essence, the "Mauritius Convention approach" can be described as introducing the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument. It introduces a flexible regime as it foresees a limited number of reservations that Contracting Parties may formulate (see above, para. 19).

*OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI")*

29. The OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI")<sup>24</sup> is aimed at modifying tax treaties between two or more Parties to the MLI, when those tax treaties have been listed by both Contracting Jurisdictions as an agreement they wish to cover in the MLI.<sup>25</sup> The MLI does not function as an amending protocol to a single existing treaty, which would directly amend the text of the tax treaties. Instead, the MLI applies alongside existing tax treaties, modifying their application in order to implement the measures to address domestic tax base erosion and profit shifting (BEPS).<sup>26</sup>

30. The MLI is a flexible instrument. It allows each Contracting Party to indicate the tax treaties to which the MLI applies. In addition, the MLI provides alternatives to comply with those provisions that represent minimum standards, without giving a preference to a particular way of meeting such standard. In case a substantive provision does not reflect a minimum standard, a Contracting Party may opt out of that provision. The MLI incorporates a number of alternatives or optional provisions which each Contracting Party can choose to apply.<sup>27</sup>

*Compatibility or conflict clauses*

31. The Working Group may wish to consider that the relation between the multilateral instrument and earlier investment treaties could be addressed through compatibility or conflict clauses. For example, the multilateral instrument could provide that the dispute settlement reform options shall be deemed to be included in

<sup>24</sup> Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI"). The Organization for Economic Cooperation and Development (OECD). <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>. OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing. See also a study prepared by OECD, entitled "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties" (the "OECD study"), which notes that "there have been a number of situations in which States have adopted multilateral conventions in order to introduce common international rules and standards and thereby harmonise a network of bilateral treaties, for example, in the area of extradition" (OECD (2015), p. 31, para. 14). The study is accompanied by an Annex A, which reflects the work of a working group composed of treaty law experts, and provides insight on treaty law issues that will be relevant in this context (see OECD (2015), pp. 29 et seq.).

<sup>25</sup> Note by the OECD Directorate of Legal Affairs. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI"). The Organization for Economic Cooperation and Development (OECD). <https://www.oecd.org/tax/treaties/legal-note-on-the-functioning-of-the-MLI-under-public-international-law.pdf>.

<sup>26</sup> Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The Organization for Economic Cooperation and Development (OECD). <https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>.

<sup>27</sup> A/CN.9/WG.III/WP.173, Submission from the Government of Colombia.

the provisions for the resolution of disputes between investors and States in existing investment treaties concluded by States Parties to the multilateral instrument, according to the modalities established in the multilateral instrument itself.

### 3. Illustration of various possible situations

32. The Working Group may wish to consider the application of the multilateral instrument to investment treaties in the various scenarios where the parties to both instruments do not necessarily coincide.

(i) *Both the respondent host State and the investor's home State which are parties to an investment treaty are also parties to the multilateral instrument*

33. In this scenario, the multilateral instrument will modify the investment treaty between the two States, with the consequence that the investor will be able to resort to the reformed ISDS created as a result of such modification. This approach is also referred to in a Submission.<sup>28</sup>

(ii) *The respondent host State but not the investor's home State is a party to the multilateral instrument*

34. Article 2(2) of the Mauritius Convention on Transparency caters for this scenario through the "unilateral offer of application", whereby the Transparency Rules also apply if the investor from a State that is not party to the multilateral instrument agrees to their application. The question is thus whether this mechanism is transposable to reform options covered by the multilateral instrument.

35. Under the general principle *pacta tertiis*, a State Party cannot be affected by a modification to which it has not consented. Therefore, the Party to the investment treaty which is not a Party to the multilateral instrument could not be subject to the ISDS reforms without its consent. As the original arbitration options contained in the investment treaty would remain unaffected, the investor would continue to have the right to resort to those options. The question that arises is whether, in addition to those existing options, an investor would be entitled to resort to the reform options contained in the multilateral instrument in reliance on a unilateral offer made by the respondent host State through the multilateral instrument.

(iii) *The investor's home State but not the respondent host State is a party to the multilateral instrument*

36. For the reform options to apply in such situation, the investor would have to seek the respondent's State consent. If such consent is given ad hoc, then there would seem to be no bar to the application of the reform options, as both States would have consented to their application. The difference with the scenario under (i) is that this constellation (iii) does not bring about a modification of the investment treaty. It merely applies the dispute settlement framework to one specific dispute.

<sup>28</sup> A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States, para. 35, which provides that "it is vital that a standing mechanism be able to rule on disputes under the large stock of existing and future agreements. This would be done through a combination of (1) accession to the instrument establishing the standing mechanism and (2) a specific notification ("opt-in") that a particular existing or future agreement would be subject to the jurisdiction of the standing mechanism. Once the contracting parties to an agreement that are also parties to the instrument establishing the standing mechanism have made a notification concerning a particular agreement, then the standing mechanism would decide disputes arising under that agreement. For agreements concluded after the establishment of the standing mechanism, a reference could be made in the agreement conferring jurisdiction on the standing mechanism, or it could be added later as described above."

- (iv) *Neither the respondent host State nor the investor's home State are parties to the multilateral instrument*

37. If States wish to promote the use of certain reform options, they could insert a provision in the multilateral instrument, whereby the instrument is without prejudice to the application of the new reformed ISDS whenever the disputing parties agree. It may be noted that disputing parties could do so even if there is no such provision in the multilateral instrument.

### C. Questions for consideration

38. Based on the above, and in light of the current preliminary stage of the consideration of the possible reform options, the Working Group may wish to note that it is feasible to develop a multilateral instrument that would apply the reforms in a coherent and flexible manner.

39. Questions for consideration include the following:

(i) Should there be core provisions or minimum standards that should be adopted in the multilateral instrument and that all parties to that instrument must accept? If so, what should such core provisions or minimum standards address in order to result in an agreeable multilateral framework?

(ii) Should the instrument apply to both existing and future investment treaties?

(iii) What guiding principles should apply to determine the reform options that should be included in a multilateral instrument? For instance, should it be the nature of the instrument to implement the specific reform option?

(iv) Based on the assumption that the multilateral instrument would cover different reform options, should combinations of various options be provided for? How would the process of opting into or out of the reform options work? Should the instrument include the flexibility to allow over time accession by States Parties to certain reform options?

(v) What form for a multilateral instrument would be the most appropriate to keep the ISDS reformed framework coherent and relatively easy to refer to and understand for users?

40. In relation to this last question, the Working Group may wish to note the proposals contained in recent commentaries with regards to the implementation of ISDS reform options. One proposal is to develop a multilateral instrument, following the models of the Mauritius Convention on Transparency and the MLI.<sup>29</sup> It is further suggested to set-up, through a multilateral instrument, an institution for dispute settlement on investment that would provide a multilateral institutional framework for adjudication, which would allow States to choose among different modes of dispute settlement administered by the institution (see above para. 14).<sup>30</sup>

<sup>29</sup> The CIDS report.

<sup>30</sup> *Designing Investment Dispute Settlement à la carte: Insights from Comparative Institutional Design Analysis*, by Stephan W. Schill and Geraldo Vidigal, University of Amsterdam.