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A Roadmap to Establish a Flexible Multilateral Instrument on International Investment Dispute Settlement: Learning From the MLI

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Against the background of the legitimacy crisis of traditional investment arbitration, states are actively pursuing the reform of investor-state dispute settlement (ISDS) through multilateral cooperation. They have thus put forward several options for ISDS reform, but no consensus has yet been reached on adopting which one option. To foster multilateral cooperation, a degree of flexibility may be essential to accommodate the diverse preferences of states. This article draws inspiration from the flexible design of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (referred to as "the MLI") and proposes a roadmap for the establishment of a flexible multilateral instrument on international investment dispute settlement. Such an instrument would enable states to achieve multilateral cooperation in ISDS reform while allowing them to pursue different reform options based on their preferences. Further, it may also serve as a promising model for future multilateral reform in international investment law.

Keywords: ISDS, Base Erosion and Profit Shifting (BEPS), flexibility, multilateral cooperation, roadmap

Introduction

Over the last few years, investor-state dispute settlement (ISDS) has become one of the most controversial issues in global economic governance. The debate of ISDS centers on the issue of the legitimacy crisis. It embodies the concerns about the lack of consistency and predictability of arbitral awards, the impartiality of arbitrators, and so on. In reaction to the legitimacy crisis, the United Nations Commission on International Trade Law (UNCITRAL) entrusted Working Group III with a broad mandate to work on the possible reform of ISDS.[1] Until the 48th Session of UNCITRAL Working Group III, states have reached a consensus on the necessity to reform ISDS, while they show different preferences about how to reform ISDS. Anthea Roberts (2018) has divided existing reform preferences of states into three camps: incrementalists, systemic reformers, and paradigm shifters.[2]

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[1] UNCITRAL Working Group III, Report of Working Group III (Investor-State Settlement Reform) on the work of its 34th Session—Part I (A/CN.9/930/Rev.1), 2017, at 2.

[2] Incrementalists favor retaining investor-state arbitration but redressing some particular concerns through modest reforms, the typical state of whom is the United States; systemic reformers favor more systemic reforms, such as establishing a multilateral investment court and appellate body to replace the existing system. Paradigm shifters favor abandoning the existing system and returning to domestic courts, state-to-state arbitration and other alternatives.

Among the three camps, it does not find much willingness to compromise from their submissions to Working Group III. The dilemma that ISDS reform currently faces is similar to the coordination game under which states have an interest in cooperation but struggle to coordinate their conflicting preferences. Such a dilemma is not unique to ISDS multilateral reform. Many multilateral treaties have encountered the problem of how to coordinate differences during the negotiating process (Magen, 2015). In the current discussion of ISDS reform, the most frequently mentioned multilateral treaties are the Mauritius Convention on Transparency (referred to as "Mauritius Convention") and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (referred to as "the MLI") (Alschner, 2019; Kaufmann-Kohler & Potesta, 2019; Schill, 2017).[3] Both of them coordinate different preferences of states through flexible treaty designs. The Mauritius Convention introduces opt-out mechanisms, allowing states to tailor their level of involvement by making reservations. For instance, signatories of the Convention can exclude a specific international investment agreement or the investment arbitration under non-UNCITRAL procedural rules from the application of the Mauritius Convention. The MLI adopts a more complicated flexible design than the Mauritius Convention. It provides varying degrees of flexibility for Base Erosion and Profit Shifting (BEPS) measures, including minimum standards, opt-out mechanisms, and opt-in mechanisms. Until now, the flexible design of the Mauritius Convention has been considered to be applied to international investment dispute settlement by many states and scholars (Kaufmann-Kohler & Potesta, 2019; Schill, 2017).[4] While the establishment of an MLI for International investment dispute settlement has not received much attention due to the complicated design and arguable effects of the MLI. Of the few literatures on the application of the MLI to ISDS reform, Wolfgang Alschner's research relating to applying the MLI to ISDS reform is the most influential. He compared the international investment regime and tax regime. He found that the two regimes have many similarities, such as common policy goals, common historical foundations, and common bilateral governance structure, as a result of which he concluded that the MLI would be an attractive model for ISDS reform to learn from (Alschner, 2019, pp. 18-30). Moreover, Alschner analyzed the MLI in terms of mechanics, scope, and design and put forward a preliminary assumption of an MLI on investment (Alschner, 2019, pp. 34-41).[5] It cannot be denied that Alschner's research is comprehensive, but unfortunately, he did not further flesh out the exact contours of the multilateral instrument on investment.

This article does not discuss the flexible design of the Mauritius Convention but only focuses on how to apply the flexible design of the MLI to ISDS reform. Based on the research of Alschner, it will further specify the flexible design of the multilateral instrument on investment (referred to as "the MI"), so as to bring some inspiration for the coordination of different preferences in multilateral cooperation on international investment dispute settlement. Accordingly, Part II of this article first analyzes the flexible design of the MLI and its implications. Part III focuses on the application of the MLI flexible design to the MI. It conducts a quantitative text analysis on the degree of states' consensus on each ISDS reform option to determine the level of flexibility

[3] UNCITRAL Working Group III, Multilateral Instrument on ISDS Reform (A/CN.9/WG.III/WP.194, Session 39), 2020; UNITRAL Working Group III, Submission From the Government of Colombia (A/CN.9/WG.III/WP.173), 2019, Para. 29.
[4] UNCITRAL Working Group III, Submission From the Governments From Chile Israel and Japan (A/CN.9/WG.III/WP.163), 2019.
[5] The mechanism of the MLI is to modify the bilateral treaty network through a multilateral instrument. The scope of the MLI is the existing and outdated tax agreements. The flexible design of the MLI includes minimum standards, opt-out mechanisms, and opt-in mechanisms.

of these reform options in the MI. Based on the results of the empirical study, this part clarifies the contours of the flexible MI. Part VI further discusses whether to learn from the MLI to impose restrictions on the flexibility in the MI and responds to some concerns about applying the MLI to ISDS. Part V summarizes all the work on the potential flexible MI and explains its inspiration for future ISDS reform.

The Flexible Design of the MLI

In October 2015, the Organization for Economic Co-operation and Development (OECD)/G20 along with developing countries released the BEPS package, including 15 action plans, as a response to mounted tax avoidance in corporations (OECD, 2024a). To swiftly implement treaty-related BEPS measures (under BEPS Actions 2, 6, 7, and 14) on a global basis, the 15th BEPS Action focused on the development of a multilateral instrument to update the tax treaty network.[6] After a long-run negotiation process, the multilateral instrument was concluded on 24 November 2016 and entered into force on 1 July 2018. To date, the MLI has already covered more than 100 countries and jurisdictions (OECD, 2024b). The MLI is a stand-alone legal instrument that exists independently of the tax network. It would only modify the tax agreements, rather than replace them. The MLI is also an opt-in instrument that only applies to tax agreements which the signatories explicitly agree to include, called "covered tax agreements (CTAs)". The consent of states will be given in the form of notification to the Secretary-General of the OECD, the treaty's depositary (Avi-Yonah & Xu, 2018).[7] In addition, what the most impressive is the three-level flexible design of the MLI, including minimum standards, opt-out mechanisms, and opt-in mechanisms. Such design corresponds to the classification of BEPS measures, namely minimum standards, reinforced international standards, and best practices.[8] These measures differ in the degree of common willingness of states to apply them. Specifically, minimum standards under BEPS Actions are mandatory measures that have achieved agreement from all participating states.[9] Reinforced international standards are in the form of a set of agreed guidance which reflects the common understanding and interpretation of provisions under the OECD and UN model tax convention.[10] In other words, participating states have a certain level of consensus on reinforced international standards, but they are not strong enough like minimum standards to require all states to follow. Best practices also take the form of guidance, which intends to solve specific problems about BEPS, and interested states are encouraged to adopt them.[11] Accordingly, they reflect less consensus among states. When states have divergence during the process of negotiating a multilateral agreement, flexibility may be considered to be used as a tool to attract states' participation and achieve multilateral cooperation, as it can permit states to tailor the agreement according to their various preferences (Helfer, 2005; Rosendorff & Milner, 2001; Koremenos, 2005; Helfer, 2006; Swaine, 2006).[12] Given the different degrees of divergence among states

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[6] OECD, Explanatory Statement to the Multilateral Tax Instrument (2016), Para. 14.
[7] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 3(6).
[8] Minimum standards include BEPS Actions 5, 6, 13, and 14; Reinforced international standards include BEPS Actions 7, 8, 9, and 10; Best practices include BEPS Actions 2, 3, 4, and 12.
[9] OECD, OECD/G20 Inclusive Framework on BEPS Progress Report, 1, 5 (July 2017-June 2018).
[10] *Supra* Note 6, at 7.
[11] *Id.* at 8.
[12] Flexibility plays a different role in treaty commitment and treaty compliance. Most current literature focuses on the role of flexibility as a risk management tool in treaty compliance. However, relatively less literature pays attention to the function of flexibility in treaty commitment to promote the universality of members of treaties.

on BEPS measures, the MLI also adopts the corresponding design, including minimum standards (no flexibility), opt-out mechanisms (low level of flexibility), and opt-in mechanisms (high level of flexibility). However, extensive flexibility may threaten the integrity of treaties (Belinda, 1991). Therefore, the drafters also limit flexibility by different means to ensure the harmonious operation of the MLI. This part then analyzes in detail how the MLI provides flexibility with constraints and what the implications of the flexible design.

Minimum Standards: No Flexibility

The term "minimum standards" is explicitly referred to both in the BEPS project and the MLI, but the legal effects of these minimum standards are different. In the BEPS project, there are four minimum standards that countries have agreed to implement.[13] They represent a common political commitment from the G20 and OECD member states to the implementation of minimum standards. From a legal perspective, these minimum standards are not legally binding, which should be classified as soft law (OECD, 2024c).[14] With the establishment of the MLI, some tax treaty-related minimum standards are concluded into four articles under the MLI. The four articles are related to the purpose of a covered tax agreement (Article 6), prevention of treaty abuse (Article 7), mutual agreement procedures (Article 16), and corresponding adjustments (Article 17). From the text of these articles, it cannot find the definition of the term "minimum standard". However, the Explanatory Statement to the MLI indicates that minimum standards are provisions that contracting parties must implement.[15] In other words, these minimum standards under the MLI are legally binding. They gain the legal effect through becoming obligations in a multilateral contract (the MLI). Thus, once states opt for the MLI, they will be obliged to implement these minimum standards.

Although minimum standards under the MLI are compulsory to implement, the MLI allows contracting parties to satisfy them in alternative ways. If existing provisions in the tax agreements have already met the minimum standard or parties intend to meet these standards, contracting parties are permitted to reserve minimum-standard articles.[16] For example, a contracting party can reserve the right not to adopt the Principal Purpose Test (PPT) prescribed by Article 7(1) of the MLI, provided that its CTAs already contain a PPT provision or parties intend to meet the minimum standard on treaty abuse by adopting a detailed Limitation on Benefits (LOB) provision in combination with either a PPT or an anti-conduit provision.[17] According to the minimum standard reservation clauses, contracting parties enjoy discretion to determine whether their tax agreements meet the minimum standards under the MLI, which may introduce the potential risk of abuse of these reservation clauses. For instance, states may utilize reservations to exclude some CTAs from the application of minimum standards. However, this potential problem could be addressed through the peer-review-based monitoring system developed by the Inclusive Framework on BEPS. This Inclusive Framework consists of 143 countries and jurisdictions, with the task of ensuring all contracting parties in a level playing field (OECD, 2024d).[18] In 2018, it began to publish the progress in respect of the peer reviews of the BEPS minimum standards in the annual

[13] BEPS Actions 5, 6, 13, and 14.

[14] The OECD indicates that all BEPS suggestions, including the minimum standards, are not legally binding, but it can be expected that they will be implemented by countries that are part of the consensus.

[15] *Supra* Note 6, at 1.

[16] *Id.* at 6.

[17] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 7(15).

[18] OECD, OECD/G20 Base Erosion and Profit Shifting Project—Explanatory Statement: 2015 Final Reports, Para. 14.

report.[19] It will inspect states' self-assessment and help ensure the implementation of minimum standards, as a result of which limiting the potential risk of abusing minimum standard reservations.

In sum, minimum standard reservations under the MLI do not exempt states from the implementation of minimum standards but only allow states to meet minimum standards in alternative approaches. In other words, there is no flexibility in the fulfilment of minimum standards under the MLI. They must be satisfied, regardless of adopting which approach. Moreover, the establishment of these minimum standards solves the issues in cases where inaction by some states would have created negative spillovers for other states and ensures that states that enter into the MLI would take action consistent with the goal of the MLI. Therefore, minimum standards play an important role in providing uniformity in the application of the MLI.

Opt-out Mechanisms: Low Level of Flexibility

Apart from minimum standards, contracting parties are also bound by many substantial provisions not reflecting minimum standards under the MLI. However, unlike minimum standards, the MLI offers more flexibility to the application of non-minimum standard provisions. It provides for a wide range of reservations in these provisions. Contracting parties can opt out of the whole or part of these provisions by making reservations. As for the legal effect of reservations, the MLI follows the approach of the Vienna Convention, providing that reservations are not subject to acceptance in principle unless a reservation itself explicitly provides otherwise.[20] Once a reservation is made, it has legal effect generally. Moreover, reservations under the MLI in principle apply symmetrically.[21] In other words, as long as a party to a tax agreement makes a reservation on a substantial provision of the MLI, its treaty partners also do not apply the relevant provision, even if they do not make a reservation. From the structure of reservations, it can be found that states' preferences are fully respected. Opt-out mechanisms give them flexibility to tailor the application of the MLI according to their preferences. However, broad flexibility may be detrimental to treaty integrity, uniformity, and consistency among contracting parties (Swaine, 2006, p. 330). Accordingly, to ensure the harmonious application of the MLI, the drafters impose restrictions on reservations in three ways.

First, the MLI adopts an exhaustive list of reservations. Article 28 of the MLI sets out all authorized reservations concerning the specific treaty provisions allowing for the opting-out and expressly provides no other reservations permitted.[22] In other words, the impermissible reservations are invalid, regardless of whether other parties accept the reservations. This approach would prevent parties from making undesirable reservations on essential provisions, thereby restricting the possible deviation from the MLI. Moreover, Article 28 also provides procedures and requirements for permitted reservations, including the time, notification, withdrawal, and replacement of reservations.[23] It can be said that this article provides all matters relating to reservations in detail. Such sophisticated design reflects that the drafters of the MLI intend to preserve certainty on reservations.

[19] See OECD/G20 Inclusive Framework on BEPS: Progress Report July 2017-June 2018, Part 2: the progress in respect of the peer reviews of the BEPS minimum standards, https://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-june-2017-july-2018.htm.

[20] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(1). But the arbitration reservations in Part VI are subject to acceptance. See Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(2); Vienna Convention on the Law of Treaties (1969), Art. 20.

[21] *Supra* Note 6, at 67.

[22] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(1), (2).

[23] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(3), (4), (5).

Second, reservations made by a party apply to all its CTAs generally. In other words, reservations to individual tax agreements are not allowed. Parties must consider their tax policy, rather than their particular interests vis-à-vis other parties to a CTA, when they make reservations (Kaufmann-Kohler & Potesta, 2019, p. 94). Accordingly, even if the MLI sets a wide range of reservations, they may not lead to new disparities regarding BEPS practices. The creation of an international tax playing field would also avoid the problem of treaty shopping. Nevertheless, the MLI also provides for exceptions allowing the application of reservation to one or more identified CTAs. These exceptions concern CTAs with a set of objectively defined characteristics, which intend to respect the specific provisions between parties.[24] For instance, the substantive MLI provision can be reserved for the identified CTAs that already contain such provision targeting hybrid mismatches.[25]

Third, the MLI does not permit parties to make broader or late reservations after they submit the final list of reservations. In the MLI, contracting parties must make reservations at the time of signature or when depositing the instrument of ratification, acceptance, and approval.[26] If reservations are not made at the time of signature, parties have the possibility to submit a provisional list of expected reservations to the depositary at that time.[27] Reservations or the provisional list of expected reservations can be amended before confirming the final list of reservations at the time of depositing the instrument of ratification, acceptance, or approval.[28] However, after the time of ratification, acceptance, or approval, reservations would come into effect and parties cannot amend them at will. They can only withdraw or replace a reservation with a narrower reservation through a notification addressed to the depositary, but cannot expand the scope of a reservation.[29] Once parties to a CTA all withdraw a reservation, the relevant MLI provision will apply to the underlying tax agreement. In other words, the obligations under the MLI can only be tightened by contracting parties, rather than be relaxed. Over the long term, this system would increase the integrity of the MLI provisions and further enhance the underlying goals of the BEPS project. In addition, late reservations are only allowed in few cases. Late reservation means a reservation made after the permitted time under the MLI. In the Guidelines of the International Law Commission, late reservations are valid if no other contracting party objects.[30] However, the MLI allows a late reservation only if it constitutes a new reservation, which aims to ensure certainty on the application of the MLI.[31] The reason lies in the fact that allowing 135 jurisdictions to make late reservations must create chaos and minimize the scope of application of the MLI, thereby undermining the treaty objective of targeting BEPS. Thus, the restriction on late reservations is necessary to ensure the harmonious operation of the MLI.

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[24] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(8).

[25] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 3(5)(b); see also Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 10(5)(c). This provision targets anti-abuse of permanent establishment situated in third jurisdictions.

[26] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(5).

[27] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(7).

[28] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(6). But if a signatory explicitly specifies that the list of reservations it makes at the time of signature is to be considered definitive, no confirmation of the reservations is required upon deposit of the instrument of ratification, acceptance, or approval.

[29] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 28(9).

[30] Guide to Practice on Reservations to Treaties (United Nations Publication, Sales No. E.10.V.8) (2011), Paras. 2.3.1 and 2.3.2.

[31] New reservations can only be made if an agreement added to a party's list of covered tax agreements is the first to fall within the scope of a reservation listed in Article 28(8) or if a newly added agreement is the first inclusion in the list of a tax agreement entered into by or on behalf of a jurisdiction or territory the international relations of which the party is responsible. See Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 29(5).

In short, opt-out mechanisms provide states flexibility to exempt from some obligations in the MLI according to their preferences. Meanwhile, those restrictions on opt-out mechanisms adopted by the MLI would reduce the potential for contracting parties to abuse flexibility and promote the objective of the MLI. About opt-out mechanisms, the MLI achieves a balance between flexibility and harmonization to some extent. However, such a design makes reservation rules more complicated. Contracting parties to the MLI would need to read carefully to fully comprehend and then assess their reservation options. For example, they would have to check all the specific provisions of CTAs to consider whether to fully reserve an article or whether existing provisions meet the specific requirements in reservation rules.

Opt-in Mechanisms: High Level of Flexibility

Opt-in mechanisms refer to provisions that would not automatically apply to contracting parties in the absence of explicit acceptance from them (Kaufmann-Kohler & Potesta, 2019, p. 68). This is to say, opt-in clauses are not mandatory for contracting parties to adopt. From a legal perspective, these clauses are soft law before parties opt-in, which means a higher level of flexibility in comparison with hard law, such as minimum standards and opt-out clauses. In the MLI, the opt-in mechanisms are in the form of opt-in and alternative provisions.

Opt-in provisions under the MLI can be divided into two categories, including optional provisions attached to other mandatory provisions and an entirely optional part that is self-standing and includes a set of provisions. Firstly, the MLI introduces many optional provisions as a supplement to other mandatory provisions, so as to extend the application range of a respective provision. For example, Article 6(3) of the MLI provides an optional preamble text in addition to Article 6(1).[32] Contracting parties can choose to add a sentence referring to a desire to develop an economic relationship or to enhance cooperation in tax matters.[33] Secondly, the MLI also contains an entirely optional part that is self-standing and includes a set of provisions. One example is Article 18 of the MLI, which allows parties to choose to apply Part VI of the MLI on arbitration. The optional Part VI is designed to introduce provisions on mandatory binding arbitration when parties do not reach a mutual agreement within a certain period to adopt mandatory binding arbitration.[34] Thus, it actually offers the possibility for parties to make further commitments in pursuit of treaty objectives.

Unlike the opt-in provisions, alternative provisions are introduced as multiple ways to address one of the problems under the MLI. Depending on whether there is a default rule, alternative provisions under the MLI can also be classified into two types (Miladinovic & Rust, 2018). One mechanism is alternative provisions with a default rule. In one article of the MLI, the default rule is generally mandatory to contracting parties, unless they make reservations on it.[35] But meanwhile the MLI also offers some alternative provisions that may be chosen as substitutive solutions to the default rule.[36] Accordingly, if parties explicitly opt for one of the alternative provisions, the default rule does not apply, but the chosen alternative provision applies. If none of the alternatives

[32] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 6.
[33] OECD, *supra* Note 6, at 21.
[34] OECD, *supra* Note 6, at 7. The optional part was established on the basis of BEPS Action 14. See OECD, Making Dispute Resolution Mechanisms More Effective—Action 14: 2015 Final Report (2015).
[35] OECD, *supra* Note 6, at 22-30.
[36] See e.g. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 9.

is opted for or the parties do not react, the default rule will still apply. Another mechanism is alternative provisions without a default rule. This kind of alternative provision is characterized by two or more alternatives in one article of the MLI. For instance, Article 13 of the MLI contains two options to tackle the artificial avoidance of permanent establishment status through specific activity exemptions, which allows parties to explicitly choose to apply one of these provisions or apply neither provision.[37] In other words, if parties do not explicitly choose one of these provisions, none of the opt-in provisions or any default rules apply. Through the two kinds of alternative provisions, parties have the possibility to make further commitments according to their preferences, thereby reaching the goal of the MLI in multiple ways.

The notification of options under the MLI is the same as the notification of reservations.[38] Contracting parties also need to notify a list of their choice to depositary at the time of signature or when depositing the instrument of ratification, acceptance, or approval. The notification of options only means that a contracting party agrees to the chosen provisions to be applied to all its CTAs. When all parties to a CTA opt for the same provision, the relative provision will apply to the specific tax agreement. Compared with opt-out mechanisms, the constraints on opt-in mechanisms are unclear. No provision of the MLI explicitly stipulates the withdrawal or replacement of an option and additional options after the MLI concludes. The absence of relative provisions is an oversight of the MLI, which may reduce the certainty of the operation of opt-in mechanisms. In short, the opt-in mechanisms give parties a higher level of flexibility in comparison to minimum standards and opt-out mechanisms, which allows parties not to commit to all anti-BEPS measures when participating in the MLI, but meanwhile offers the possibility for them to make further commitments. Therefore, opt-in mechanisms also have a positive effect on ensuring the universality of parties in the MLI.

To sum up, through opt-out mechanisms and opt-in mechanisms, the MLI "blocks" coalitions of states who have the same policy choice, and promote the universality of the parties. Minimum standards and restrictions on reservation clauses prevent the abuse of flexibility and enhance harmonization. To some extent, the MLI has achieved the balance between flexibility and harmonization. However, such flexible design may lead to increased rule complexity and legal uncertainty (Kleist, 2018). Contracting parties would have to read the existing tax treaty, the OECD Model Tax Convention, the MLI Explanatory Statement, and the MLI. These extensive, arcane, and interrelated regulations would be a challenge for parties to interpret and apply. Moreover, the flexible design allows for a large number of combinations of reservations and options. Every contracting party also needs to understand other parties' choices and then match their own choice to determine whether a provision applies to the specific CTA, which would further enhance the complexity of the application of the MLI. The rule complexity of the MLI may further lead to the problem of legal uncertainty. If tax authorities had a poor understanding of the legislation, it would affect taxpayers to make a reasonably certain prediction of how the tax authority will decide specific legal matters. To reduce the complexity, the OECD established an MLI matching database to manage states' choices and matching results. The utilization of technology may help to alleviate the problem of rule complexity to some extent, but the problems of rule complexity and legal uncertainty are undeniably the negative effects of the flexible design of the MLI.

[37] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 13.
[38] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 29.

The MLI Flexible Design in International Investment Dispute Settlement

Through adopting a flexible design with constraints, the MLI enables the coordination of different preferences in multilateral cooperation on anti-BEPS. Given that there are similar structural challenges between tax and investment law reform, the MLI experience provides an attractive template for multilateral reform on international investment dispute settlement to learn from (Alschner, 2019, p. 64). In form, it can be considered to establish an opt-in multilateral instrument independent of international investment agreements (IIAs), so as to swiftly realize the modification of the investment treaty network. The MI would also only apply to IIAs that states agree to include, called “covered IIAs”. The Secretariat of UNCITRAL could also act as the secretariat of the MLI to manage covered IIAs and collect notifications from states. The objective of the MI would be to address states’ concerns about ISDS. In terms of the design of the MI, it can also attempt to adopt the three-level flexible design of the MLI to coordinate conflicting ISDS reform options. At present, ISDS reform issues discussed in UNCITRAL Working Group III can be summarized into 13 ISDS reform options and further divided into three blocks, namely support, dispute settlement, and procedural rules.[39] If the MLI flexible design was adopted in the MI, it would be necessary to determine the degree of flexibility for each reform option.

As mentioned in the previous section, the MLI designs three levels of flexibility as a response to different levels of divergence among states on BEPS measures. The greater the differences among states on BEPS measures, the more flexible design the MLI adopts and vice versa. Accordingly, this article also takes the degree of consensus among states on ISDS reform options as the critical determinant of allowing different levels of flexibility to relevant reform options under the MI. It employs quantitative text analysis tools to evaluate the degree of consensus among states on ISDS reform options.

Data and Methods

In political science, textual data are arguably the most readily accessible source to measure policy preferences, since writings have considerable potential for unveiling insights into the policy positions of their authors (Klüver, 2009). Likewise, in the field of international law, treaties and other legal documents can also reveal information about states’ attitudes towards legal matters to some extent. Accordingly, to assess states’ attitudes towards ISDS reform options, this article first considers reviewing the submissions from states in UNCITRAL Working Group III. Until August 2024, 23 states submitted their suggestions to Working Group III.[40] Although these submissions cannot represent the positions of all states in the world, they include most of the world’s important economies. Therefore, the analysis of these submissions is not meaningless but can help us roughly understand the attitudes of states on reform options, so as to provide a reference for the flexible design of the MI. Apart from the submissions from states, another important data source would be IIAs. The basic logic is that the application of the reform option in the IIA may mean that the contracting parties to the

[39] The block of support includes one reform option, namely “Advisory Center”. The block of dispute settlement includes “Exhaustion of Local Remedies”, “Dispute Prevention and Mediation”, “Improved Investor-State Arbitration”, “Appellate Mechanism”, “Multilateral Investment Court”, and “State-to-State Arbitration”. The block of procedural rules includes “Code of Conduct”, “Security for Cost”, “Multiple Proceedings”, “Counterclaim”, “Frivolous Claims”, and “Third-Party Funding”.

[40] The 23 states submitting suggestions in UNCITRAL Working Group III include the EU and its member states (EU), Costa Rica, Chile, Israel, Japan, Mexico, Peru, Thailand, Korea, Morocco, Indonesia, Burkina Faso, Russian Federation, Kazakhstan, Kuwait, Mali, Bahrain, China, South Africa, Ecuador, Turkey, Colombia, and Brazil.

IIA hold a favorable attitude towards the option. The more IIAs that apply the reform option, the more support from states this option receives. The review of IIAs is based on the United Nations Conference on Trade and Development's (UNCTAD's) online database of international investment agreements. According to UNCTAD, there have been more than 3,000 IIAs signed until August 2024 (UNCTAD, 2024). However, not all IIAs are suitable for review. Old-generation IIAs signed before 2012 typically preserve the unreformed ISDS mechanism, which is marked by broad scope and lack of procedural improvements.[41] ISDS reform options are not very likely to be found in these IIAs. In contrast, most of the ISDS reform elements are included in new-generation IIAs from 2012 and integrated into UNCTAD's Reform Package for the international investment regime.[42] Thus, it would be reasonable to only select submissions from states in UNCITRAL Working Group III and IIAs from 2012 as the dataset of the quantitative text analysis. The dataset comprises submissions from 23 states and 379 IIAs in total.

After determining the dataset, I selected the content analysis method to assess the states' consensus on ISDS reform options. The content analysis method relies on "the initial definition of words or phrases systematically associated with particular coding categories in relevant texts" (Laver & Garry, 2000, p. 625). The words or phrases associated with each category are then automatically calculated. It is arguably a promising way to find the state's attitude on ISDS reform options in IIAs. Following this method, I first translated about 66 non-English IIAs into English using Google Translator to ensure all IIAs could be recognized by the software R. Then I selected some keywords concerning each reform option except the "advisory center" reform option, as it would be the support mechanism for the MI that impossibly occurs in IIA. After achieving a corpus about reform options, I coded these keywords about reform options and utilized R to count the frequency of related words of each reform option in IIAs. Here, it should be noted that this article does not focus on states' attitude to the specific provisions of each reform option, but only on their attitude to the issues involved in each reform option. For example, some international investment agreements (IIAs) adopt International Bar Association Guidelines to regulate arbitrators' behaviour, which may be different from the future provisions of the "code of conduct" reform option, but it still reflects the states' support for the reform issue of establishing arbitrator ethical rules. Therefore, as long as the IIA covers keywords that relate to reform options, it would be considered that contracting states to the IIA have a supportive attitude towards reform options. In addition to simply calculating the frequency of words, the content analysis method also allows for measuring positive or negative evaluations expressed toward a given concept (Gavras, Mader, & Schoen, 2022). This may also be a feasible way to analyze submissions from states to assess states' attitudes towards reform options. However, the challenge of measuring sentiment is the more complicated text corpus. Commonly, researchers would use prefabricated dictionaries that contain a list of words with a certain score (i.e., negative or positive) (Munnes et al., 2022, p. 7). While the accuracy may vary depending on the dictionary itself and the characteristics of the text corpus (Munnes et al., 2022, p. 8). Since measuring sentiments through computational approaches seems difficult and lacks accuracy to some extent, and meanwhile, the number of submissions from states is not large, I turned to manually review these submissions and then count the number of states that support each reform option.

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[41] UNCTAD, World Investment Report 2020: International Production Beyond the Pandemic (United Nations Publication, Sales No. E.20.II.D.1, 2020), at 134.
[42] *Id.*

Results

As noted, the frequency of keywords related to reform options in 329 IIAs signed after 2012 was first calculated by R. Figure 1 ranks reform options according to the frequency of their appearances in IIAs. Notably, all IIAs contain provisions about the "dispute prevention and mediation" reform option, which indicates states have a high degree of consensus on amicable settlement of disputes. Moreover, most IIAs provide two investment dispute settlement methods, namely state-to-state arbitration and investor-state arbitration, with states having the option to apply either. Among 268 IIAs with investor-state arbitration, there are 91 IIAs (about one-third of IIAs adopting traditional investor-state arbitration) that adopt improved investor-state arbitration; for instance, they explicitly provide the qualification of arbitrators and challenge of arbitrators. This implies that "improved investor-state arbitration" has not yet been supported by most states in treaty practice. In addition, the "multiple proceedings" reform option has been included in more than half of IIAs signed after 2012, which may mean states have a certain level of consensus on it. For the remaining reform options, few IIAs signed after 2012 contain them. They may be perceived as lacking the broad support of states.

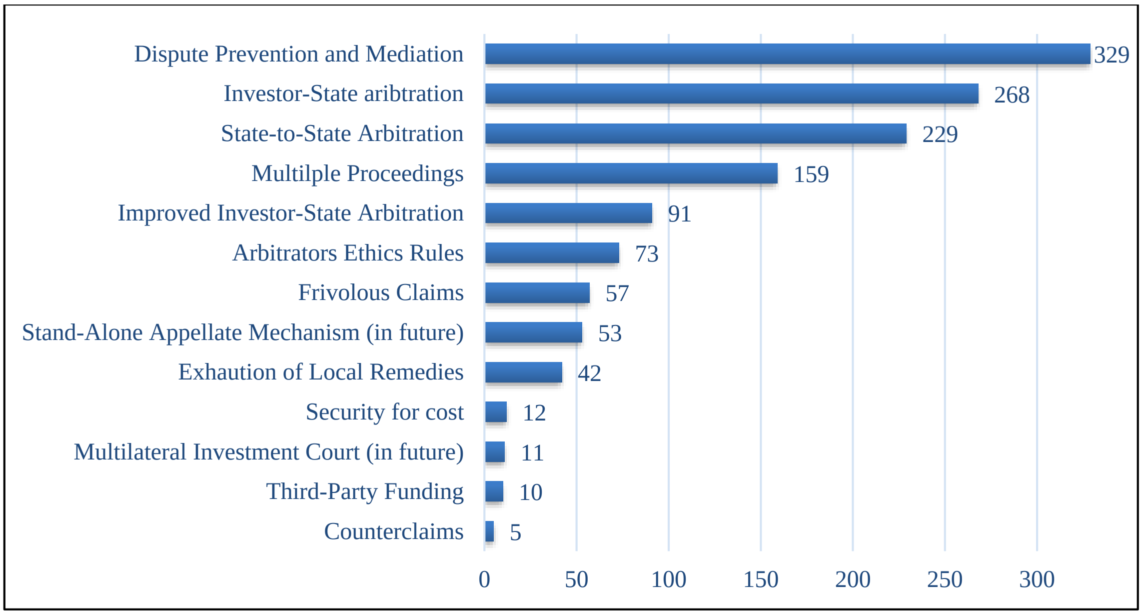

Figure 1. Reform options in IIAs from 2012 (numbers of IIAs).

Second, the submissions from 23 states in Working Group III were reviewed manually. The results are summarized in Figure 2, which presents the number of states that support each reform option in their submissions. Similar to statistical results concerning IIAs, "dispute prevention and mediation" is the reform option with the most support among all reform options. There are more than half of states that expressed support for the "dispute prevention and mediation" reform option in their submissions. Moreover, "improved investment arbitration" and "code of conduct" also received support from more than half of these states, but their support rate was slightly less compared with that of "dispute prevention and mediation". In addition to the three reform options mentioned above, other reform options are less expressly supported by a majority of these states. To some extent, this may imply the opposition or wait-and-see attitude of many states towards these reform options.

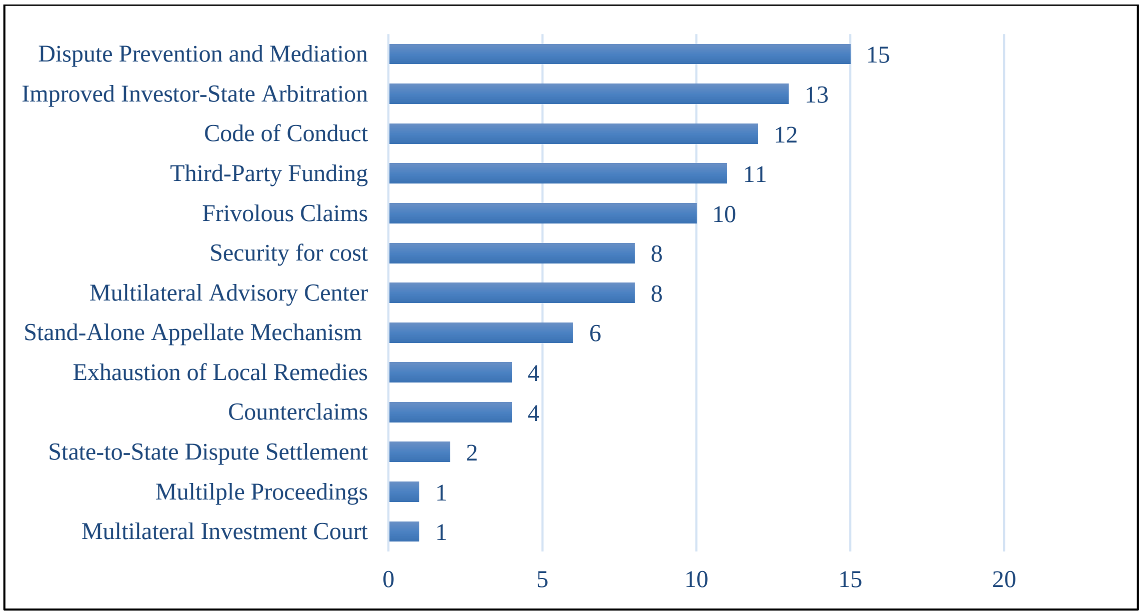

Figure 2. Support for ISDS reform options in states' submissions in UNCITRAL Working Group III (numbers of states).

Combined with the results of the empirical analysis of submissions from states and IIAs, it can be found that the "dispute prevention and mediation" reform option is not only widely applicable in IIAs, but also has the most support among states that submitted suggestions in Working Group III. This indicates a high degree of consensus among states on the "dispute prevention and mediation" reform option. Thus, it could be considered as the minimum standard to be applied in the MI.

As for the opt-out mechanism, it may be appropriate to apply it to the "improved investor-state arbitration" reform option. The reason is that although this reform option is not widely applied in the IIAs, more than half of the states that submitted suggestions about ISDS reform express support for the future adoption of the "improved investor-state arbitration" reform option. This implies that states have a certain degree of consensus on it. More importantly, since the "improved investor-state arbitration" reform option does not deviate too much from the widely used investor-state arbitration in IIAs, it may be more acceptable for most states. Therefore, designing this option as a treaty obligation in the MI may not discourage states from joining the MI. However, given the explicit objections of some states to apply the "improved investor-state arbitration" reform option, it would not be appropriate to design it as the minimum standard. The adoption of the opt-out mechanism on the "improved investor-state arbitration" reform option would allow those states to exclude the application by making a reservation, which may attract more states to join the MI.

As for the other 11 reform options, it may be appropriate to adopt opt-in mechanisms. Among these reform options, what needs to special noted is the "state-to-state arbitration" and "code of conduct" reform options. The "state-to-state arbitration" reform option is adopted in most IIAs as an alternative dispute settlement mechanism to investor-state arbitration, but in ISDS reform, this option is discussed to replace investor-state arbitration. Thus, states' supportive attitudes on state-to-state arbitration reflected in IIAs cannot be regarded as support for replacing investor-state arbitration with it. Given that there are only two states that support replacing investor-state arbitration with state-to-state arbitration, "state-to-state arbitration" should be an opt-in reform option for states to apply. In addition, the “code of conduct” reform option has received support from more than half of the states that submitted suggestions in Working Group III, but there are fewer IIAs containing it. The situation of the “code of conduct” reform option is similar to the “improved investor-state arbitration” reform option. While the difference is that improved investor-state arbitration is based on the widely accepted investor-state arbitration by states, the code of conduct is a new matter for states. For wait-and-see states, the “code of conduct” reform option may be more difficult to accept than the “improved investor-state arbitration” reform option. Thus, to attract more states to join the MI, it would be better to design the “code of conduct” as an opt-in reform option. Finally, the remaining reform options did not gain widespread support in submission from states and were not adopted by many IIAs. Therefore, it would be reasonable to apply opt-in mechanisms to them.

Constraints of the Flexible MI

Based on the empirical analysis of the flexibility for ISDS reform options, it can be found that the reform options in the block of support mechanism and procedural rules are all opt-in. The block of dispute settlement includes a minimum-standard reform option, an opt-out reform option, and four opt-in reform options. As mentioned in the second part, broad flexibility may undermine the goal of the treaty, so the MLI takes some techniques to impose restrictions on flexibility. For the MI, it may also need to consider whether to learn from the MLI to limit flexibility to promote the harmonization of the MI. The following will respectively analyze the restrictions on flexibility in the blocks of support mechanism, procedural rules, and dispute settlement.

Support Mechanism and Procedural Rules

In terms of opt-in mechanisms, in the MLI, a contracting party may agree to apply opt-in provisions to all its CTAs by notifying the depositary of its choice. But only if all parties to a tax agreement choose the same option, the option will apply to the specific tax agreement. As for the restrictions on opt-in mechanisms, such as the withdrawal and replacement of options, the MLI does not explicitly provide for them. In this article, it is argued that the MI is better to restrict the withdrawal of reform options in the block of procedural rules, but allow it in the block of support mechanism.

In the block of support mechanism, there is only one reform option, namely “advisory center”. The establishment of an advisory center intends to complement other reform options, which may serve as a platform to share information, exchange best practices and provide capacity-building, provide advice about negotiations and non-contentious amicable means of dispute resolution, etc.[43] The specific provisions on the advisory center would be listed in a separate protocol for signatories to opt in. When signatories expressly opt for the protocol of the advisory center and notify the secretariat, they would become members of the center, thereby bearing the obligations and enjoying the benefits. Since the advisory center is only a kind of support mechanism, rather than options related to core issues in ISDS reform, it seems appropriate to allow states to withdraw the advisory center, if a signatory is no longer willing to use it or assume obligations.

In the block of procedural rules, there are six opt-in reform options related to various procedural issues. These reform options may exist in the form of model law based on draft provisions provided by UNCITRAL

[43] UNCITRAL Working Group III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 43rd Session (A/CN.9/1124, Session 56), 2022.

Working Group III in the future.[44] States are encouraged to adopt these model laws. As the same as the MLI, signatories of the MI would also need to notify the list of their options in the block of procedural rules at the time of signature or when depositing the instrument of ratification, acceptance, or approval. The notification of a signatory only means that it agrees to apply the selected reform option to its covered IIAs. When all parties to an IIA choose one reform option, it will apply to the specific IIA. But unlike the MLI, there is a need to clarify that the withdrawal of a reform option in the block of procedural rules is not permitted. The main reason lies in the fact that the prohibition of withdrawing these reform options is consistent with the goal of the MI to address states' concerns about ISDS. More states choosing to adopt these reform options would increase the opportunity to apply them to more IIAs. Meanwhile, the adoption of model law by more states would also be conducive to promoting consistency in provisions dealing with relative procedural concerns. Accordingly, allowing the withdrawal of these reform options is not only a step backwards considering treaty objectives but also detrimental to the consistency of international investment law. In addition, since reform options in the block of procedural rules are independent of each other and deal with different procedural issues in ISDS, states cannot replace one reform option with another. Thus, there is no need to discuss the problem of replacement, but only clarify the prohibition of withdrawal of reform options in the block of procedural rules.

Dispute Settlement

As states have different preferences on investment dispute settlement, the block of dispute settlement contains discussed reform options currently, which relate to domestic remedies, amicable dispute settlement, and various kinds of international investment dispute settlement mechanisms. Since the reform options in the block of dispute settlement interact with each other, this section will discuss the restrictions on them, based on the clarification of their relationship.

First, the domestic remedies are provided in the opt-in reform option "exhaustion of local remedies". This reform option deals with the relationship between domestic remedies and international investment dispute settlement in response to some states' concern that investment tribunals may be unfamiliar with the domestic legal system, thus possibly ignoring the public interest and making awards that conflict with domestic law and regulations.[45] Since not all states have such concern, the "exhaustion of local remedies" reform option would also take the form of model law for states to choose to apply, like reform options in the block of procedural rules. However, the difference is that the MI would be neutral on the application of the model law on the exhaustion of local remedies, rather than encouraging states to opt for it. Accordingly, if a contracting party to the MI changes its policy preference in the future, for instance, the party no longer considers the bypass of domestic legal institutions as a concerned problem, it should allow the party to withdraw the "exhaustion of local remedies" reform option. Likewise, if contracting parties without such concern change their minds after the time of signature or when depositing the instrument of ratification, acceptance or approval, it also should permit parties to choose to apply the "exhaustion of local remedies" reform option. In addition, as the same as opt-in mechanisms in the

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[44] UNCITRAL Working Group III has published draft provisions on code of conduct, frivolous claims, multiple proceedings, security for cost, third-party funding, etc. See UNITRAL Working Group III, Procedural Rules Reform and Cross-Cutting Issues, (August 20, 2023), https://uncitral.un.org/zh/proceduralrulesreformandcrosscuttingissues.

[45] See UNCITRAL Working Group III, Submissions From South Africa (A/CN.9/WG.III/WP.176), 2019; Submissions From Morocco (A/CN.9/WG.III/WP.161), 2019; Submissions From Indonesia (A/CN.9/WG.III/WP.156), 2019; Submissions From Mali (A/CN.9/WG.III/WP.181), 2019.

MLI, a contracting party chooses the "exhaustion of local remedies" reform option, which means it agrees to apply it to all its covered IIAs. Only when parties to an IIA notify their choice to the Secretariat, the reform option would apply to the specific IIA.

Second, the "dispute prevention and mediation" reform option provides an amicable dispute settlement. At present, UNCITRAL Working Group III has published the draft provisions on mediation, draft UNCITRAL guidelines on investment mediation, and draft legislative guide on investment prevention and mitigation.[46] It should be noted that only the draft provisions on mediation are considered to be used in investment treaties and the MI.[47] Thus, the "dispute prevention and mediation" reform option as the minimum standard in the MI refers to the draft provisions on mediation. In other words, states that choose to participate in the MI must apply the provisions on mediation to their covered IIAs. However, in the MLI, in order to provide states with alternative approaches to meet minimum standards, it permits reservations on them if existing provisions in the tax agreements have already met minimum standards or parties intend to meet these standards.[48] Since the "dispute prevention and mediation" reform option aims to promote the use of amicable dispute settlement, it may be appropriate to allow states to make reservations on the provisions on mediation and choose other methods to provide amicable dispute settlement, such as mandatory mediation.

Third, the international investment dispute settlement mechanisms refer to four reform options, namely "improved investor-state arbitration", "state-to-state arbitration", "appellate mechanism", and "multilateral investment court". Among these reform options, only "improved investor-state arbitration" adopts an opt-out mechanism, while others are all opt-in reform options. For a concise analysis, this article divides the three reform options into first-instance and second-instance dispute settlement mechanisms.

The first instance includes improved investor-state arbitration, state-to-state arbitration, and first-instance of multilateral investment court. Contracting parties can only adopt one of them as their first-instance dispute settlement mechanism, which means the three dispute settlement mechanisms are substitutes for each other. However, since improved investor-state arbitration adopts an opt-out mechanism, while the two others adopt opt-in mechanisms, their application order would not be the same. In particular, when states join the MI, the improved investor-state arbitration would be automatically applied, unless they make reservations on it. But if a contracting party chose to adopt one of the other two dispute settlement mechanisms for the first instance, it may be reasonable to regard the improved investor-state as a default option that would no longer be applicable due to the alternative relationship between the three dispute settlement mechanisms.

Based on clarifying the relationship between the three dispute settlement mechanisms of the first instance, whether restrictions on flexibility are needed to ensure the harmonization will be further discussed. In terms of

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[46] UNCITRAL Working Group III, Draft Provisions on Mediation (A/CN.9/1105), 2023; Draft UNCITRAL Guidelines on Investment Mediation and Draft Legislative Guide on Investment Prevention and Mitigation (A/CN.9/1150), 2023.

[47] Draft Provisions on Mediation, *Id.* at 2; Draft Legislative Guide on Investment Dispute Prevention and Mitigation would include best practices to assist states in setting up and implementing a coherent dispute prevention and mitigation system. See UNCITRAL Working Group III, Possible Reform of investor-state dispute settlement (ISDS): Draft Legislative Guide on Investment Dispute Prevention and Mitigation (A/CN.9/WG.III/WP.228), 2023, at 2-3; The UNCITRAL Guidelines on Investment Mediation do not intend to promote best practice and impose any legal requirements binding upon the parties or the mediator, but rather list and describe briefly issues that should be considered when undertaking investment mediation, so as to assist states in understanding the various aspects of investment mediation, the nuances of the process, and the possible benefits. See Draft UNCITRAL Guidelines on Investment Mediation and Draft Legislative Guide on Investment Prevention and Mitigation *Id.* at 1.

[48] *Supra* Note 6, at 6.

the opt-out mechanism, like the MLI, the reservation made by contracting parties of the MI would also apply to all covered IIA of them, so as to reduce the risk of treaty shopping. In order to avoid states making undesirable reservations to undermine the goal of the MI, an exhaustive list of reservations is also necessary to be provided in the MI, although there is only one opt-out reform option at present. However, in the MI, since states may change their policy preferences towards investment dispute settlement mechanisms in the future, and it is difficult to judge which dispute settlement mechanism is better to address the concerns about ISDS, the reservation on improved investor-state arbitration may be allowed after the time of signature or when depositing the instrument of ratification, acceptance, or approval, so as to give states the opportunity to opt for state-to-state arbitration or multilateral investment court (Bonnitcha, Skovgaard Poulsen, & Waibel, 2017).[49] For the same reason, contracting parties who choose the "state-to-state arbitration" or "multilateral investment court" reform options would also be allowed to withdraw both of them and make a choice again. In addition, there may be concerns about increased uncertainty if allowing the late reservation, but since the choice of states would apply to their all covered IIAs, they have to carefully consider changing their choice. Thus, it would reduce the risk of arbitrary change of their previous choice.

In terms of the second instance, there is only one reform option, namely the "appellate mechanism". For the purpose of avoiding duplication of review proceedings and further fragmentation, the "appellate mechanism" would handle the appeal of arbitral awards and the first-instance awards of the multilateral investment court.[50] Generally, after choosing the first-instance dispute settlement mechanism, contracting parties can determine whether to adopt the "appellate mechanism" reform option. However, if contracting parties choose the "multilateral investment court" reform option, they are deemed to have agreed to the application of the "appellate mechanism" and do not need to express their consent on it again. As the same as the two opt-in dispute mechanisms of the first instance, the MI would also stipulate provisions on the appellate mechanism, but the specific procedures of it would take the form of a separate protocol. Similarly, the MI would also permit states to withdraw the "appellate mechanism" reform option, given that there is no criterion to judge whether the "appellate mechanism" reform option is better to address concerns about ISDS and states may change their policy preferences in the future.

In sum, some techniques taken by the MLI to limit flexibility are necessary to be taken in the MI, so as to enhance the harmonization, such as the prohibition of withdrawing reform options in the block of procedural rules and the application of an exhaustive list of reservations. However, not all of these techniques are suitable for the MI to learn from. Compared with the MLI, fewer restrictions on the flexible design of the MI would provide states with greater flexibility to some extent while reducing the complexity of the rule.

Conclusion

In order to coordinate conflicting ISDS reform options in multilateral cooperation, this article has reviewed the flexible design of the MLI and attempted to adopt such a design in international investment dispute settlement. The MLI adopts minimum standards, opt-out mechanisms, and opt-out mechanisms to provide states with three

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[49] The policy preferences of states on investment dispute settlement are not fixed. For example, the policy preference of developing countries on ISDS has been changed in the last decades.

[50] UNCITRAL Working Group III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its Resumed 38th Session (A/CN.9/1004/Add.1), 2020, Para. 24.

levels of flexibility according to different levels of consensus among states on BEPS measures. To balance flexibility and harmonization, the MLI also imposes restrictions on flexibility, such as the most notably sophisticated reservation clauses. Such flexible design enables states to tailor the application of the MLI based on their preferences, which would help attract states to join the MLI. Yet, such a design of the MLI makes the provisions too complicated. Contracting parties may have difficulties in the interpretation and application of the MLI, which possibly further leads to the problem of legal uncertainty. These problems have also been recognized by the OECD, the matching database developed by which would help to alleviate these problems.

On the basis of understanding the flexible design of the MLI, this article explores how to apply the MLI flexible design in international investment dispute settlement. Firstly, this article has briefly explained the form of the MLI in international investment dispute settlement. In order to swiftly realize the implementation of ISDS reform options and the modification of the investment treaty network, it can be considered to establish an opt-in multilateral instrument independent of international investment agreements, which only applies to IIAs that states agree to include, and rely on the Secretariat of UNCITRAL to manage covered IIAs and contracting parties' choice. Secondly, this article has focused on the application of the MLI flexible design in international investment dispute settlement. As the same as the MLI, this article also determines the levels of flexibility of each reform option according to the degree of states' consensus on them. Then it conducts a quantitative text analysis of submissions from states in UNCITRAL Working Group III and IIAs signed after 2012, to measure states' consensus on 13 ISDS reform options discussed. Based on the results of the empirical study, this article proposes a potential flexible design of the MI. That would design the "dispute prevention and mediation" reform option as the minimum standard, adopt the opt-out mechanism in the "improved investor-state arbitration" reform option, and adopt the opt-in mechanism in other reform options. Apart from the minimum standard, the application of other reform options requires all parties to an IIA to make no reservations or make a choice on them. In order to enhance the harmonization of the MI, the article further discusses the application of techniques used by the MLI to restrict flexibility. It has shown that not all techniques are suitable for the MI. The reduction in flexibility restrictions enables the design of the MI more flexible than the MLI. Moreover, since the MI only relates to procedural reform in investment law and has fewer restrictions on flexibility, the problem of rule complexity would be less obvious than the MLI to some extent. Of course, the MI can also use computer technology to help states apply it.

Overall, this article simply intends to propose a roadmap for establishing a flexible instrument in international investment dispute settlement, so as to bring inspiration to the coordination of conflicting ISDS reform options in multilateral cooperation. If states reached a higher-level consensus on more reform options in the future, it could be considered to reduce the flexibility of those reform options in the MI and vice versa. Likewise, other future concerns on ISDS or even investment law in the future could also be considered for inclusion in the MI as reform options with less or more flexibility.

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