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Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development[1]

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Abstract

Within the discussions at the United Nations Commission on International Trade Law, countries are working toward the creation of a multilateral instrument that could be crafted so as to reform investor-state dispute settlement (ISDS). Recognizing that initiative, and broader support for reform of international investment law, this paper proposes the creation of a Framework Convention on Investment and Sustainable Development (the "Framework Convention"). The Framework Convention would provide States a practical, efficient, and flexible mechanism to move beyond the current investor-protection centered system, and to allow countries and other stakeholders to address the challenges and advance the objectives of sustainable development by developing and implementing new approaches to the support and regulation of transnational investment.

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I. Introduction

There is growing tension between the international legal regime concerning foreign investment and the need to promote sustainable development. A network of more than 3000 international investment agreements (IIAs) provide foreign investors with expansive protections that can be enforced against host-State governments through a process of binding arbitration known as investor-state dispute settlement (ISDS). This system has been the subject of increasing criticism from States, intergovernmental organizations, and civil society groups. Key concerns are that ISDS provides foreign investors with rights but not corresponding duties, undermines the willingness and ability of States to exercise their rights and fulfill their duties to regulate in the public interest, exacerbates political and economic inequality, fails to meet its purported objectives, and imposes costs on societies that are not outweighed by demonstrated public benefits.

The United Nations Commission on International Trade Law (UNCITRAL) responded to this controversy in July 2017 by tasking its Working Group III (WGIII) with a "broad mandate" to explore potential reforms to ISDS.[2] Although this mandate has been interpreted to be limited to procedural reforms,[3] States and other stakeholders within and outside that process have indicated that there is a wider need to rethink IIAs and ensure that the investment regime supports sustainable development. Aligning international investment law with sustainable development will require addressing not only the adverse effects of investment treaties on the ability of States to regulate but also other issues presently outside the scope of the investment treaty system, including the desire of States to recruit investment that supports their sustainable development goals and to develop new approaches to the regulation of transnational investors and investment.

Thus, as WGIII advances its work and, in particular, considers instruments for implementing the procedural reforms it is contemplating, there is a key opportunity to ensure that such implementing instruments enable and support broader action. We propose that this be done through the creation of a Framework Convention on Investment and Sustainable Development ("Framework Convention"). This Framework Convention can be used as a place to "dock" WGIII's outputs on procedural ISDS reform, but can also transcend that work and facilitate the wider reorienting so widely urged.

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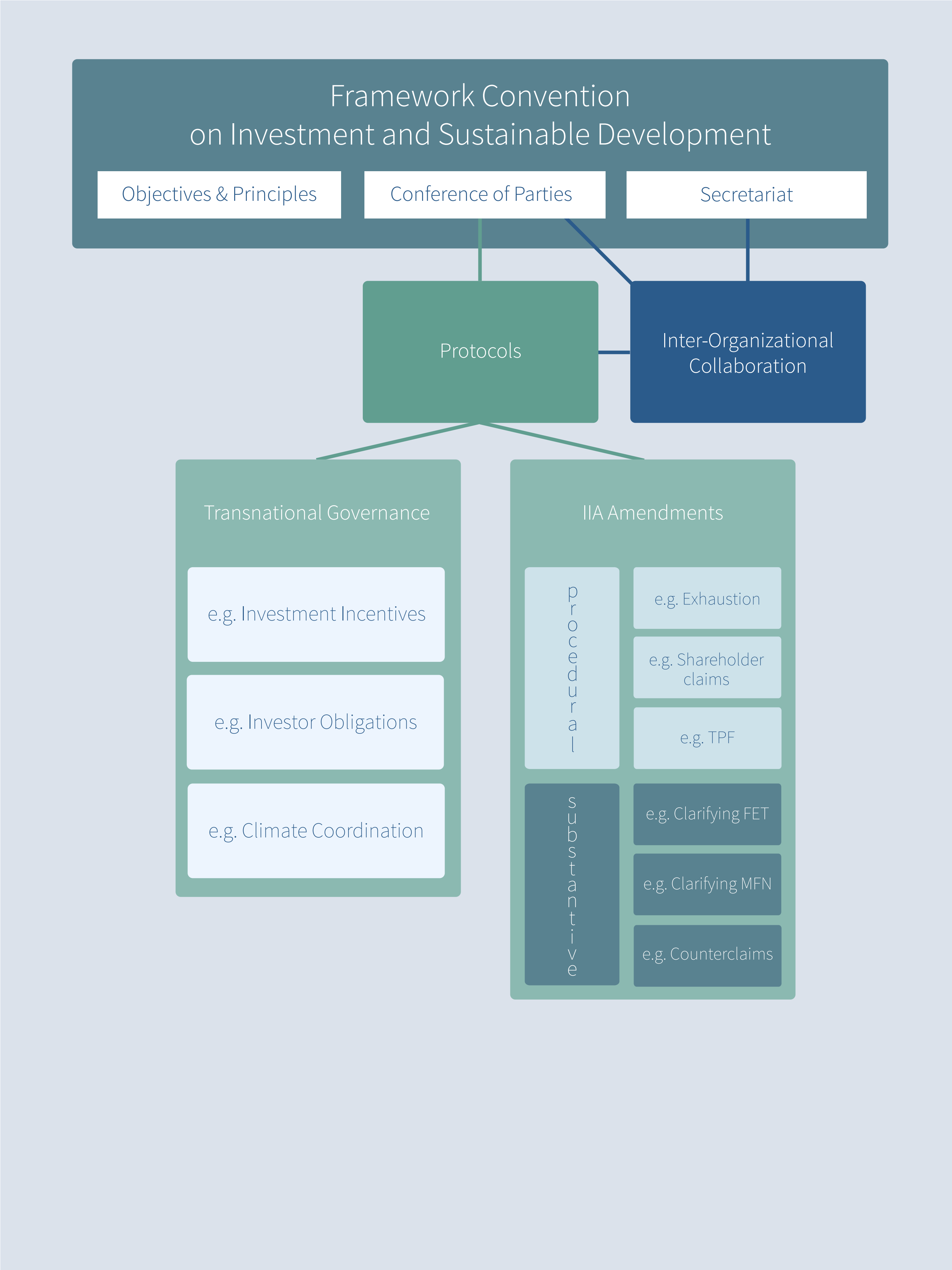
[2] *Report of the United Nations Commission on International Trade Law Fiftieth Session,* para. 264, A/72/17 (3-21 July 2017) [hereinafter "UNICTRAL Fiftieth Session Report"], https://undocs.org/A/72/17 ("The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement.")

[3] *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session*, para. 18, A/CN.9/935 (14 May 2018) ("During the deliberations, it was underlined that the mandate of the Working Group was understood to focus on the procedural aspects of ISDS rather than on the underlying investment protection standards, thereby ensuring that any proposed reform would be feasible and achievable.").

Several themes have emerged from the WGIII's deliberations that support the use of a Framework Convention to effect multilateral reform of the investment regime. First, States and other stakeholders have emphasized the importance of greater coherence between the investment treaty system and the goals of sustainable development. Second, States have emphasized that they see a need for a deep overhaul, for "systemic" reform, though they may differ on their views of the "structural" and "other" reforms best able to achieve that objective, or the precise scope of reforms desirable. Third, States have called for a multilateral approach to reform. Fourth, States have noted the need for flexibility with regard to the reforms they pursue and adopt.

A Framework Convention can respond to these priorities. It can advance a holistic approach to reform of international investment law that will permit States to both modify and move beyond the current system. As discussed in this paper, a Framework Convention could specify the intent of the Parties to establish a flexible, multilateral mechanism both for reform of existing IIAs and for broader work to align international investment law with the principles of sustainable development. It could establish an institutional structure that could include a Conference of Parties, a Secretariat, and a dispute settlement mechanism. Deliberations on investment policy under the Framework Convention could be informed by establishing avenues of cooperation with other organizations with relevant expertise, such as the United Nations Conference on Trade and Development (UNCTAD). Finally, it could incorporate a procedure for the proposal and adoption of protocols to implement specific reforms.

Section II of this paper briefly reviews the themes that have emerged in and beyond WGIII that indicate that there is support for bringing the investment system into alignment with sustainable development goals through a flexible, multilateral instrument. It also sets forth some broad areas in which a Framework Convention could expand investment policy coherence beyond the narrow silo of today's investment protection framing. Section III then provides an overview of how a Framework Convention could be structured to advance sustainable development objectives while providing flexibility with regard to the scope and timing of reforms, and the ability of each State to determine which reforms it adopts.


Framework Convention
on Investment and Sustainable Development
Objectives & Principles
Conference of Parties
Secretariat
Protocols
Inter-Organizational Collaboration
Transnational Governance
e.g. Investment Incentives
e.g. Investor Obligations
e.g. Climate Coordination
IIA Amendments
procedural
e.g. Exhaustion
e.g. Shareholder claims
e.g. TPF
substantive
e.g. Clarifying FET
e.g. Clarifying MFN
e.g. Counterclaims

II. Aligning International Investment Law with Sustainable Development

States and other participants in the WGIII deliberations have repeatedly raised the need to reconcile the investment regime with the principles of sustainable development.[4] For example, South Africa emphasized that any proposed reforms—

[4] For state submissions to UNCITRAL *see* Submission from South Africa, U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.176; Submission from Thailand, U.N. Doc. A/CN.9/WG.III/WP.147 (Apr. 11, 2018), https://undocs.org/en/A/CN.9/WG.III/WP.147; Submission from the Government of Morocco, U.N. Doc. A/CN.9/WG.III/WP.161 (4 March 2019), https://undocs.org/en/A/CN.9/WG.III/WP.161; Submission from the Government of Mali, U.N. Doc. A/CN.9/WG.III/WP.181 (17 September 2019), https://undocs.org/en/A/CN.9/WG.III/WP.181; Submission from the European Union and its Member States, U.N. Doc. A/CN.9/WG.III/WP. 159 (24 January. 2019), https://undocs.org/en/A/CN.9/WG.III/WP.159; Statement on Behalf of the Group of 77 and China by H.E. Mr. Mohamed Edrees, Permanent Representative of Egypt to the United Nations, at UNCITRAL Working Group III Meeting on the Investor-State Dispute Settlement Reform (New York 23 April 2018) ("The Group of 77 and China attach great importance to the improvement of the global investment environment in a way that encourages fairness and promotes investment policies that are in line with the three pillars of sustainable development) available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wgiii_-_35th_session_-_g77_statement.pdf; Statement of the Group of G77 and China Delivered by Ms. Veronica Gomes, Charge D'Affaires A.I. of the Permanent Mission of Ecuador at the UNCITRAL WGIII (Investor-State Dispute Settlement Reform 29 October – 2 November 2018) (29 October 2019) ("The Group of 77 and China attaches great importance to the improvement of the global investment environment in a way that encourages fairness and promotes investment policies that are in line with the three pillars of sustainable development") available at https://uncitral.un.org/sites/uncitral.un.org/files/g77wgiiifinal_291018.pdf; *see also* Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea, para. 48, U.N. Doc. A/CN.9/WG.III/WP.154 (Sept. 28, 2018), https://undocs.org/en/A/CN.9/WG.III/WP.154 (noting "the need for ISDS reforms to take into account other policy considerations such as sustainable development, human rights, and environment"). UN Special Procedures Mandate Holders also have written a letter to UNCITRAL Member states noting that international investment agreements and the ISDS mechanism have "often proved to be incompatible with international human rights law and the rule of law," and urging States "to place the SDGs and the full realization of human rights at the center of any discussions of reform of international economic governance." Letter from Surya Deva, Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Saad Alfarargi, Special Rapporteur on the right to development, David R. Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Juan Pablo Bohoslavsky, Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Victoria Lucia Tauli-Corpuz, Special Rapporteur on the rights of indigenous peoples; Livingstone Sewanyana, Independent Expert on the promotion of a democratic and equitable international order; and Léo Heller, Special Rapporteur on the human rights to safe drinking water and sanitation, to the Members of UNCITRAL Working Group III (7 March 2019) (hereinafter "UN Special Rapporteurs' Letter"). In the UNCITRAL context, various other observer organizations have also made written submissions that stress the importance of aligning investment law and dispute resolution with sustainable development objectives. Observer submissions are available at

must advance the United Nation's objectives most recently articulated in the Sustainable Development Goals (SDGs). Promoting and attracting investment should not be an end in itself, but a step towards realising the broader objectives of the SDGs and the human rights obligations, such as reducing poverty and hunger, empowerment of indigenous peoples, promoting decent work, and reversing environmental degradation and climate change.[5]

Similarly, Thailand has called for the WGIII's deliberations to be "holistic and balanced, taking into account the different priorities of each State including … the attainment of global objectives such as sustainable development."[6] Other state submissions have raised similar points.[7]

With respect to non-State observers and other experts, a group of UN Special Procedures Mandate holders, noting that international investment agreements and the ISDS mechanism have "often proved to be incompatible with international human rights law and the rule of law," have urged States participating in WGIII "to place the SDGs and the full realization of human rights at the center of any discussions of reform of international economic governance."[8] Other UNCITRAL observer organizations have likewise urged participating States to place sustainable development at the heart of reform efforts.[9]

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https://uncitral.un.org/en/library/online_resources/investor-state_dispute. Other U.N. entities have similarly recognized the tension between the current investment treaty system and sustainable development. *See generally* UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2015), https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

[5] Submission by South Africa, para. 16, *supra n.* 7.

[6] Submission by Thailand, para. 4, *supra n. 7.*

[7] Supra n. 7.

[8] UN Special Rapporteurs' Letter, *supra* n. 7. Several UN Special Procedures Mandate holders have long expressed fundamental concerns about the compatibility of ISDS with international human rights norms and obligations. For a summary of certain other engagement on this topic by UN mandate holders and entities *see* Jesse Coleman, Lise Johnson, Lisa Sachs, and Kanika Gupta, *International Investment Agreements, 2015-2016: A Review of Trends and New Approaches*, paras 2.15-2.16, in Yearbook on International Investment Law & Policy 2015-2016 (Oxford University Press). *See also* Jesse Coleman, Kaitlin Y. Cordes, and Lise Johnson, *Human Rights Law and the Investment Treaty Regime*, CCSI Working Paper 2019 (June 2019), p. 5, 12, 13 http://ccsi.columbia.edu/files/2019/06/Coleman-Cordes-and-Johnson-Human-Rights-Law-and-the-Investment-Treaty-Regime.pdf.

[9] *E.g.* Lisa Sachs, *ISDS Reform at UNCITRAL: Two Guiding Principles* (Oct. 16, 2019) *available at* http://ccsi.columbia.edu/2019/10/17/isds-reform-at-uncitral-two-guiding-principles/; Melanie Foley, Public Citizen, Global Trade Watch division, *Recommendations for UNCITRAL ISDS Discussions* (July 15, 2019) *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_publiccitizen.pdf; ClientEarth, *Potential Solutions for Phase 3: Aligning the Objectives of UNCITRAL Working Group III with States' International Obligations to Combat Climate Change*, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_clientearth.pdf; Transport & Environment, Center for International Environmental Law, ClientEarth, SOMO, *Reform Options for ISDS*, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_recs_and_justification_final.pdf; Nicolás M. Perrone, *The ISDS Reform Process:*

To respond to these calls, it is crucial to focus on three main channels through which IIAs and their dispute settlement mechanisms impact sustainable development. These are in the governance systems and norms they directly and indirectly establish and institutionalize, the types of investments they support, and the nature and extent of international cooperation they advance. Thus, in order to advance sustainable development, IIAs—and reform thereof—

should seek to:

(1) support sustainable development-advancing governance;
(2) encourage investments that promote, and do not undermine, sustainable development; and
(3) enable new approaches to international cooperation in the governance of transnational investors and investment.[10]

As is discussed below, a Framework Convention could be designed to implement each of these three aims.

1. Investment law can support sustainable development-advancing governance

International investment law affects whether and to what extent governance is consistent with sustainable development in at least two ways. First, it shapes governance itself through its rules and systems determining who can participate in disputes, how, and with what effect.[11] ISDS also indirectly affects governance through the signals that claims and decisions send to domestic governments about how they should procedurally and substantively treat foreign investors and balance foreign investors' concerns against the concerns of other stakeholders.[12] The impact of IIAs on domestic systems can result in the over-prioritization of the interests of

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The missing development agenda, South Centre Investment Policy Brief 19 (Marcy 2020) *available at* https://www.southcentre.int/investment-policy-brief-19-march-2020/.

[10] *See generally* Lise Johnson, Lisa Sachs, and Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, 58 COLUM. J. OF INT'L L. 58 (Sept. 2019), <https://static1.squarespace.com/static/5daf8b1ab45413657badbc03/t/5e3b8b4ef8c77558cb965e00/1580960590923/%28f%29+Johnson+et+al+%2858-1%29.pdf>. UNCTAD's Investment Policy Framework for Sustainable Development, which includes guidelines, policy options, and action menus for States, places sustainable development at the heart of investment policy-making. UNCTAD, *Investment Policy Framework for Sustainable Development* (2015).

[11] CCSI, IISD, IIED, *Third-Party Rights in Investor-State Dispute Settlement: Options for Reform*, Submission to UNCITRAL WGIII (July 2019) < http://ccsi.columbia.edu/files/2019/07/uncitral-submission-third-party-participation-en.pdf> (Spanish version available at < http://ccsi.columbia.edu/files/2019/07/uncitral-submission-third-party-funding-es.pdf>). For further discussion of and resources concerning this issue area, see also CCSI, *Access to Justice*, <http://ccsi.columbia.edu/work/projects/access-to-justice/>. *See also*

[12] Johnson et al., fn. 13 at 94.

foreign capital at the expense of other stakeholders, undermining domestic policy-making processes and outcomes, threatening key elements of sustainable development, and eroding faith in government institutions.[13]

In addition to how it affects the process of governance, ISDS can also implicate governance outcomes by impacting governments' willingness and abilities to implement and/or enforce policies to ensure that investments generate benefits, and not harms, in the host state.[14] In announcing the United Nation's 2030 Sustainable Development Goals in 2015, the UN General Assembly stressed the importance of protecting policy space and the primary role of governments in promoting sustainable development, noting that—

> [c]ohesive nationally owned sustainable development strategies…will be at the heart of our efforts. We reiterate that each country has primary responsibility for its own economic and social development and that the role of national policies and development strategies cannot be overemphasized.[15]

While international law inherently constrains a certain level of domestic policy space, it is important to consider when, why and how we wish international law to play such a role, and how it should be crafted to effectively restrain certain behaviors but not over-deter others. In this context, it is also crucial to consider how ISDS, which provides investors the power to bring cases and assert arguments on treaty interpretation and application (even when such arguments potentially depart from the views of the treaty parties)—might create different risks of over-deterrence than a state-to-state dispute settlement system.

The effect of investment treaty standards and ISDS on excessively chilling government policy space and regulatory action is at the core of critiques of the current system. Indeed, UNCITRAL's Working Group III has agreed that "regulatory chill" is a systemically important issue that must be addressed in the ISDS reform process.[16] Mali, for example, stressed this link between sustainable development and the regulatory authority of States, stating that it "supports comprehensive investor-State dispute settlement reform that *fosters sustainable development by, inter alia, safeguarding the right of States that receive investments to establish regulations aimed at promoting the development goals*."[17]

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[13] *Id.*

[14] *Id.*

[15] Resolution adopted by the General Assembly on 25 September 2015, Transforming our World: The 2030 Agenda for Sustainable Development, para. 63, U.N. Doc. A/RES/70/1 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

[16] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019), U.N. Doc. A/CN.9/970, paras 36-37, https://undocs.org/en/A/CN.9/970. *See* IIED, CCSI, IISD, *Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Issues* (15 July 2019) (setting forth how regulatory chill and other "cross-cutting issues" can guide reform options), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_crosscuttingissues__0.pdf.

[17] Submission from Mali, para. 1, *supra* n. 7.

With respect to policy-making outcomes, even if a claim or award does not cause the abandonment or modification of a regulatory measure, it can increase the costs to the government of choosing to implement or maintain it. These costs include political costs as a result of an ISDS threat or claim, as well as defense costs and any awards paid. Such costs can impact government decision-making then or in the future[18] and alter the cost-benefit allocation of regulatory outcomes.

A Framework Convention with an object and purpose of advancing sustainable development objectives could provide a forum and architecture through which States could convene to craft, implement, and enforce rules that result in desired policy-making incentives, practices, and outcomes. Framework Convention language could clearly indicate that the object and purpose of covered investment treaties is to advance sustainable development in the contracting States. Moreover, it can provide a mechanism through which particular reforms to the existing ISDS system could be docked, and a process for ensuring that those reforms are consistent with and advance—at domestic and international law levels—principles of equality, good governance, and cooperation reflected in SDGs 16 and 17.

In addition to providing a platform for implementation of procedural reforms to ISDS within the scope of WGIII's present mandate, such a convention could provide a mechanism capable of advancing substantive reforms (or reforms that straddle the line between process and substance). Indeed, as some States have highlighted in the context of WGIII that protecting policy space will require both substantive and procedural reforms to IIAs,[19] it would seem important and efficient to ensure that any convention designed to implement procedural reforms to ISDS could also examine and advance reform more broadly.

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[18] OECD Public Governance Reviews, Preventing Policy Capture: Integrity in public decision making (OECD 2017), at p. 38 (Entities can also "abuse justice to harass public officials, e.g. by initiating litigation aiming to show the illegality or administrative incompetence of a decision taken by the official, or levying accusations about some real or fictitious crime. Even if the public official eventually wins the case, significant costs and reputational damage would arise [internal citation omitted]. Faced with such threats, even honest public decision-makers may make biased policy choices.").

[19] *See* Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session, para. 40, U.N. Doc. A/CN.9/970 (April 9, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf ("It was …noted that any work by the Working Group would need to take into account developments in investment agreements including with regards to the substantive standards therein. It was emphasized that solutions to be developed by the Working Group should be flexible enough to adapt to these developments.*");* Comments by the Government of Indonesia, para. 2, U.N. Doc. A/CN.9/WG.III/WP.156 (Nov. 9 2018), https://undocs.org/en/A/CN.9/WG.III/WP.156 ("Indonesia is of the view that procedural law is inherently substantive and vice versa. Substantive and procedural provisions in the international investment agreements (IIAs) are intertwined in nature"). *See also* UNICTRAL Fiftieth Session Report, *supra* note 1, para. 257:

> It was mentioned [by UNCITRAL Members] that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States' right to regulate, fair and equitable treatment, expropriation and due process requirements.

2. Investment law could encourage and channel investments that promote, and do not undermine, sustainable development

The Organization for Economic Cooperation and Development (OECD) has recently observed that although foreign investment can make important contributions to sustainable development by providing host countries with financial resources and access to global markets, it also poses risks.[20] Foreign investment can undermine sustainable development in a number of ways, including by financing projects that dislocate communities or cause significant environmental harm.[21] Accordingly, States need the capacity to (1) recruit foreign investment that supports their sustainable development goals, and (2) better assess the potential impact of proposed foreign investment and potentially screen out, or better regulate, investment that threatens to undermine those goals.

On the first point, the structure and content of most international investment agreements are based on the hypotheses that (1) enforceable commitments by a state to provide investors internationally tethered standards of treatment would result in increased investment into that State, and (2) that such investment will benefit the host country. The first hypothesis is unproven after roughly a decade of inquiry into the topic; the second, as the OECD notes, can be, but is not necessarily valid.[22] Whether investment produces benefits for the host (or home) country depends on a range of factors, including the aims of the investor and the relevant industry and activity.[23]

However, IIAs need not, and indeed, should not, focus so narrowly on protection and ISDS. Rather than imposing blunt and broad disciplines on host-State behavior that largely focus on limiting government involvement in the market, IIAs could support purposeful engagement that helps ensure investment contributes to addressing, and not magnifying, the economic, social, and environmental challenges felt within and across countries. IIAs could, for instance, provide an institutional structure to help governments and stakeholders within them identify and

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[20] OECD, *FDI Qualities Indicators: Measuring the sustainable development impact of investmen*t, at 13 (2019), http://www.oecd.org/investment/FDI-Qualities-Indicators-Measuring-Sustainable-Development-Impacts.pdf.

[21] *See* Johnson *et al.*, *supra* n. 13, at 72-74.

[22] Joachim Pohl, *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence*, OECD Working Papers on International Investment, No. 2018/01 (2018), OECD Publishing, Paris, https://doi.org/10.1787/e5f85c3d-en. See also Lise Johnson, Lisa Sachs, Brooke Skartvedt Guven, and Jesse Coleman, *Costs and Benefits of Investment Treaties: Practical Considerations for States*, CCSI Policy Paper (March 2018) < http://ccsi.columbia.edu/files/2018/04/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf>; Lise Johnson, Brooke Skartvedt Guven, and Jesse Coleman, *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?*, CCSI Blog (Dec. 2017) < http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/>.

[23] Although treaties may and do impact how companies structure investments, there is no clear or consistent evidence that treaties impact investment decisions as to how or how much to invest into a country.

overcome specific barriers to investment, and in particular, to the subset of particularly desirable investments. For example, IIAs could include mechanisms and commitments on the part of both home and host States to promote investments of the kind and in sectors that are consistent with the IIA parties' development objectives, or include capacity building for investment promotion agencies, investment support such as provision of risk capital, and assistance in developing technical, managerial, or other professional expertise.[24]

States may decide to provide certain investment protections but to do so in a more nuanced and tailored way that targets desirable investment and excludes other types of investors and investments from eligibility. This would be similar to what is being done by other systems of government support for private market actors, such as government-sponsored political risk insurance providers and incentive or state aid schemes.[25] Definitions of desirable and undesirable investors and investments would not need to be hard-wired into treaties. Rather, and relevant to the second point about the need to support clearer articulation of what is, and what is not, desirable investment, a Framework Convention could establish "living" institutions and mechanisms that could give content to these categories and refine them over time. These inputs could be used to inform definitions of covered "investors" and "investments," access to risk insurance, or access to dispute settlement mechanisms.

Relatedly, a Framework Convention could be used to provide States with support on investment-related issues. An advisory center established under such a Convention could assist with relevant tasks such as conduct of environmental impact assessments on major and complex projects. This would enable governments and their stakeholders to better understand the advantages and disadvantages of proposed projects, which is especially crucial to the successful development and operation of large and long-term investments.

A Framework Convention could also provide a platform for increased inter-state and multi-stakeholder dialogue on other investment-related topics such as investment screening.

3. Investment law could enable new approaches to international cooperation in the governance of transnational investors and investment

In addition to playing a role in promoting good governance of international investment and in attracting sustainable development-driving investments, investment law could help to address the challenges of investment governance that are particularly in need of international cooperation and solutions. Some of these challenges are those that can be exacerbated by global corporate actors with complex transboundary corporate structures and mobile capital;

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[24] *Johnson et al., supra n.* 13, at 66-71.

[25] Political risk insurers, particularly government-sponsored entities, often incorporate relatively robust screens and systems that are designed to ensure that beneficiaries do not have deleterious social, environmental, and human rights impacts in host (or home) countries. *Johnson et al., supra n.* 13, at 75-78.

others arise from international collective action problems. Adapting the system of international investment law to meet the demands of sustainable development will require new approaches to international cooperation in both of those areas that go beyond the parameters of the current investment regime, which is focused almost exclusively on investor protection.[26]

On the first issue, cross-border activity by multinational corporations raises myriad governance challenges. Complex corporate structures and fragmented global supply chains make it difficult to fully understand who the companies are that are supplying goods and services, bidding for projects, and applying for government incentives. These complexities also make it difficult to draft, monitor, and enforce laws to effectively tax firms, or hold them liable for environmental, social, human rights, or other harms caused.[27] Accordingly, there are growing calls for new approaches to governance that will facilitate more effective regulation of transnational corporations, including both at the international level in the context of the ongoing intergovernmental negotiations to govern transnational corporations,[28] and domestically under human rights due diligence laws.[29]

While governments have, in some contexts, started to cooperate on taxation of MNEs to prevent the evasion and avoidance of taxes,[30] investment law could go further. Cooperation between States could be aimed at anticipating and monitoring the governance gaps that corporations exploit and could support cooperation to close these gaps or remedy their effects, including on a special and differential treatment basis. Such cooperation could include technical and financial support, information-sharing agreements, cooperation on monitoring and enforcement, and the establishment of funds and mechanisms to ensure appropriate remedies.

On the second issue, international collective action problems, one such challenge relates to costly and inefficient competitions for capital. Countries and jurisdictions within them at

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[26] *See generally* Nicolás M. Perrone, *The ISDS Reform Process: The Missing Development Agenda* South Centre, Investment Policy Brief 19 (May 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3584335.

[27] *See* Johnson et. al., *supra* note 5, at 37 ("Cross-border activity by [transnational corporations] raises important governance challenges. The tasks of drafting, monitoring, and enforcing laws regulating [their] conduct are more difficult as firms are structured across borders as atomized legal entities, each with carefully crafted holdings of assets and liabilities.")

[28] *See, e.g.,* UN Human Rights Council, *Open-Ended Intergovernmental Working Group on Transnational Corporations, Second Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (August 6, 2020), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

[29] *See* David Gaukrodger, *Business Responsibilities and Investment Treaties*, Consultation Paper by the OECD Secretariat (Jan. 15, 2020) (Section 4 discusses BHR/RBC developments in national and regional law and policy) http://www.oecd.org/daf/inv/investment-policy/Consultation-Paper-on-business-responsibilities-and-investment-treaties.pdf.

[30] *E.g.* OECD, *Inclusive Framework on Base Erosion and Profit Shifting* (https://www.oecd.org/tax/beps/about/#:~:text=The%20OECD%2FG20%20Inclusive%20Framework,needed%20to%20tackle%20tax%20avoidance.)

present often feel pressure to offer investment incentives to attract or keep investment, which can cause races to the bottom in tax or other policy areas, and reduce the benefits of an investment project for even the jurisdiction that "wins" the investment. While investment law may at present exacerbate such competitions for capital by making it easier for companies to move across borders, it could instead help to combat those races through, for example, supporting cooperative agreements to discipline the use of certain incentives, improving transparency around incentives schemes, and enabling citizens and businesses to help monitor and evaluate the use of these tools.[31]

Another collective action challenge relates to harm to the global commons and includes the challenges of climate change. Procedural (and even substantive) reform grafted onto a system that is, at its heart, focused on investor protection to the exclusion of all else is likely to be woefully inadequate to address such issues, which would benefit from international investment-related cooperation on topics ranging from disciplines on fossil fuel subsidies (including compensation for transition risks through ISDS) to transfers of renewable energy technologies.[32] While these are frequently considered to be outside of the narrow IIA realm, there is no reason that they need, or should, be. Pursuing broad, holistic, and coordinated approaches to international investment is arguably necessary to effectively addressing issues such as climate change that are inextricably linked to economic law and policy.

While some of the elements addressed above fall outside the scope of what is being considered within WGIII, to the extent WGIII will put into place an institutional mechanism or convention to reform ISDS, it is crucial to consider how such a mechanism could be structured to not only reform ISDS, but to serve as a vehicle that will facilitate other approaches to addressing multinational investors and investments in a holistic and sustainable way.

III. The Framework Convention Approach to Reform

[31] For example, the Treaty on the Functioning of the European Union contains a robust set of rules preventing (with certain exceptions) EU member states from offering incentives or "State Aid" to outbid other EU member states in their efforts to attract and retain investment. *See* Philippe Gugler, *Incentives in the European Union*, in RETHINKING INVESTMENT INCENTIVES: TRENDS AND POLICY OPTIONS 94, 113-14 (Ana Teresa Tavares-Lehmann et al. eds., 2016); Lise Johnson, *Regulation of Investment Incentives: Instruments at an International/Supranational Level*, in RETHINKING INVESTMENT INCENTIVES: TRENDS AND POLICY OPTIONS 264, 285-88, 294 (Ana Teresa Tavares-Lehmann et al. eds., 2016). Some treaties, such as the NAFTA, USMCA and others, permit private parties to file complaints alleging breach of some non-derogation/non-lowering of standards provisions. North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Sept. 9, 1993, 32 I.L.M. 1480, 1483; Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., ch. 27, arts. 23.11, 24.27, 24.28.

States involved in the WGIII negotiations are considering how to structure a mechanism to implement ISDS reforms at the multilateral level.[33] UNCTAD has noted that "a collective, multilateral approach is the best way to reform the IIA regime with a view to making it work for sustainable development."[34]

Several models for such a multilateral mechanism are being considered by WGIII. Frequently cited are the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention"), and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI").[35] Both conventions were used (or, in the case of the Mauritius Convention with only six parties, have the structure and potential to) reform large networks of treaties. The Mauritius Convention applies the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration to existing investment treaties,[36] and the MLI addresses tax avoidance by multinational enterprises by modifying bilateral tax treaties.[37]

Several commentators have suggested models that could assist the Working Group in designing a multilateral framework that could be used to effectively and efficiently implement

[33] *See* Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, para. 3, U.N. Doc. A/CN.9/935 (New York, 23–27 April 2018), https://undocs.org/en/A/CN.9/935 (participants in WGIII "underlined the importance of considering the topic of possible ISDS reform at a multilateral level.") *See also* Submission from the Government of Ecuador, para. 28, U.N. Doc. A/CN.9/WG.III/WP.175 (July 17, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.175 ("one possible solution … would be to adopt a multilateral international convention governing relations among States parties in all matters pertaining to investor-State arbitration"); Submission from the Government of Colombia*,* para. 8, U.N. Doc. A/CN.9/WG.III/WP.173 (June 14, 2019) ["Colombia Submission"], https://undocs.org/en/A/CN.9/WG.III/WP.173 (proposing implementation of ISDS reform through "a unique multilateral instrument common to all countries"); Submission from the Government of Morocco*,* Annex, para. 3, U.N. Doc. A/CN.9/WG.III/WP.161 (March 4, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.161 ("comprehensive reform of the ISDS regime at the multilateral level should mean that ISDS arrangements would no longer be necessary in bilateral investment treaties concluded by countries that have committed to multilateral reform of the regime, and it would result in harmonized standards and procedures at the international level.")

[34] UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT, at 72 (2015), https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

[35] UNCITRAL Secretariat, Possible reform of investor-State dispute settlement (ISDS)—Multilateral instrument on ISDS reform*,* U.N. Doc. A/CN.9/WG.III/WP.194 (Jan. 16, 2020). *See id.,* paras. 25-40. *See also* Colombia Submission, *supra* note 16 (proposing the MLI as a model for IIA reform); Submission from the European Union and its Member States, para. 36, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019) [hereinafter "Submission from the European Union"], https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1 (noting MLI and Mauritius Convention as models); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, at 4-5, U.N. Doc. A/CN.9/WG.III/WP.182 (Oct. 2, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.182 (Mauritius Convention and MLI as models).

[36] The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Oct. 18, 2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf.

[37] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, ((July 1, 2018),

https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

reforms. Anthea Roberts, Taylor St. John, and Wolfgang Alschner have set forth a flexible framework for ISDS reform based on certain guiding principles: (1) listening to UNCITRAL delegates, (2) equality of concerns, (3) some centralization and minimum standards, and (4) flexibility and adaptability. Their model incorporates dispute settlement, support (e.g. an advisory center) and other instruments, and places at its core a forum for States to meet and advance ongoing reforms.[38]

Stephan Schill and Geraldo Vidigal have studied various ways in which discussions around investment dispute settlement have coalesced, conceptualizing a Multilateral Institution for Dispute Settlement on Investment (MIDSI) that is based on a flexible architecture for administering a State's dispute-settlement preferences, including a multilateral investment court, investor-state arbitration, or inter-state arbitration.[39] The MIDSI would have dispute settlement functions, but also procedural (e.g., challenges to arbitrators or provisional measures) and quasi-legislative systemic (e.g., preliminary rulings or advisory opinions) functions.[40]

This Framework Convention proposal is intended to build on these other approaches. As described below, a Framework Convention approach offers complementary and additional ways in which certain elements of each of these proposals can be implemented or advanced to suit State objectives. It also, critically, moves beyond existing proposals thus far introduced into WGIII by situating ISDS and investment law reform within the broader frame of advancing sustainable development in a holistic, coherent, and efficient manner. In particular, a Framework Convention approach would provide States with a forum for ongoing discussions and work on governance of transnational investment and sustainable development and greater flexibility regarding the nature, scope and timing of the reforms that they adopt.

1. An Overview of a Framework Convention on Investment and Sustainable Development

Framework Conventions are a form of treaty that establishes the broad parameters for international governance on an issue, including goals and principles, broad commitments, and processes for future decision making. More specific commitments are implemented through

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[38] Anthea Roberts and Taylor St. John, *UNCITRAL and ISDS Reform: Visualising a Flexible Framework,* available at: https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/; UNCITRAL Webinar #1 on a Multilateral Instrument on ISDS Reform (23 April 2020) available at https://uncitral.un.org/en/multilateralinstrumentwebinar; UNCITRAL Webinar #2 on a Multilateral Instrument on ISDS Reform (14 May 2020) available at https://uncitral.un.org/en/multilateralinstrumentwebinar_20200514.

[39] Stephan W. Schill and Geraldo Vidigal, *Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519259; UNCITRAL Webinar #1 & UNCITRAL Webinar #2, *id.*

[40] *Id.*

subsequent protocols, creating an incremental approach to international lawmaking.[41] Prominent examples of framework conventions include the United Nations Framework Convention on Climate Change (UNFCCC)[42] and the World Health Organization Framework Convention on Tobacco Control (WHO FCTC).[43] A Framework Convention on Investment and Sustainable Development could serve as a multilateral reform instrument while providing States with maximum flexibility regarding scope of, participation in, and the timing of reforms.

Core elements of the Framework Convention should include the following:

- **A statement of objectives and principles** expressing the intent of the Parties to establish a flexible, multilateral mechanism both for reforming IIAs and for broader efforts to reconcile the international legal regime applicable to foreign investment with the principles of sustainable development;

- **Institutional arrangements,** including the establishment of a Conference of the Parties as the governing body of the Framework Convention and a forum for further negotiations, a Secretariat to serve as the Framework Convention's administrative body, arrangements for collaboration with other institutions and processes, and if deemed appropriate by the Parties, a dispute settlement mechanism for resolving any disputes arising under the Convention; and

- **Procedures for adopting subsequent protocols** that would contain more specific provisions (including but not limited to amendments to existing IIAs) to implement the objectives of the Framework Convention concerning aligning international investment law and sustainable development.

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[41] *See* Daniel Bodansky, *The Framework Convention/Protocol Approach*, at 15, WHO/NCD/TFI/99.1 (1999), https://apps.who.int/iris/handle/10665/65355:

> The so-called framework convention/protocol approach to international lawmaking allows States to proceed incrementally. First, the framework convention establishes the general norms and institutions of the regime—for example, its objective, principles, basic obligations, and institutions, as well as procedures regarding decision-making, finance, dispute settlement, and amendment. Then, the protocols build on the parent agreement through the elaboration of additional (or more specific) commitments and institutional arrangements.

See also Note by the Secretariat, Economic Commission for Europe, *Framework Convention Concept,* at 1 (2011), https://www.unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf

("a framework convention … establishes broader commitments for its parties and leaves the setting of specific targets to subsequent more detailed agreements…. In essence, a framework agreement serves as an umbrella documents which lays down the principles, objectives and the rules of governance of the treaty regime.")

[42] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, *available at* https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

[43] World Health Organization Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166, *available at* http://www.who.int/tobacco/framework/fctc_en.pdf?ua=1 .

As discussed below, this Framework Convention approach could both incorporate and move beyond the flexible mechanisms contained in the MLI and the Mauritius Convention and other proposals currently being considered by WGIII.

2. Advantages of the Framework Convention Approach

A Framework Convention on Investment and Sustainable Development would provide States with a process for exploring new approaches to integrating sustainable development into the global investment regime. And by addressing substantive commitments through optional protocols, a Framework Convention would provide maximum flexibility regarding which reforms they participate in as well as the timing of reforms.

Participants in the WGIII discussions have indicated that the process for implementing reforms should be flexible in at least three respects: first, with regard to *scope*, as discussed above; second, with regard to *participation*, permitting each country to determine which reforms it chooses to adopt;[44] and third, with regard to *timing,* permitting both the "early harvest" of reforms for which there is sufficient support, as well as the ability to consider and implement other reforms in the future.[45]

The MLI and the Mauritius Convention provide Parties with some flexibility regarding the extent of their participation through opt-in and opt-out mechanisms. Both conventions, however, contain certain minimum substantive reforms to which Parties must agree (although the MLI includes some flexibility in how parties satisfy this requirement).

States could similarly agree to a minimum core in a Framework Convention, including, for example, restrictions on third-party funding of ISDS claims or a requirement that investors

[44] *See*, *e.g.*, UNCITRAL Working Group III, Submission from the Governments of Chile, Israel, and Japan, , at 4, U.N. Doc. A/CN.9/WG.III/WP.163 (March 15, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.163 ("The Working Group should have maximum flexibility to develop a menu of relevant solutions… that Member States can choose to adopt, based on their specific needs and interests, including those of developing countries."); Submission from the Government of Costa Rica, para. 5, U.N. Doc. A/CN.9/WG.III/WP.164 (March 22, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.164 ("because not all Member States have the same concerns, the process should ensure enough flexibility so that they can choose to adopt the solutions and form that best suits their specific interests"). *See also* Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session, para. 2, U.N. Doc. A/CN.9/970 (April 9, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf ("[A]ny solutions devised would be designed…with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s)"). Some participants in WG III have suggested that, in addition to optional provisions, there should be a minimum core of commitments that must be accepted by all Parties to a multilateral instrument on investment. S*ee* UNCITRAL Secretariat, *Possible reform of investor-State dispute settlement (ISDS)—Multilateral instrument on ISDS reform,* A/CN.9/WG.III/WP.194, para. 8, 30 (Jan. 16, 2020), https://undocs.org/en/A/CN.9/WG.III/WP.194.

[45] *See, e.g.*, Submission from the Government of Costa Rica, paras. 3-4, U.N. Doc. A/CN.9/WG.III/WP.164 (March 22, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.164 ("Costa Rica …recognizes that the Working Group will require flexibility to develop and implement different solutions in the short, medium or long term. This means that Costa Rica accepts …. the possibility of 'early harvests', while not excluding future reform of a broader scope.")

exhaust domestic remedies prior to initiating an ISDS claim. A minimum core could also include language to guide arbitral tribunals in their interpretations of IIA provisions, potentially including clauses recognizing the right to regulate and clarifying that it is the goal of investment treaties to advance inclusive sustainable development. Developing countries, in particular, have started to include certain of these elements in newer model treaties, but may not have the negotiating leverage to include them in bilateral agreements. Developing States, however, may have an opportunity to include these provisions as part of the minimum core of obligations in a Framework Convention.

Beyond a potential minimum core and orienting principles, a Framework Convention approach could provide Parties with maximum flexibility regarding their specific commitments within a broader multilateral structure, an approach known as "variable geometry" that is used in many treaty regimes.[46] The Convention itself could set forth broad goals and objectives, and establish institutional arrangements and decision-making procedures. Specific reforms (beyond any minimum core) would be accomplished through optional protocols that Parties could participate in on an opt-in or opt-out basis. For protocols involving amendments to existing IIAs, Parties could control the scope of treaty coverage through an opt-in matching process similar to that used in the MLI (i.e. a match in commitments between both of the Parties to the IIA (or between two or more Parties to a multilateral IIA)), or an opt-out mechanism as used in the Mauritius Convention.

Of course, while crafting a Framework Convention States will need to carefully consider the balance between a more or less robust minimum core and the degree of flexibility they wish to introduce. Considerations of this balance implicate negotiating power, freedom for States to pursue their desired solutions, and complexity that can be created by greater flexibility. With respect to bargaining power, it will be important for, in particular, developing States, to consider whether, to what extent, and how, and in what direction, maximum flexibility impacts their bargaining power. If, for instance, a largely capital importing state A signs onto one protocol to amend its existing IIAs, but its capital exporting state treaty party B chooses not to, then the reforms embodied in that protocol would not apply to the treaty between A and B. In other words, will having a managed framework to advance certain visions be effective to achieve reform? Will it be more effective than a bi- or multi-lateral treaty context? Or other platforms? What lessons can be learned from the MLI and Mauritius Convention as to their effectiveness in achieving reforms sought by such treaties? With respect to complexity, for example, whether managing upgrades and amendments to treaties via a Framework Convention is more or less complex than the current ad hoc IIA system.[47]

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[46] *See* John Linarelli, *Redesigning Global Trade Institutions*, 18 Southwestern J. Int'l L. 75, 78 (2011)("The phrase 'variable geometry' has developed to refer to situations in which a multilateral set of agreements exists, under some form of overarching organizational structure, but not all countries adhere to the same agreements the organizational structure covers."). The multilateral World Trade Organization, for example, provides for variable geometry through several different mechanisms, including plurilateral agreements such as the Agreement on Government Procurement and the provisions of Article XXIV of the GATT regarding regional trade agreements.

[47] E.g. managing treaty-matching in the MLI context is extraordinarily complex. A database is used to organize treaty obligations in that context. https://www.oecd.org/tax/treaties/mli-matching-database.htm.

3. The Limits of the MLI and Mauritius Convention as Models

The MLI and the Mauritius Convention both provide States with some flexibility with regard to *participation, i.e.* the treaties that a Party chooses to cover and the reforms that apply. Under the MLI, Parties use an opt-in, positive-list matching approach to determine the bilateral tax treaties to which it applies, covering only those treaties that both Parties notify the depository of the Convention that they intend to cover.[48] The MLI contains mandatory provisions that apply except to the extent that a Party takes a specifically enumerated reservation,[49] as well as some optional and alternative provisions.[50]

The Mauritius Convention, in contrast, uses an "opt-out" matching approach to treaty coverage, applying the UNCITRAL Rules on Transparency to all IIAs between Parties,[51] unless a Party take a reservation excluding a treaty from coverage.[52] The Mauritius Convention is less flexible than the MLI with regard to the specific reforms that it implements in that it applies the UNCITRAL Rules on Transparency to all covered arbitrations without permitting reservations from specific provisions of the Rules.[53]

With regard to the timing of reforms, neither the MLI nor the Mauritius Convention provide flexibility. The distinction between these two models and a Framework Convention approach (as well as ideas set forth by Roberts, St. John and Alschner and Schill and Vidigal, which each recognize the need for an ongoing "legislative" function) is that the MLI and Mauritius

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[48] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, July 1, 2018, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf, art. 2:1(a).

[49] *See* MLI, art. 28 (listing permitted exceptions different articles). *See also* Nathalie Bravo, *The Mauritius Convention on Transparency and the Multilateral Tax Instrument: Models for the Modification of Treaties?*, 25 TRANSNAT'L CORPS. 85, 93 (2018).

[50] *See, e.g.*, MLI, art. 18 ("A Party may choose to apply this Part [V: Arbitration] with respect to its Covered Tax Agreements and shall notify the Depository accordingly. This Part shall apply in relation to two Contracting Jurisdictions with respect to a Covered Tax Agreement only where both Contracting Jurisdictions have made such a notification*"). See also* Bravo, *supra* note 55, at 93 (the MLI "provides for some opting-in mechanisms in the form of unilateral declarations and alternative provisions that apply only if the parties expressly opt in to such optional or alternative provisions.")

[51] The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention"), (Oct. 18, 2017), https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf, at art. 2:1 ("The UNCITRAL Rules on Transparency shall apply to any investor-State Arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the Respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a)").

[52] *Id.* art. 3:1(a).

[53] *See id.* art. 2:1 (stating that the Transparency Rules apply to all covered arbitrations between a Party and a claimant of a Party except where a permitted reservation has been taken); *id.* art 3 (specifying permitted reservations).

Convention were structured to implement reforms that had been previously agreed upon: the OECD Base Erosion and Profit Shifting Action Plan for the MLI,[54] and the UNICITRAL Rules on Transparency for the Mauritius Convention.[55] Neither convention is structured to encourage an ongoing process of deliberation among States and incremental and ongoing reform.

The MLI does not provide for a regular Conference of Parties[56] and contains only general language permitting the adoption of protocols without specifying the process.[57] The Mauritius Convention similarly does not call for a regular Conference of Parties and contains no provision for protocols.[58]

A Framework Convention, in contrast, could be structured to provide for regular meetings of the COP and the establishment of working groups to continue negotiations on additional reforms or work on other technical matters. Such parties could collaborate, where relevant, with existing international organizations, such as UNCTAD, that are advancing policy and legal work on sustainable investment norms and practices. To provide for subsets of likeminded States to move forward on a plurilateral basis, desired reforms could be implemented through a mechanism that would permit a groups of Parties to open protocols for accession.[59]

While the proposals advanced by Roberts, St. John, and Alschner, and Schill and Vidigal recognize the need for an ongoing and "legislative" function, through a conference of parties or otherwise, they stop short of exploring the broader range of investment policy and investment-related issues that could, and we argue should, be incorporated within any reform effort, such as those addressed in Part II above. In so doing, a Framework Convention would move beyond repairing identified problems with ISDS, and even beyond the narrow range of issues that

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[54] *See* OECD *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 -2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project,* at 3-4 (2015), *available at* http://dx.doi.org/10.1787/9789264241688-en.

[55] *See* Mauritius Convention*, supra* note 57 preamble. *See also* Bravo, *supra* note 24, at 87 (discussing adoption of the Mauritius Convention to apply the UNCITRAL Rules on Transparency to IIAs concluded before the Rules became effective and the development of the MLI to implement the measures identified in the OECD/G20 BEPS project).

[56] See MLI, art. 31 (providing for the convening of a Conference of Parties when supported by one-third of the Parties "for the purposes of taking any decisions or exercising any functions as may be required or appropriate under the provisions of this Convention").

[57] *See id*., art. 38 ("This Convention may be supplemented by one or more protocols.")

[58] The only reference to a Conference of Parties is in Article 10, which provides for the convening of a Conference of Parties for the purpose of amending the Convention. The request for a Conference must be supported by one third of the Parties (art. 10:1), and an amendment must be approved by consensus, or if consensus cannot be achieved, "as a last resort" may be approved by two thirds of the Parties voting (art. 10:2).

[59] Although international agreements—including protocols—are typically adopted and opened for accession by vote of two-thirds of the States involved in the negotiations, a Framework Convention could provide for a much lower threshold for the adoption of protocols. *See* Vienna Convention on the Law of Treaties, art. 9:2 ("The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.")

currently fall under the investment treaty-making regime. Rather, it could be a vehicle through which States could holistically support international investment for sustainable development.

IV. Conclusion

The limited procedural reforms that are currently under consideration in UNCITRAL's WGIII are unlikely to stem the criticisms of IIAs and ISDS. Many of these criticisms reflect an aspiration to make a fundamental shift from a system focused on investor protection to one aimed at ensuring international investment supports sustainable development. However, the efforts in WGIII to craft an instrument implementing narrower procedural reforms to ISDS could form the basis for negotiating a broader Framework Convention on Investment and Sustainable Development.

Given the aims of such a Framework Convention, we propose a structure that learns from but moves beyond the MLI and Mauritius Convention. Those treaties were designed to implement pre-negotiated reforms to treaty regimes, but did not aim, as a Framework Convention on Sustainable Convention would, to fundamentally change those regimes. Roberts, St. John, and Alschner, and Schill and Vidigal have made great advancements in conceptualizing broader institutional frameworks that could be used to negotiate and implement ongoing legislative work by States parties, but also appear to focus on a narrow framing of today's investment law and critiques thereof, as opposed to considering broader approaches to the governance of investors and investments, and the demands of sustainable development. Advancing sustainable investment policy-making and cooperation necessarily require moving beyond today's legal and policy silos and considering the wider spectrum of issues that States face in effective investment governance. A Framework Convention on Investment and Sustainable Development would provide States with a flexible and forward-looking process for negotiating and implementing reforms that would center sustainable development as the primary objective of international investment law.