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Mismatched commitments: treaty law solutions for multilateral ISDS reform

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ABSTRACT

Calls to reform the system of investor–State dispute settlement (ISDS) have progressed to the multilateral negotiation of several treaties within UNCITRAL Working Group III. This article analyses the risk of mismatched commitments under the draft Multilateral Instrument on ISDS Reform (MIIR), which would serve as the delivery vehicle for proposed reforms. While the MIIR's opt-in design allows each State to select its preferred reform protocols and which of its international investment agreements are to be modified by each protocol, such flexibility may generate further fragmentation. Empirical evidence from the implementation of recent treaties on OECD tax reform (BEPS MLI) and transparency in ISDS proceedings (Mauritius Convention) underscores the challenges in aligning State preferences through treaty design. This article identifies five scenarios of mismatched commitments and offers possible solutions informed by the general law of treaties. It argues that the MIIR should prioritize systemic coherence to mitigate transaction costs and ensure effective reform. A pragmatic roadmap is provided for negotiators to balance these competing goals in navigating the technicalities of treaty law in a fragmented ISDS system.

INTRODUCTION

Calls to reform the system of investor–State dispute settlement (ISDS) have fast moved from the margins of political debate to the heart of multilateral treaty-making. In July 2024, the UNCITRAL Secretariat circulated a draft treaty as the basis for negotiations towards a framework convention on reform of the ISDS system, currently taking place in UNCITRAL Working Group III (WGIII).[1] Mainly inspired by the design of the OECD Base Erosion and Profit Shifting Multilateral Instrument (BEPS MLI),[2] the Secretariat's proposed treaty—the Multilateral Instrument on ISDS Reform (MIIR)—would create a 'dual opt-in mechanism' whereby States parties decide, first, the Protocols to which they will adhere, and, secondly, specify which of their international investment agreements (IIAs) fall under the scope of the chosen Protocols.[3]

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[1] UNCITRAL, *Possible reform of investor–State dispute settlement (ISDS): Draft multilateral instrument on ISDS reform: Note by the Secretariat* (8 July 2024) UN Doc A/CN.9/WG.III/WP.246 [Draft MIIR].
[2] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, 24 November 2016, OECD Doc. C(2017)39, 56 I.L.M. 1025 (2017) [BEPS MLI].
[3] Draft MIIR (n 1), para 51.

While the design of the MIIR creates significant flexibility for States by adopting a smorgasbord approach in which diverse preferences can be accommodated, it also carries the risk that few States will ultimately commit to the same obligations. If that is the case, the network of more than 3,000 IIAs that currently exist may remain largely unmodified at best and may be rendered significantly more complex at worst, as investors, States, and law firms navigate 'mismatched commitments' under the MIIR.[4]

In this article, we examine the risks of mismatched commitments and explore treaty design options that would mitigate those risks. In particular, we highlight recent evidence that casts doubt on the appropriateness of taking the BEPS MLI as a partial blueprint for treaty design, whilst omitting the mechanism that has been most successful in modifying the international tax regime: an essential package of obligations that all parties must accept. In this light, we suggest that adherence to a core package of Protocols to the MIIR should be compulsory or the default position. Flexibility may be attractive insofar as it encourages broad adherence to the MIIR, but that flexibility would come at the cost of defeating the very purpose of the MIIR: to establish a holistic and coherent approach to ISDS reform.[5] We also make a range of recommendations to refine the design of the MIIR in accordance with the general law of treaties, including a proposed mechanism for binding joint interpretations.

After the introduction, 'The road to a multilateral instrument' section of this article provides an overview of the reform discussions that have taken place in WGIII, introducing the proposed MIIR and briefly comparing the treaty design and effectiveness of the BEPS MLI and UN Convention on Transparency in Treaty-Based Investor–State Arbitration (Mauritius Convention).[6] The next section identifies five scenarios of mismatched commitments of varying complexity under the MIIR. Drawing on lessons from the BEPS MLI and other treaty regimes, as well as comments from delegations,[7] treaty law experts,[8] and academics,[9] the article identifies 10 possible solutions to reduce the risk of mismatched commitments in accordance with the rules of treaty law regarding inter se modification, unilateral interpretative declarations, subsequent agreements

[4] 'Mismatched commitments' is not a term of art and should not be conflated with the technical notion of 'normative conflict'; ie, 'the impossibility of simultaneous performance of two norms that share the same subject matter': Gloria M Alvarez, 'Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension' (2018) 33 ICSID Rev 560, 568. See also Dafina Atanasova, 'Non-Economic Disciplines Still Take the Back Seat: The Tale of Conflict Clauses in Investment Treaties' (2021) 34 Leiden J Int'l L 155, 157; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 161–200. As this article explains, a Protocol under the MIIR cannot create any norm applicable in relations between two parties unless they both accede to that Protocol and list a bilateral IIA in their Notifications, whereupon the IIA would be modified to include the Protocol, subject to a conflict clause in favour of the Protocol: Draft MIIR (n 1), art 7. See further *Scenario E*' regarding an incompatible conflict clause in the IIA itself.

[5] Draft MIIR (n 1), Preamble.

[6] United Nations Convention on Transparency in Treaty-based Investor–State Arbitration, 10 March 2015, UN Doc A/RES/69/116, 54 I.L.M. 747 (2015) [Mauritius Convention].

[7] In February 2025, written comments on the MIIR were submitted by the EU and its Member States, the USA, and the Moscow-based International and Comparative Law Research Center (ICLRC): 'Submission from the European Union and its Member States: A/CN.9/WG.III/WP.246—Draft Multilateral Instrument on ISDS' <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2025.02.14_submission_mi_joint_interpretation.pdf> accessed 16 June 2025); 'UNCITRAL Working Group III—USG Comments on A/CN.9/WG.III/WP.246' (16 February 2025) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/us_comments_to_wp_246_miir_-_2025.02.16_final.pdf> (accessed 16 June 2025); International and Comparative Law Research Center, 'Comments on the Draft Multilateral Instrument on ISDS Reform (A/CN.9/WG.III/WP.246)' February 2025 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/iclrc_multilateral_instrument_comments.pdf> accessed 16 June 2025.

[8] Particularly notable in this regard are a series of comments on the possible design of an MIIR from five experts in the law of treaties (Danae Azaria, Makane Moïse Mbengue, Malgosia Fitzmaurice, Duncan Hollis, and Jan Klabbers) received by the UNCITRAL Secretariat in mid-2022: 'Multilateral Instrument on ISDS Reform: Comments on A/CN.9/WG.III/WP.194' <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_experts_0.pdf> accessed 16 June 2025 [Expert Comments (2022)].

[9] Few academic pieces have yet engaged with the MIIR. For the exceptions, which are both blogs, *see* Joshua Paine, 'A Multilateral Instrument on ISDS Reform (MIIR): Selected Design Issues' (*EJIL:Talk!*, 3 June 2025) <www.ejiltalk.org/a-multilateral-instrument-on-isds-reform-miir-selected-design-issues/> accessed 5 June 2025); Caroline Kittelmann and Sarah Lemoine, 'An Overview of the First Draft of the Multilateral Instrument on ISDS Reform' (*Kluwer Arbitration Blog*, 6 September 2024) <https://arbitrationblog.kluwerarbitration.com/2024/09/06/an-overview-of-the-first-draft-of-the-multilateral-instrument-on-isds-reform/> accessed 16 June 2025.

in treaty interpretation, and conflicts between successive treaties. The last section concludes by underscoring which of the solutions we recommend as the best aligned with the purpose of the MIIR, the general law of treaties, and the relevant evidence of effective treaty design in international economic law.

THE ROAD TO A MULTILATERAL INSTRUMENT

Discussions in UNCITRAL WGIII started in late November 2017, prompted by concerns regarding the ISDS system, including the costs, consistency, and coherence of the system.[10] In the first and second phases of its mandate, the Working Group identified a series of concerns regarding the ISDS system,[11] assessed whether such concerns were well-grounded and decided whether those concerns merited incremental or systemic reform.[12] After having agreed that a number of concerns were ripe for reform, delegations participating in WGIII moved to the third phase of work in 2019, which centred on discussion of reform options. Over 45 governments submitted comments on the way forward,[13] with some delegations suggesting that a series of reform options be housed under the umbrella of one multilateral instrument,[14] explicitly drawing on the BEPS MLI and the Mauritius Convention as inspiration for such treaty design.[15] Following these suggestions, the Secretariat produced an initial paper on the potential structure, scope, and operation of a multilateral instrument in 2020,[16] prompting States in 2022 to request the Secretariat to produce a draft MIIR.[17] The resulting draft MIIR was circulated to states in July 2024[18] and discussed at the September 2024 and February 2025 sessions of WGIII,[19] as well as the Chengdu intersessional meeting held in October 2024.[20]

The MIIR proposed by the Secretariat is a framework convention,[21] which would contain optional Protocols regarding various ISDS reforms.[22] The illustrative list of Protocols identified by the Secretariat includes: UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023); UNCITRAL Model Provisions on Mediation for International Investment Disputes (2023); Statute of the Advisory Centre on International Investment Dispute

[10] UNCITRAL, 'Possible Reform of Investor–State Dispute Settlement (ISDS): Note by the Secretariat' 18 September 2017, UN Doc A/CN.9/WG.III/WP.142, paras 22–41.

[11] UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session' (April 2018), 14 May 2018, UN Doc A/CN.9/935.

[12] UNCITRAL, 'Possible Reform of Investor–State Dispute Settlement (ISDS): Note by the Secretariat' 5 September 2018, UN Doc A/CN.9/WG.III/WP.149. Here, we borrow the terminology from Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor–State Arbitration' (2018) 112 AJIL 410.

[13] For a compilation of the submissions, see UNCITRAL, 'Possible Reform of Investor–State Dispute Settlement (ISDS): Note by the Secretariat' Addendum, 30 July 2019, UN Doc A/CN.9/WG.III/WP.166/Add.1.

[14] UNCITRAL, 'Note by the Secretariat: Workplan to Implement Investor–State Dispute Settlement (ISDS) Reform and Resource Requirements, Fortieth Session (resumed)' UN Doc A/CN.9/WG.III/WP.206 (May 2021).

[15] See Comments of Colombia, 'Possible Reform of Investor–State Dispute Settlement (ISDS)' 14 June 2019, UN Doc. A/CN.9/WG.III/WP.173, paras 4–30; Submission from the European Union and its Member States, 'Possible Reform of Investor–State Dispute Settlement (ISDS)' 24 January 2019, UN Doc A/CN.9/WG.III/WP.159/Add.1, para 36; Submission from the Government of Ecuador, 'Possible Reform of Investor–State Dispute Settlement (ISDS)' 17 July 2019, UN Doc A/CN.9/WG.III/WP.175, paras 29–32; Submission from the Governments of Chile, Israel, Japan, Mexico, and Peru, 'Possible Reform of Investor–State Dispute Settlement (ISDS)' 2 October 2019, UN Doc A/CN.9/WG.III/WP.182, 4.

[16] UNCITRAL, 'Possible Reform of Investor–State Dispute Settlement (ISDS), Multilateral Instrument on ISDS Reform: Note by the Secretariat' 16 January 2020, UN Doc A/CN.9/WG.III/WP.194 [Note by the Secretariat (January 2020)].

[17] UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Forty-third Session' (Vienna, 5–16 September 2022), UN Doc A/CN.9/1124, para 88.

[18] Draft MIIR (n 1).

[19] UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Forty-ninth Session' (Vienna, 23–27 September 2024), UN Doc A/CN.9/1194, paras 105–121; UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Fifty-first Session, First Part' (New York, 17–19 February 2025), UN Doc A/CN.9/1196 [WGIII Report (February 2025)], paras 31–94.

[20] UNCITRAL, 'Summary of the Intersessional Meeting on Investor–State Dispute Settlement (ISDS) Reform Submitted by the Government of China' 6 December 2024, UN Doc A/CN.9/WG.III/WP.249, paras 51–62.

[21] Draft MIIR (n 1) art. 3(1)-(3).

[22] ibid art 2.

Resolution (2024); draft provisions on procedural and cross-cutting issues (subject to possible categorization); draft statute of a standing mechanism for the resolution of international investment disputes; and draft statute of an appeal mechanism for the resolution of international investment disputes.[23]

As mentioned, the MIIR would create a dual opt-in mechanism in respect of Protocols and IIAs. First, each party would choose which Protocol(s) it wishes to join ('Protocol Opt-In Mechanism'). Secondly, each party would choose which of its IIAs would be modified by each Protocol ('IIA Opt-In Mechanism'). More precisely, when joining the MIIR, each State would specify its chosen Protocol(s) in the same instrument of ratification or accession to the MIIR, or subsequently deposit a separate instrument in respect of any other Protocol(s).[24] If a given Protocol contained its own provisions on ratification or accession, the State would need to accede to that Protocol as for a separate treaty.[25] Within 3 months of depositing its instrument of accession to a Protocol, the State would then be obliged to notify the MIIR Secretariat of the IIAs to which the relevant Protocol would apply, detailing how that Protocol would modify each of the listed IIAs ('Notification').[26] An IIA would not be modified until all parties to that IIA have acceded to that Protocol and listed the IIA in their unilateral Notifications.[27] However, in February 2025, delegates agreed that a future draft of the MIIR should specify that matching notifications between two or more parties to a multilateral IIA would constitute an inter se modification.[28]

The dual opt-in mechanism of the MIIR is not an arbitrary construct but draws on recent experience of multilateral treaty design in international economic law. On the recommendation of governments, the UNCITRAL Secretariat was inspired by the treaty design of the BEPS MLI and, to a lesser extent, the Mauritius Convention.[29] It is easy to see why both treaties are attractive blueprints for ISDS reform: each is designed to overwrite a network of thousands of existing treaties, retrofitting old treaties with new provisions. The BEPS MLI was concluded in 2015 in the context of the OECD's work on international tax agreements and aims to modify a network of around 3,300 extant bilateral tax treaties to incorporate rules against abusive tax avoidance practices.[30] Like the MIIR, the BEPS MLI houses many provisions agreed by States across a range of issues and was designed to provide flexibility to prospective parties in two ways. First, the BEPS MLI is divided into a set of non-derogable minimum standards and a suite of optional provisions to which States may subscribe. Secondly, in a similar vein to the IIA Opt-In Mechanism, parties are required to list the tax treaties modified by the BEPS. For an optional provision of the BEPS MLI to modify a tax treaty, therefore, all parties to that treaty must opt into that provision and list the treaty as falling within its scope.

The BEPS MLI rapidly gained wide acceptance and entered into force on 1 July 2018, with nearly 100 parties and the consequent modification of more than 1,000 tax treaties.[31] At first glance, therefore, it would seem that the BEPS MLI has been successful in achieving its goals whilst ensuring a degree of flexibility, providing a proof of concept for the MIIR. However, when you scratch beneath the surface, that success is qualified: the vast majority of tax treaties that have been modified by BEPS MLI result from the obligatory minimum standards agreed by States,

[23] ibid.
[24] ibid art 3(4)-(6).
[25] ibid art 3(7). Each Protocol would nonetheless 'constitute an integral part' of the framework convention: ibid, art. 2(3).
[26] ibid art 6(3).
[27] ibid art 7.
[28] WGIII Report (February 2025) (n 19), paras 39–46, 57–66. On inter se modification, see '*MIIR party (acceded to Protocol Ω, listed multilateral IIA) v MIIR party (acceded to Protocol Ω, listed multilateral IIA) v MIIR party (acceded to Protocol Ω, unlisted multilateral IIA)*' section.
[29] See Note by the Secretariat (January 2020) (n 16) 25–30. For comparative analysis of the two treaties, see Nathalie Bravo, 'The Mauritius Convention on Transparency and the Multilateral Tax Instrument: Models for the Modification of Treaties?' (2018) 25 Transnat Corp 85.
[30] In particular, the practice of shifting profits to lower tax jurisdictions to avoid tax liabilities: see BEPS MLI (n 2), Preamble.
[31] As of 9 June 2025, 89 States have ratified the BEPS MLI.

rather than its optional provisions. In the following section, we examine in more detail the lessons to be drawn from the implementation of the BEPS MLI between 2018 and 2025.[32] For now, we emphasize that the relative success of the BEPS MLI should not be mistaken for strong evidence in support of the MIIR's dual opt-in mechanism.

It is equally difficult to draw clear-cut lessons for the MIIR from the Mauritius Convention. This Convention entered into force on 18 October 2017 with a single purpose: to apply the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (Transparency Rules) to arbitral proceedings brought under one of the roughly 3,000 IIAs concluded before 1 April 2014.[33] Specifically, the Mauritius Convention provides that the Transparency Rules apply to an investor–State arbitration whenever both home and host States are parties to the Convention or when the respondent State is a party and the claimant investor agrees that the Transparency Rules should apply, with an option for States to exclude any IIAs by way of reservation.[34] Despite these relatively modest goals, uptake of the Mauritius Convention has been very slow. Currently, only nine States have ratified the Convention.[35] Their matching commitments would apply the Transparency Rules to investor–State arbitrations brought under four IIAs.[36] The Convention thus covers 0.15 per cent of the 2,608 IIAs currently in force.[37] Only one arbitration has ever been brought under any of the four IIAs.[38] In short, the Mauritius Convention has so far done little to close the 'transparency gap' in ISDS.[39]

The reasons why States have not signed or ratified the Mauritius Convention, notwithstanding their avowed concern for transparency, are underexplored in the academic literature.[40] In the view of one distinguished arbitrator, the 'optional nature' of the Mauritius Convention has undermined its ambition; the Transparency Rules would become 'automatically applicable' to an effective number of matching commitments only once the Convention has been ratified by 'a critical mass

[32] See '*Scenario A*' and '*Scenario B*' sections.

[33] The Transparency Rules automatically apply to arbitrations initiated under the UNCITRAL Arbitration Rules based on treaties concluded on or after 1 April 2024: UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration, UN Doc A/RES/68/109 (16 December 2013) [Transparency Rules]. However, the Mauritius Convention applies the Transparency Rules to 'any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules': Mauritius Convention (n 6) art 2(1).

[34] Mauritius Convention (n 6) arts 2–3.

[35] The nine States parties are Australia, Benin, Bolivia, Cameroon, Canada, Gambia, Iraq, Mauritius, and Switzerland. Fifteen states have signed the Convention but not ratified it: Belgium, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Netherlands, Panama, Sweden, Syrian Arab Republic, the UK, and the USA. Most recently, the EU ratified the Convention on 25 September 2025, which will enter into force for the EU on 25 March 2026. However, the Convention will only apply to cases brought against the EU in accordance with the 20-year sunset clause under art 47(3) of the Energy Charter Treaty, 17 December 1994, entered into force 16 April 1998, 2080 U.N.T.S. 95 [hereinafter ECT], which was the only pre-2014 IIA in which the EU consented to ISDS and from which it withdrew on 28 June 2025.

[36] *See* Agreement between the Swiss Confederation and the Republic of The Gambia on the Promotion and Reciprocal Protection of Investments, 22 November 1993 (entered into force 30 March 1994); Agreement between the Government of the Republic of Mauritius and the Swiss Federal Council Concerning the Promotion and Reciprocal Protection of Investments, 26 November 1998 (entered into force 21 April 2000); Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, 9 January 2013 (entered into force 12 May 2014); Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments, 3 March 2014 (entered into force 16 December 2016). Several other IIAs have been concluded between two or more parties to the Mauritius Convention but they either are not yet in force as of 1 July 2025, have been terminated, do not contain State consent to ISDS, or were concluded after 1 April 2014. We note that art 33 of the Benin–Canada IIA and art 30 of the Cameroon–Canada IIAs already provided for public access to documents; the Mauritius Convention therefore provided little additional benefit in terms of transparency to these IIAs.

[37] Data from UN Trade & Development, International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 17 June 2025.

[38] *Alimenta SA v Republic of The Gambia*, ICSID Case No ARB/99/5. The case settled and was discontinued by agreement on 3 May 2001.

[39] Sebastian Puerta and Tim R Samples, 'Investment Law's Transparency Gap' (2022) 55 Cornell Int'l LJ 9. More generally, the Transparency Rules have done little to improve transparency in ISDS. For example, only 33 cases have been listed in the Transparency Registry since 1 April 2014, whereas nearly 800 publicly known cases have been filed since then: UNCITRAL Transparency Registry <https://www.uncitral.org/transparency-registry/registry/index.jspx> accessed 7 July 2025.

[40] For possible reasons why increased transparency may not be in a State's best interests, see Jarrod Wong and Jason Yackee, 'Transparency, Accountability, and Influence in the International Investment Law System' (2025) 46 Mich J Int'l L 121, 157.

of States including major trading nations'.[41] Yet, in the case of the MIIR, none of the Protocols would apply automatically, even if the MIIR itself were to be ratified by every State in the world.

Throughout the rest of this article, we keep in mind the need to strike a balance between flexibility and effectiveness in seeking to ensure that States do not merely become parties to the MIIR but also modify their IIAs by maximizing the opportunities to match their commitments to ISDS reform. Much will turn on the future political appetites of States as the masters of their treaty commitments. In the first instance, however, the risk of mismatched commitments undermining the ambition of States for multilateral ISDS reform is a problem of treaty design.

FIVE SCENARIOS OF MISMATCHED COMMITMENTS

In its current form, the MIIR may lead to several scenarios of mismatched commitments under the MIIR and its Protocols between two States with existing treaty relations under an IIA. Specifically, in this Part, we identify and address five scenarios of varying complexity:

- *Scenario A*—Two MIIR parties do not accede to the same Protocol ('Protocol Ω').[42]
- *Scenario B*—Two MIIR parties both accede to Protocol Ω, where one party's Notification lists their bilateral IIA, but the other party's Notification does not.
- *Scenario C*—Two MIIR parties both accede to Protocol Ω and list the same multilateral IIA in their Notifications, but a third party to these instruments has not listed the IIA.
- *Scenario D*—Two MIIR parties both accede to Protocol Ω and list the same IIA in their Notifications, but they provide conflicting details as to how Protocol Ω would modify the listed IIA.
- *Scenario E*—Two MIIR parties both accede to Protocol Ω and provide consistent details in their Notifications as to how Protocol Ω would modify the listed IIA, but the IIA itself contains incompatible provisions regarding its modification.

In this section, we take each mismatched commitment in turn, identifying and analysing the issue before proposing how the risks of mismatch might be mitigated. We make a range of recommendations to refine the design of the MIIR in accordance with the general rules of the Vienna Convention on the Law of Treaties (VCLT) regarding inter se modification (Article 41), subsequent agreements in treaty interpretation (Article 31(3)(b)), and conflicts between successive treaties (Articles 30 and 59), as well as the work of the International Law Commission (ILC) on unilateral interpretative declarations, suggesting that the MIIR include a mechanism for binding joint interpretations.

Our main argument, however, is informed by the relative success of the BEPS MLI: without a set of core protocols that all MIIR parties are obliged to accept—or a set of default protocols from which they may opt out—the MIIR is unlikely to succeed in its goal of increasing coherence in the ISDS system. Indeed, it is likely to make the situation considerably worse as States, investors, and other actors in the international investment field are required to identify not just the relevant IIA, but also whether the State is a party to the MIIR, the Protocols to which that State is party, whether the IIA has been listed under those Protocols, and whether the other State party has also listed and accepted the same obligations. If the objective of the MIIR really is to create a 'holistic and coherent approach' to ISDS reform, its current design fails to live up to this goal.[43]

[41] Alexis Mourre and Alexandre Vagenheim, 'Again on the Case for the Publication of Arbitral Awards' (2023) 39 Arb Int'l 259, 263.

[42] We use Ω as a neutral term to refer to any Protocol included in the final MIIR, rather than referring to any specific Protocol included in the illustrative list under art 2 of the draft MIIR.

[43] Draft MIIR (n 1), Preamble.

Scenario A

The first scenario we consider is when two parties to the MIIR opt into different Protocols. Would one State's accession to Protocol Ω have any consequence for their bilateral treaty relations under an applicable IIA? The treaty law on this point is straightforward. Under Article 3 of the MIIR, both States must opt into the same Protocol *and* make unilateral Notifications in respect of that IIA under Article 6. An IIA between two MIIR parties that do not both accede to Protocol Ω would thus be unmodified. However, a problem arises because the dual opt-in mechanism would allow States to choose different packages of Protocols, and to choose different IIAs to which those Protocols would apply. As a result, it may be the case that very few commitments would actually match between MIIR parties, and very few IIAs would be modified as a result.

Evidence for this risk comes from recent empirical research on the first 3 years (2018–2021) of implementation of the BEPS MLI.[44] We supplemented this evidence with our own data for the period 2021–2025.[45] As mentioned, under the BEPS MLI, once all parties to a double taxation treaty have notified the depository that the treaty is a Covered Tax Agreement (CTA), States parties commit to an essential package of obligations that apply to all CTAs, described as 'minimum standards'.[46] These provisions reflect the agreement by States engaged in the BEPS process that certain issues constituted the 'most important sources of BEPS concerns',[47] in particular issues related to treaty shopping/abuse for tax benefits (BEPS Action 6), and dispute settlement for treaty-based disputes (BEPS Action 14).[48] Beyond the minimum standards, parties 'reserve the right' for additional obligations under the BEPS MLI not to apply to their CTAs, such that these optional commitments are implemented only if both parties to a CTA choose not to make unilateral reservations.[49]

There is a strong resemblance between the design of the BEPS MLI and the IIA Opt-In Mechanism. However, there are two important differences. First, States parties to the MIIR must *opt into* specific Protocols, whereas the BEPS MLI requires parties to *opt out* of obligations in the form of a reservation to its instrument of accession or ratification.[50] These mechanisms may seem functionally equivalent, since both instruments require a State to choose whether or not to commit to the optional provisions. But the Protocol Opt-In Mechanism is bound to increase transaction costs, relative to the BEPS MLI, because each and every Protocol of the MIIR must be positively selected and may have additional accession requirements. A second significant difference is that, unlike the BEPS MLI, the MIIR contains no obligatory provisions; all Protocols are optional.

Data on the implementation of the BEPS MLI since its entry into force (1 July 2018) to 1 July 2025 suggest that the MIIR would have limited success in its proposed form, at least in the short- to mid-term. Out of the 3389 tax treaties in force, 2210 are between BEPS MLI parties. Of those, 1718 were listed by both BEPS MLI parties, and hence are CTAs modified by the obligatory minimum standards under the BEPS MLI. However, the optional provisions of the BEPS MLI have had very little impact on modifying CTAs. Certain provisions, such as Article 5 regarding elimination of double taxation, resulted in the modification of as little as 123 or 6.8 per cent of CTAs, whilst even the most successful optional provisions, such as Article 13 regarding avoidance

[44] Antonia Hohmann, Valeria Merlo and Nadine Riedel, 'Multilateral Tax Treaty Revision to Combat Tax Avoidance: On the Merits and Limits of BEPS's Multilateral Instrument' (2024) 40 Econ Pol'y 427.

[45] These data may be made available on request.

[46] BEPS MLI (n 2) arts 6–7, 16.

[47] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6—2015 Final Report* (OECD 2015) 9.

[48] ibid. See also OECD, 'Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting' para 14 <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-mli/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.pdf> accessed 30 September 2025.

[49] BEPS MLI (n 2) arts 3–5, 8–15, 17–18.

[50] For each party's list of reservations, see *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 1 June 2025* (OECD 2025) <www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-mli/beps-mli-signatories-and-parties.pdf> accessed 5 June 2025.

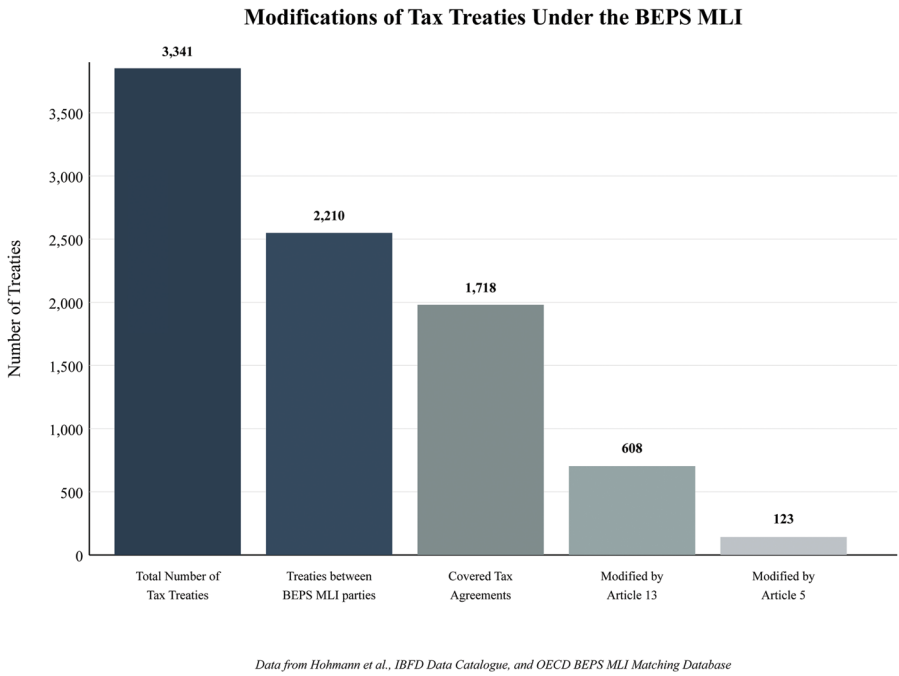

Figure 1. Data from Hohmann and others, IBFD Data Catalogue, and OECD BEPS MLI Matching Database.

of permanent establishment status, modified only around one-third of CTAs.[51] As Fig. 1 shows, this accounts for just a fraction of the total number of tax treaties in force. Obligations that fall outside the scope of the minimum standards have therefore proved relatively ineffective in bringing about multilateral reform of the international tax regime. As discussed above, the Mauritius Convention offers even less cause for optimism regarding the uptake of optional provisions.[52]

This evidence suggests that the Protocol Opt-In Mechanism under the MIIR—in the absence of a core package of Protocols—risks poor uptake by States and, consequently, the failure to modify IIAs due to mismatched commitments.[53] We believe that two solutions are possible: first, an opt-out mechanism for a set of 'default' Protocols or, secondly, a package of 'essential' Protocols to which all MIIR parties accede automatically and cannot opt out.[54]

The first solution is that the MIIR designates a *default* package of Protocols to which every MIIR party accedes automatically unless they expressly decide to opt out. Protocols outside this default package would remain subject to the Protocol Opt-In Mechanism currently proposed in the MIIR. This solution would preserve the flexibility of the MIIR but should reduce transaction

[51] For the period 2018–2021, see Hohmann, Merlo and Riedel (n 44) 466. We followed their methodology in collecting data for the period 2021–2025, drawing from IBFD's data catalogue and the BEPS MLI Matching Database.

[52] See 'The road to a multilateral instrument' section.

[53] For similar observations on the importance of 'core provisions or minimum standards': Expert Comments (2022) (n 8) (in particular the comments of Azaria, Mbengue, and Fitzmaurice).

[54] These solutions are without prejudice to the US proposal to 'divide the instruments identified in the MIIR into two groups—Protocols and Model Provisions—based on the nature of those instruments and how they are structured': *UNCITRAL Working Group III—USG Comments on A/CN.9/WG.III/WP.246: Draft Multilateral Instrument on ISDS Reform* (16 February 2025) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/us_comments_to_wp_246_miir_-_2025.02.16_final.pdf> accessed 5 June 2025) [*US comments*] 1. See also International and Comparative Law Research Center, 'Comments on the Draft Multilateral Instrument on ISDS Reform (A/CN.9/WG.III/WP.246)' (February 2025) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/iclrc_multilateral_instrument_comments.pdf> accessed 5 June 2025 [*ICLRC comments*] paras 9–23.

costs by requiring the default Protocols to be addressed in the original instrument of ratification or accession to the MIIR itself, rather than separate accession procedures. Indeed, other treaty regimes have successfully used default options to coordinate State decisions, such as dispute settlement under Part XV of the UN Convention on the Law of the Sea (UNCLOS) or multilateral environmental agreements (MEAs) with optional protocols.[55] A treaty design based on default options, from which States may opt out, also finds support in the literature on decision-making from the behavioural social sciences, which demonstrates the power of opt-out provisions in determining both individual and State decisions.[56]

A second solution would mirror the success of minimum standards under the BEPS MLI by specifying a package of *essential* Protocols that form a non-derogable core of the MIIR. It is beyond the scope of this article to speculate whether it is politically feasible to designate any Protocol(s) as essential, akin to minimum standards under the BEPS MLI.[57] However, if this solution is to be legally effective, it would be important for the MIIR to affirm that parties may not opt out of the essential Protocols by way of unilateral reservation, which is presumptively prohibited by the MIIR,[58] or by way of an inter se agreement between two or more MIIR parties.[59] While this solution would constrain the discretion left to States—and potentially chill accession to the MIIR framework—it would ensure a minimum floor of matching Protocols among those States that do accede to the MIIR.

We believe that either solution—but more so the essential Protocols—would reduce the transaction costs of multiple accessions and promote a higher degree of coherence in ISDS reform than the current draft MIIR. Moreover, both solutions serve the additional benefit of raising the profile of the default or essential Protocols both within and beyond domestic governments, thus ensuring that the ISDS reforms effected by such Protocols do not fall off a State's list of priorities in international law-making.[60] The Protocol Opt-In Mechanism would remain for whichever Protocols are not deemed to be default options or essential commitments.

Scenario B

A second scenario is that two States accede to both the MIIR and Protocol Ω, but only one party lists their bilateral IIA under Article 6 of the MIIR as one to which Protocol Ω shall apply. States parties to the MIIR are unlikely to list all their IIAs for modification under Protocol Ω, as recent practice under BEPS MLI demonstrates. On average, BEPS MLI parties listed 80 per cent of their CTAs, though this proportion dropped as low as 10 per cent for some States.[61] Two potential underlying reasons for this selectivity can be identified. First, there is the administrative burden of identifying and cataloguing all IIAs, and detailing how each would be modified by Protocol Ω.

[55] See the survey in Makane Moïse Mbengue, 'Potential Options for a Multilateral Instrument—Pros & Cons' (13 May 2022) in Expert Comments (2022) (n 8). See further, Sean D Murphy, 'Creativity in Dispute Settlement Relating to the Law of the Sea' in Charles N Brower and others (eds), *By Peaceful Means: International Adjudication and Arbitration—Essays in Honour of David D. Caron* (OUP 2024) 195; Campbell McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024) 170–201 (discussing the treaty design of MEAs).

[56] See eg, Eric J Johnson and Daniel Goldstein, 'Do Defaults Save Lives?' (2003) 302 Science 1338; Cass R Sunstein, 'Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych' (2013) Harv Pub L Working Paper (21 May 2013) 7–16 < https://ssrn.com/abstract=2171343> accessed 5 June 2025. For the importance of opt-out choice framing in international law: Jean Galbraith, 'Treaty Options: Towards a Behavioral Understanding of Treaty Design' (2013) 53 Va J Int'l L 309.

[57] Some observers have noted that 'flexibility is fundamental' for the negotiators at UNCITRAL WGIII, which may make it difficult to agree on a package of default or essential Protocols: Anthea Roberts and Taylor St John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty System' (2022) 116 AJIL 96, 132. However, for a recent success story in the multilateral combination of 'disparate topics in a single package': Daniel Bodansky, 'Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement' (2024) 118 AJIL 299.

[58] Draft MIIR (n 1) art 8.

[59] See '*Scenario C*' section.

[60] Along these lines, an anonymous reviewer of this article suggested that the low number of parties to the Mauritius Convention may be attributable to the fact that many States simply consider accession to the Convention to be unimportant or, indeed, do not consider it at all.

[61] Hohmann and others (n 44) 439.

This burden is likely to be even greater for IIAs than for CTAs.[62] Secondly, States may adopt a selective strategy, choosing treaties based on factors such as the substantive compatibility of specific IIAs with Protocol Ω's objectives, or the political desirability and feasibility of aligning with certain treaty partners. As explained above, the modification of an IIA occurs only if all parties to that IIA have listed it in their Article 6 Notifications regarding Protocol Ω. Conversely, where one MIIR party fails to list its IIA under Protocol Ω, the original terms of their bilateral obligations remain unaltered under Scenario B.

There are two possible solutions to the problem of MIIR parties not choosing to apply Protocol Ω to their IIAs, akin to the proposed solutions under Scenario A: first, to abandon the IIA Opt-In Mechanism and require MIIR parties to list all their IIAs upon accession to Protocol Ω, with a mechanism to opt out of certain IIAs, or secondly, to require MIIR parties to list all their IIAs on a non-derogable basis. Similar trade-offs would need to be considered as for amending the Protocol Opt-In Mechanism: on the one hand, the possibility that fewer States may decide to join Protocol Ω if accession constitutes an offer to modify all IIAs (or, at least, requires a party to opt out in respect of specific IIAs); on the other hand, greater effectiveness in implementing ISDS reform among those MIIR parties that do accede to Protocol Ω.

However, whereas a core package of default or essential Protocols would reduce the transaction costs involved with multiple accessions to separate Protocols, the solutions for Scenario B need to be considered alongside Article 6(3) of the MIIR, which obliges the parties to detail how Protocol Ω would modify each listed IIA in their Notifications.[63] This obligation creates an administrative burden that may be dispersed across time under the terms of the MIIR, since parties would be entitled to opt in on a rolling basis. However, if States were required to list all their IIAs upon accession to Protocol Ω, or shortly after, this burden would be highly concentrated in time, even if the parties were entitled to opt out.

Regardless of whether the obligation to notify is dispersed across time or concentrated at the moment of accession, notification may be particularly challenging for developing States, the capacity of which to conduct this work may be limited. One solution to alleviate such a burden could be to designate the Advisory Centre on International Investment Dispute Resolution (Advisory Centre) to assist parties in preparing their Notifications as part of the Advisory Centre's technical assistance and capacity-building function.[64] The Statute of the Advisory Centre could thus form part of a non-derogable package of essential Protocols under the MIIR, which should be the least controversial of all Protocols because the Statute would not itself modify any IIAs.[65]

In the overall balance between flexibility and coherence, we recommend that the IIA Opt-In Mechanism should be kept as the main flexibility mechanism, with greater coherence in ISDS reform to be achieved through our suite of other recommendations. However, if there is no political appetite to designate a core package of default or essential Protocols as we have recommended, then greater coherence would need to be achieved by replacing the IIA Opt-In Mechanism. We suggest the first solution is preferable—that is, requiring MIIR parties to list all their IIAs upon accession to Protocol Ω, with an opt-out mechanism—because it would promote coherence in ISDS reform while preserving the ability of parties to choose which IIAs are modified by Protocol

[62] The OECD and UN model tax conventions have had a harmonizing influence on the drafting of bilateral tax treaties, which is relatively absent in the fragmented system of IIAs. *Compare* Elliott Ash and Omri Marian, 'The Making of International Tax Law: Empirical Evidence from Tax Treaties Text' (2020) 24 Fla Tax Rev 151; Yoram Z Haftel, Morr Link and Tomer Broude, 'Last Year's Model? Investment Arbitration, Negotiation, and the Gap between Model BITs and IIAs' (2023) 26 J Int'l Econ L 483.

[63] Draft MIIR (n 1), art 6(3). See further, '*Scenario D*' section.

[64] UNCITRAL, 'Draft Statute of an Advisory Centre on International Investment Dispute Resolution: Note by the Secretariat' (25 April 2024) UN Doc A/CN.9/1184 [Advisory Centre Statute], art 6.

[65] Draft MIIR (n 1) para 13. The Statute would, however, carry obligations to make minimum financial contributions: Advisory Centre Statute ibid, art 8.

Ω. Regardless of the preferred solution, we recommend that the Advisory Centre be designated to assist MIIR parties in preparing their Notifications.

Scenario C

A third scenario is that two MIIR parties both accede to the Protocol and list a multilateral IIA in their Notifications, but a third party to these instruments has not listed the IIA. The MIIR does not expressly provide for modification of a multilateral IIA where two or more parties—but not all—have met the requirements of the IIA Opt-in Mechanism. Under Article 7(3) of the MIIR, the notifications of these parties would simply be treated as an 'offer' to the remaining parties to modify the IIA by the respective Protocol.[66] However, to promote the implementation of ISDS reform, it is arguable that matching Notifications should modify the multilateral IIA between two or more parties to the IIA that have opted into Protocol Ω and listed the IIA.

Under the MIIR, the unilateral form of Notifications would not be caught by the general rule on inter se modification under Article 41 of the VCLT, which contemplates an agreement between two or more States. But there is nothing to prevent the MIIR from setting out special provisions by which two or more matching Notifications are deemed to have formed an inter se agreement to a multilateral IIA.[67] Indeed, in February 2025, it was agreed by delegates at WGIII that 'Article 7(2) should be clarified' to provide that, 'in the case of a multilateral [IIA], corresponding notifications by some of the parties to that treaty would constitute an agreement to modify the treaty among them.'[68] We support this solution, though it may be better to include such an amendment in a separate paragraph of Article 7 of the MIIR with express reference to Article 41 of the VCLT.

If this solution were implemented, the strict conditions under Article 41(1)(b) of the VCLT would still warrant scrutiny in respect of the relevant IIA. In simplified terms, inter se modifications must neither be prohibited by the multilateral IIA; nor affect the rights or obligations of other IIA parties; nor relate to a provision from which derogation is incompatible with the effective execution of the object and purpose of the treaty as a whole.[69] It is possible that some inter se modifications of a multilateral IIA to implement Protocol Ω—even if expressly enabled by the MIIR—would be impermissible under the terms of the IIA, as some commentators have argued in respect of the Energy Charter Treaty (ECT).[70]

Although this solution would enable MIIR parties to implement ISDS reforms to their bilateral treaty relations under a multilateral IIA, there may be drawbacks for the MIIR to become a framework convention for inter se modifications. If only a subset of parties to a multilateral IIA listed it under Protocol Ω, different obligations would be owed under the same IIA. Such fragmentation of existing IIAs may undermine the effectiveness of Protocol Ω and a basic purpose of the MIIR: to establish a holistic and coherent approach to ISDS reform.[71] Notwithstanding these possible

[66] Draft MIIR (n 1) art 7(3).

[67] We observe that some participants in WGIII felt that the phrase 'deemed to have been modified' in art 7(2) of the MIIR 'might not be accurate' because, in respect of a bilateral IIA, matching Notifications would be governed by the rules on 'successive treaties' under art 30 of the VCLT: WGIII Report (February 2025) (n 19) paras 39, 58. We revisit this point in '*Scenario D*' section. However, in respect of a multilateral IIA, a deeming provision may be needed to meet the formal requirements of inter se modification under art 41 of the VCLT; Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 [VCLT].

[68] WGIII Report (February 2025) (n 19) para 58.

[69] For detailed commentary: Anne Rigaux and others, '1969 Vienna Convention: Article 41 Agreements to Modify Multilateral Treaties Between Certain of the Parties Only' in Olivier Corten and Pierre Klein (eds), *Commentary on the Vienna Conventions on the Law of Treaties* (OUP 2011) 986.

[70] cf Oliver Hailes and others, '*Opinion: Disapplication of the Energy Charter Treaty's Sunset Clause by* Inter Se *Agreement under UK and International Law*' (17 January 2025; updated 4 March 2025) paras 51–66 < https://tjm.org.uk/wp-content/uploads/2025/04/Inter-se-opinion-UPDATED-04-03-25.pdf> accessed 5 June 2025.

[71] Draft MIIR (n 1) Preamble.

objections, we support the solution of inserting a provision into the MIIR that deems two or more matching Notifications to have formed an inter se modification to a multilateral IIA.[72]

Scenario D

A fourth scenario is that two MIIR parties both accede to Protocol Ω, list an applicable IIA in their Notifications, and comply with their obligation to describe the modification to the IIA under Article 6(3) of the MIIR. In doing so, however, the unilateral Notifications conflict in detailing how Protocol Ω would modify the IIA. The purpose of Article 6(3), according to the UNCITRAL Secretariat, is to reaffirm that 'Parties are responsible for actively clarifying how their investment treaties are to be modified' by requiring them 'to specify how the investment treaty would be modified by applying the Protocol (for example, the articles in the treaty that will be replaced by the Protocol)' and by allowing them 'to include any additional information (for example, a separate conflict clause).'[73]

Article 6(3) creates at least two uncertainties as to the legal effect of Notifications when two States disagree on how Protocol Ω would modify their IIA.[74] First, mismatched Notifications may give rise to doubt whether there is mutual consent of the MIIR parties to modify their IIA. The legal effect of a Notification is to indicate a MIIR party's intent to modify its IIA, which is deemed, first, to constitute an offer to include Protocol Ω in the IIA and, once all IIA parties have opted into Protocol Ω, to have accordingly modified the IIA.[75] However, when there is no meeting of the minds, it is unclear whether the modification may be deemed to have taken effect. Secondly, assuming a modification of the IIA does take effect, any conflict in the substance of the underlying Notifications would create uncertainty for States and investors as to which Notification, if any, correctly details the modification to the IIA.

Treaty interpreters would likely approach the mismatched Notifications as one of two types of unilateral statements: 'reservations' or 'interpretative declarations'. First, at least one of the mismatched Notifications may be treated as containing a unilateral *reservation* to Protocol Ω. In general, any State may exclude or modify the legal effect of a treaty by way of unilateral reservation when making its notification of accession.[76] However, Article 8 of the MIIR prohibits any reservations, unless expressly permitted by Protocol Ω.[77] Also, because the IIA Opt-In Mechanism deems an IIA to have been modified to include Protocol Ω, it is arguable that reservations would also need to be permitted under the IIA.[78] Secondly—and more likely, given the UNCITRAL Secretariat's explanation—the mismatched Notifications would be treated as competing *interpretative declarations* that specify or clarify each State's understanding of the intended meaning or scope of Protocol Ω.[79] The distinction between a reservation, which might be prohibited, and a permissible interpretative declaration would be drawn by interpreting the Notification in good

[72] An alternative solution would be to require MIIR parties to list all their IIAs upon accession to Protocol Ω—as suggested to resolve Scenario B—since Scenario C assumes that a third party has acceded to Protocol Ω but not listed the multilateral IIA. However, this solution would not reduce the risk of fragmented treaty relations under a multilateral IIA where the third party has not acceded to Protocol Ω, let alone a State that has not even become an MIIR party. For completeness, if another State acceded to the multilateral IIA after two MIIR parties had implemented Protocol Ω by way of inter se agreement to the IIA, the new party's treaty relations would be governed by the unmodified IIA unless it also made a matching Notification: cf VCLT (n 67) art 40(5)(b).

[73] Draft MIIR (n 1) para 34.

[74] *ICLRC comments* (n 57) para 28; US comments (n 54) 8–10; *2025 Working Group III report* (n 19) para 49.

[75] Draft MIIR (n 1) art 7(1)-(2).

[76] VCLT (n 67) arts 2(1)(d), 19–23; 'Guide to Practice on Reservations to Treaties' (2011) II(2) *Yearbook of the International Law Commission* 26 [ILC Guide to Practice on Reservations to Treaties].

[77] Eg, UNCITRAL Working Group III, 'Possible Reform of Investor–State Dispute Settlement (ISDS): Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes: Note by the Secretariat' (8 February 2024) UN Doc A/CN.9/WG.III/WP.239, Art. 39, which foresees the possibility of making reservations relating to the jurisdictional scope of the standing mechanism.

[78] Reservations are sometimes prohibited by IIAs. See, eg, ECT (n 35) art 46.

[79] ILC Guide to Practice on Reservations to Treaties (n 76) Guideline 1.2.

faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying the intention of the MIIR party as to the Notification's legal effect on Protocol Ω.[80]

Regardless of whether the mismatched Notifications would prevent the implementation of Protocol Ω or instead be viewed as reservations or—most likely—interpretative declarations, none of these possibilities would promote coherence in ISDS reform. Three solutions appear possible to avoid the problem of MIIR parties detailing how Protocol Ω would modify their IIA in conflicting ways: first, to *delete* Article 6(3) of the MIIR; secondly, to limit the possible content of Notifications based on an optional or mandatory *template*; or, thirdly, to include a provision for *binding joint interpretations*. A combination of the second and third solutions is likely most desirable.

First, the risk of mismatched Notifications would be avoided altogether if Article 6(3) were deleted from the MIIR, such that the parties would not be obliged to detail in their Notifications how Protocol Ω would modify each IIA. A benefit of this solution may be to decrease the administrative burden on MIIR parties when they make their Notifications.[81] The issue of how Protocol Ω would modify a given IIA would thus be referred to the professional judgement of a wider pool of treaty interpreters, including the legal advisers of investors and, in the last resort, arbitrators or members of a standing mechanism. However, this solution may not advance the goal of coherence in the implementation of ISDS reform under the MIIR, nor the emphasis on transparency reflected in the MIIR Secretariat's obligation to 'make publicly available' all Notifications.[82] Because each MIIR party is likely to form a view on how Protocol Ω would modify a given IIA before it accedes, the obligation to make that view transparent may be preferred. In any event, the deletion of Article 6(3) would not remove the risk of MIIR parties making unilateral interpretative declarations beyond the framework of the Protocol Opt-In Mechanism.

Secondly, the risk of mismatched Notifications may be reduced by limiting their possible content to the terms of an optional or mandatory template. Templates have been used to great effect in cognate regimes, such as the 'Model Clauses' for inclusion in IIAs developed by the International Centre for Settlement of Investment Disputes (ICSID) and the 'Template Reservations and Notifications' under the BEPS MLI.[83] Already the UNCITRAL Secretariat has prepared a 'sample' Notification, inviting the Working Group 'to consider whether such text should be provided in the body of the [MIIR] or in the Protocol.'[84] This sample addresses the obligation under Article 6(3) by restating, 'for greater certainty', the legal effect of the IIA Opt-In Mechanism, namely that an IIA is modified to include Protocol Ω such that its provisions apply to arbitral proceedings under the IIA.[85] If such 'boilerplate' restatements are all that is envisaged by Article 6(3), then including a template with optional or mandatory language under Protocol Ω may suffice to mitigate the risk of mismatched Notifications and to reduce the transaction costs of accession.[86]

However, the Working Group might wish to consider templates with more precise language, which States would be obliged to use for their notifications. This would involve a revision of Article 6(3) to direct States towards these templates. We consider that Article 6(3) could be amended to read: 'A Party shall detail how the Protocol(s) would modify the investment treaties listed in the notification, *using the template provided in Annex Z.*' As to the content of the Annex, we suggest that, if an IIA does not include provisions that address the same subject matter as Protocol Ω, a

[80] ibid. Guideline 1.3.
[81] See *'Scenario B'* section.
[82] Draft MIIR (n 1) art 6(6).
[83] 'ICSID Model Clauses' <https://icsid.worldbank.org/resources/content/model-clauses> accessed 5 June 2025; 'Template Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting' <www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-mli/beps-mli-position-papua-new-guinea.pdf> accessed 5 June 2025.
[84] Draft MIIR (n 1) para 39.
[85] ibid para 38.
[86] Lauge Poulsen and Michael Waibel, 'Boilerplate in International Economic Law' (2021) 115 AJIL Unbound 253.

party's notification shall be limited to the following language: 'Protocol Ω *shall supplement* the provisions of [IIA].' If an IIA includes provisions that address the same subject matter as Protocol Ω, the notification shall be limited to the language of the following two options: (1) 'Protocol Ω *shall supplement* Articles [x] to [y]/Chapter [z] of [IIA]'; and/or (2) 'Protocol Ω *shall prevail over* Articles [x] to [y]/Chapter [z] of [IIA].'[87]

Thirdly, the problem of mismatched Notifications may be mitigated by adopting a recommendation of the European Union (EU) and its Members States: to include a mechanism in the MIIR for binding joint interpretations.[88] In general, any parties to the MIIR or an IIA would be free to issue a joint interpretative declaration, though with variable legal effect.[89] The 'joint formulation' of an interpretative declaration by *some* parties to a *multilateral* IIA would not affect the unilateral nature of that declaration.[90] However, a joint declaration by *both* parties to a *bilateral* IIA would transform that declaration into a collateral agreement, which may be deemed to constitute an 'authentic interpretation' of how Protocol Ω modifies the IIA.[91] In this way, the joint declaration would constitute a 'subsequent agreement' to the IIA that must be taken into account by treaty interpreters.[92] (Protocol Ω itself would constitute a 'successive treaty', discussed in Scenario E *infra*.) But it is unclear whether an authentic interpretation in the form of a joint declaration would be treated as conclusive, since the general rule of interpretation merely provides that subsequent agreements must be 'taken into account' together with context.[93]

It is therefore best for parties to provide expressly that their joint interpretation has conclusive effect, either in the original IIA or in their subsequent agreement.[94] Indeed, the EU and its Member States have recommended that the MIIR itself 'include a provision on joint interpretation that would create a structure in the multilateral instrument for binding interpretations', which could be 'optionally applied or utilized both by Parties to the [MIIR] that are parties to the relevant [IIA] but also other parties (whether Parties to the multilateral instrument or not).'[95]

[87] Accordingly, an example Notification of a MIIR party (State L) that chooses to list two of its IIAs (Σ and Λ) using the template language would be as follows: 'In accordance with Article 6 of the Convention, State L submits this notification with regard to Protocol Ω, to which the State has deposited its instrument of ratification on DD/MM/YYYY. List of investment treaties to which Protocol Ω applies and relevant modifications: (1) IIA Σ: Protocol Ω shall prevail over Articles [x] to [y] of IIA Σ. (2) IIA Λ: Protocol Ω shall supplement Chapter [z] of IIA Λ.'

[88] For the avoidance of doubt, the proposed mechanism in the MIIR for binding joint interpretations should not be conflated with the debate over Joint Statement Initiatives (JSIs) in international trade law: Jane Kelsey, 'The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO' (2022) 25 J Int'l Econ L 2. A closer analogy would be with the mechanism for authoritative interpretations under art IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154.

[89] David Gaukrodger, 'The Legal Framework Applicable to Joint Interpretive Agreements of Investment Treaties' OECD Working Papers on Int'l Inv, No 2016/01 (2016); Lucas Clover Alcolea, 'States as Masters of (Investment) Treaties: The Rise of Joint Interpretative Statements' (2023) 22 Chin J Int'l L 479.

[90] ILC Guide to Practice on Reservations to Treaties (n 76), Guideline 1.2.2.

[91] ibid. Guideline 1.2.8; 'Reservations to Treaties' (1999) II(2) *Yearbook of the International Law Commission* 89, 125–126.

[92] VCLT (n 67) art 31(3)(a).

[93] ibid art 31(3); 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (2018) II(2) *Yearbook of the International Law Commission* 23, 30–32; *Seda et al v Republic of Colombia*, ICSID Case No ARB/19/6, Award, para 694 (27 June 2024). cf Kasikili/Sedudu Island (*Botswana v Namibia*), Judgment, 1999 ICJ Rep 1045, para 49; *Bilcon of Delaware Inc et al v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability, paras 430–432 (17 March 2015). We note that the WTO Appellate Body treated subsequent agreements as mandatory, stating that they 'must be read into the treaty for the purposes of its interpretation'; WTO Appellate Body, *U.S.-Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (4 April 2012) para 269. To have this effect, the AB has stated that the agreement must bear 'specifically upon the interpretation of the treaty' at issue; see WTO Appellate Body, *EC-Bananas III (Article 21.5 – Ecuador II)*, WT/DS27/AB/RW2/ECU (26 November 2008) para 390. On the (ironic) ambiguity of 'authentic interpretation' in the work of the ILC: Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 200; Fuad Zarbiyev, 'A Quiet Revolution in the Making? The Changing State Authority in Treaty Interpretation' in Nico Krisch and Ezgi Yildiz (eds) *The Many Paths of Change in International Law* (OUP 2023) 291.

[94] For relevant arbitral and treaty practice, also addressing the distinction between interpretation and amendment: Panos Merkouris and Andreas Kulick, 'Article 31 of the VCLT: General Rule of Interpretation' in Andreas Kulick and Michael Waibel (eds), *General International Law in International Investment Law: A Commentary* (OUP 2024) 120, paras 34–51.

[95] 'Submission from the European Union and its Member States A/CN.9/WG.III/WP.246—Draft Multilateral Instrument on ISDS' (14 February 2025) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2025.02.14_submission_mi_joint_interpretation.pdf> accessed 5 June 2025, para 7. See further *2025 Working Group III report*, para 89; Paine (n 9).

Although the EU proposal does not address the risk of mismatched Notifications under Article 6(3) of the MIIR, its proposed mechanism for binding joint interpretations could be designated as the only permissible means of specifying or clarifying a MIIR party's understanding of the meaning or scope of Protocol Ω, to the exclusion of unilateral interpretative declarations in the form of a Notification or otherwise.[96]

The USA, on the other hand, has recommended that the IIA Opt-In Mechanism be amended to allow only for joint—not unilateral—Notifications by two or more parties to an IIA.[97] In a proposed amendment to Article 6(3), 'the notifying Parties shall describe in detail how the Protocol(s) applies to and/or affects the Parties' rights and obligations under the [IIAs] identified in the joint notification'.[98] Certainly, this requirement would abolish the risk of mismatched Notifications. However, other participants in WGIII have observed that such a requirement would 'run contrary to the aim of the [MIIR]', namely 'to provide a simple mechanism for its Parties to modify existing treaties by indicating the reforms that they wished to apply', and 'could pose practical difficulties and be burdensome as it would, in essence, require a renegotiation of existing treaties with multiple counterparts'.[99] We agree.

In summary, we believe that the best response to Scenario D is to combine the second and third solutions. Rather than deleting Article 6(3) of the MIIR, or requiring joint notifications, the MIIR may be amended to include: an optional or mandatory template for unilateral Notifications, limited to boilerplate restatements of the legal effect of the IIA Opt-In Mechanism; and a mechanism for binding joint interpretations, along the lines proposed by the EU, if the MIIR parties wish to specify or clarify the meaning or scope of Protocol Ω over and above the terms of the template. In designing the mechanism for binding joint interpretations, it would be important to address the question of whether a MIIR party is obliged to formulate a joint interpretation or whether participation is purely discretionary.[100]

Scenario E

The final scenario is where two MIIR parties accede to Protocol Ω, list the same IIA in their Notifications, and provide matching details under Article 6(3) as to how Protocol Ω would modify the IIA. But the IIA contains an incompatible rule, which may be later relied on by a third party—most likely a claimant investor—to challenge the implementation of Protocol Ω.

Under the law of treaties, Protocol Ω would most likely constitute a 'successive treaty' on the same subject matter as the existing IIA, such that the IIA would apply only to the extent that its provisions are compatible with Protocol Ω.[101] Article 7(2) of the MIIR reflects this general rule, which provides that the IIA is 'deemed to have been modified' by Protocol Ω once all parties have met the requirements of the IIA Opt-In Mechanism. While this scenario in principle is clear, a conflict may arise if the IIA contains a special rule of procedure regarding its amendment or modification, and those rules were not followed prior to the entry into force of Protocol Ω between the two MIIR Parties.[102] In a future dispute, a claimant investor may thus seek to avoid the ISDS reform implemented by Protocol Ω. However, if the IIA were merely bilateral, the MIIR itself might be

[96] However, some participants in Working Group III believe that 'any article on joint interpretation should not deprive the parties of [their general power to issue authoritative interpretations] nor oblige them to take part in the exercise': *2025 Working Group III report* (n 19) para 90.

[97] *US comments* (n 54) 8–10.

[98] ibid 9.

[99] *2025 Working Group III report* (n 19) para 40.

[100] *Ibid.*, para 41. cf *Republic of Ecuador v United States of America*, PCA Case No 2012-05, Award, paras 225–228 (29 September 2012).

[101] VCLT (n 67) art 30(3).

[102] See, eg, Bilateral Investment Treaty Between the Government of the Republic of India and the Government of the United Arab Emirates, art 38, 13 February 2024 (entered into force 31 August 2024).

treated as a successive treaty that takes priority over the original rule regarding amendment or modification.

Alternatively, the IIA may contain a special provision that attempts to bind parties' future treaty-making, such that the earlier IIA takes priority over successive treaties to the extent of any inconsistency.[103] Such a rule would conflict with Article 7(5) of the MIIR, which provides that Protocol Ω shall prevail in the event of any incompatibility with the IIA. A different rule of treaty law would seemingly apply to this conflict: a subsequent treaty shall terminate or suspend a prior treaty that relates to the same subject matter, either if that is the intention of the parties or if the provisions of the treaties are not capable of being applied at the same time.[104] To avoid the extreme consequence of wholesale termination or suspension of the IIA, it must be possible for the MIIR to expressly provide that any such conflict merely results in the suspension of the special rule on non-derogation.[105]

A solution to these possible conflicts would thus be to clarify in Article 7 of the MIIR that matching Notifications in respect of Protocol Ω are deemed to constitute a bilateral agreement to modify the IIA to the extent necessary to allow for implementation of Protocol Ω and, in the event of any incompatible clause regarding modification or non-derogation in the original IIA, that clause is suspended. This solution could also apply to multilateral IIAs to the extent that inter se modification is enabled by the MIIR, addressed in Scenario C above.

A final complication may arise where an IIA expressly provides that any modification is without prejudice to rights and obligations that arose before such modification.[106] The key question would be whether this rare type of survival or sunset clause applies only to arbitral *proceedings* that have already commenced—which is also affirmed by Article 7(6) of the MIIR—or to all *investments* made or to *breaches* alleged to have occurred before the amendment.[107] If one of the latter two interpretations is correct, then such clauses may impose a meaningful restriction on the ability of certain States to implement ISDS reform in respect of established investors.[108] However, we make no recommendation to address this complication in the MIIR itself, given the rarity of sunset clauses that apply to modification.[109] Rather, this complication may be resolved by the IIA parties in their Notifications of a binding joint interpretation.

CONCLUSION

We have mapped five possible scenarios of mismatched commitments under the MIIR, many of which would defeat its very purpose: to provide a coherent framework for ISDS reform. In particular, recent evidence from the implementation of the BEPS MLI suggests that the MIIR would be ineffective without a minimum floor of default or essential Protocols. However, our recommendations have also sought to maintain a high level of flexibility for States to choose which IIAs are modified by accession to Protocols, mainly by preserving the IIA Opt-In Mechanism.

First, the Protocol Opt-In Mechanism should not apply to a core package of essential Protocols, which all MIIR parties must accept without the possibility of derogation. Secondly, we recommend that the MIIR include a provision deeming two or more matching Notifications to have formed an inter se modification to a multilateral IIA. Thirdly, an optional or mandatory template Notification should be included in the MIIR to reduce the risk of conflicting descriptions of how

[103] See, eg, Free Trade Agreement Between the Republic of Korea and the Republic of Colombia, art 1.2(2), 21 February 2013 (entered into force 15 July 2016). For a multilateral example, see ECT (n 35) art 16.

[104] VCLT (n 67) art 59(1).

[105] By analogy to ibid, art 30(3).

[106] See, eg, Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments, art 11, 22 October 1998 (entered into force 17 June 1999).

[107] For more granular treatment of such 'critical dates', see Sean D. Murphy, 'Temporal Issues Relating to BIT Dispute Resolution' (2022) 37 ICSID Rev 51.

[108] August Reinisch and Sara Mansour Fallah, 'Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors' (2022) 37 ICSID Rev 101, 106.

[109] Gaukrodger (n 89) 12.

Protocol Ω would modify a listed IIA, in tandem with a mechanism for binding joint interpretations. Fourthly, the MIIR should clarify the legal effect of matching Notifications, specifically by providing that any incompatible clause regarding modification or non-derogation in the original IIA would be suspended by accession to Protocol Ω. Finally, the Advisory Centre should be designated under the MIIR to assist parties in preparing their Notifications as part of its technical assistance and capacity-building function.

Table 1. Possible solutions to five scenarios of mismatched MIIR commitments, with recommended solutions in bold.

Scenario	Solution 1	Solution 2	Solution 3	Relevant rules
A. *MIIR party (acceded to Protocol Ω) v MIIR party (not acceded to Protocol Ω)*	Default Protocols on accession to MIIR, *with* opt-out mechanism	**Essential Protocols on accession to MIIR,** without **an opt-out mechanism.**	–	BEPS MLI
B. *MIIR party (acceded to Protocol Ω, listed bilateral IIA) v MIIR party (acceded to Protocol Ω, unlisted bilateral IIA)*	All IIAs listed on accession to Protocol Ω, *with* an opt-out mechanism.	All IIAs listed on accession to Protocol Ω, *without* an opt-out mechanism.	**Advisory Centre to assist MIIR parties in preparing their Notifications.**	BEPS MLI
C. Scenario D: MIIR party (acceded to Protocol Ω, listed multilateral IIA) v MIIR party (acceded to Protocol Ω, listed multilateral IIA) v MIIR party (acceded to Protocol Ω, unlisted multilateral IIA)	**Insert provision deeming two or more matching Notifications to have formed an inter se modification to a multilateral IIA.**	As above.	–	VCLT, Articles 40(5)(b), 41
D. *Scenario E: MIIR party (Protocol Ω, listed IIA, modification detailed in Notification) v MIIR party (Protocol Ω, listed IIA, conflicting modification detailed in Notification)*	Delete Article 6(3) of the MIIR.	**Amend Article 6(3) to limit the content of Notifications to optional or mandatory language in an annexed template.**	**Insert a mechanism for binding joint interpretations.**	VCLT, Article 31(3)(a); ILC Guide to Practice on Reservations to Treaties
E. *Scenario F: MIIR party (Protocol Ω, listed IIA, modification detailed in Notification) v MIIR party (Protocol Ω, listed IIA, matching modification detailed in Notification) v claimant investor (incompatible IIA)*	**Insert a provision clarifying the effect of matching Notifications by providing that the incompatible clause in IIA is suspended by accession to Protocol Ω.**	–	–	VCLT, Articles 30(3), 59

Table 1 summarizes the five scenarios and possible solutions in light of treaty law. The solutions in bold are those reflecting our recommendations, which we believe would strike the best balance between coherence and flexibility in designing a multilateral framework for ISDS reform. However, if there is no political appetite to designate a core package of essential Protocols, then greater coherence may need to be achieved by requiring MIIR parties to list all their IIAs upon accession to Protocol Ω, with an opt-out mechanism, which would preserve the ability of parties to choose which IIAs are modified by Protocol Ω.

Regardless of whether our recommendations are adopted by delegates at WGIII, we consider that it is vital for the MIIR Secretariat (or another appropriate and well-resourced body) to maintain a 'Matching Database', as the OECD Secretariat does for the BEPS MLI, which would provide up-to-date information on the application of the MIIR and its Protocols to the vast network of existing IIAs.[110] Without such a service, the MIIR would run the risk of further complicating the network of instruments that States, investors, and other actors must navigate to determine the applicable rules of law.

Conflict of interest. None declared.

[110] *BEPS MLI Matching Database* (OECD, 2025) <www.oecd.org/en/data/tools/beps-mli-matching-database.html> accessed 5 June 2025.