

Mismatched Commitments: Treaty Law Solutions for Multilateral ISDS Reform

Daniel Peat, Leiden University

Oliver Hailes, LSE Law School

*Chunlei Zhao, Ocean
University of China*

Academic Forum on ISDS Concept Paper 2025/3

Version 07.07.2025

Citation: Daniel Peat, Oliver Hailes and Chunlei Zhao, 'Mismatched Commitments: Treaty Law Solutions for Multilateral ISDS Reform', *Academic Forum on ISDS Concept Paper 2025/3*, 7 July 2025

Disclaimer: This work represents the views of the individual authors and not necessarily those of the Academic Forum on ISDS and its members. The Academic Forum on ISDS does not take positions on substantive matters. The paper has undergone double blind peer review.

Mismatched Commitments: Treaty Law Solutions for Multilateral ISDS Reform

Daniel Peat, Oliver Hailes and Chunlei Zhao¹

Executive summary

1. This paper examines what would happen when two States commit to different options ('mismatched commitments') under the framework of a multilateral instrument on investor-State dispute settlement ('ISDS') reform ('MIIR').² We take the draft MIIR proposed by the UNCITRAL Secretariat in WP.246 as our basis, having regard also to the comments of certain experts and participants in Working Group III.³ This paper is intended to assist all participants by examining the extent to which the law of treaties regulates six scenarios of mismatched commitments and identifying possible solutions for the ultimate design of the MIIR.
2. The MIIR would create a 'dual opt-in mechanism' for ISDS reform.⁴ First, each party would choose which Protocol(s) it wishes to join ('Protocol Opt-In Mechanism').⁵ Second, each party would choose which of its international investment agreements ('IIAs') would be modified by each Protocol ('IIA Opt-in Mechanism'). Specifically, within three months of depositing its instrument of accession to a Protocol, the party would be obliged to notify the MIIR Secretariat of the IIAs to which the relevant Protocol would apply, detailing how that Protocol would modify each of the listed IIAs ('Notification').⁶

¹ The authors would like to thank Jonathan Bonnitcha, Taylor St John and an anonymous reviewer for helpful comments. Thanks to Nick McGuire for research assistance. Any mistakes remain our own.

² UNCITRAL Working Group III, *Possible reform of investor-State dispute settlement (ISDS): Draft multilateral instrument on ISDS reform: Note by the Secretariat* (8 July 2024) UN Doc. A/CN.9/WG.III/WP.246 [Draft MIIR].

³ In mid-2022, the UNCITRAL Secretariat received comments on the possible design of a MIIR from five experts in the law of treaties. In February 2025, written comments on the draft MIIR were submitted by the EU and its Member States, the United States, and the Moscow-based International and Comparative Law Research Center (ICLRC). These comments are referenced below where relevant.

⁴ Draft MIIR, para. 51.

⁵ Any State could accede to the MIIR as a framework convention, which would contain optional Protocols regarding various ISDS reforms. To opt into those reforms, each State would specify its chosen Protocol(s) in the same instrument of ratification or accession to the MIIR or subsequently deposit a separate instrument in respect of any other Protocol(s): Draft MIIR, Art. 3(4)–(6). If a given Protocol contained its own provisions on ratification or accession, the State would need to accede to that Protocol as for a separate treaty: Draft MIIR, Art. 3(7).

⁶ Draft MIIR, Art. 6(3). An IIA would not be modified until all parties to the IIA have acceded to that Protocol and listed the IIA in their unilateral Notifications: Draft MIIR, Art. 7. However, in February 2025, delegations agreed that a future draft MIIR should specify that matching notifications between two or more parties to a multilateral IIA would constitute an *inter se* modification: UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, first part (New York, 17–19 February 2025)* (28 February 2025) UN Doc. A/CN.9/1196 [2025 Working Group III report] paras 39–46, 57–66. See also the discussion of Scenario D below.

3. In its proposed form, the dual opt-in mechanism may lead to several scenarios of mismatched commitments under the MIIR and/or its Protocols between two States with existing treaty relations under an IIA. Specifically, this paper addresses six scenarios of varying complexity:
 - A. A State that accedes to the MIIR ('MIIR party') and a State that does not ('non-MIIR State').
 - B. Two MIIR parties that do not accede to the same Protocol ('Protocol Ω ').⁷
 - C. Two MIIR parties that both accede to Protocol Ω , where one party's Notification lists their bilateral IIA but the other party's Notification does not.
 - D. Two MIIR parties that both accede to Protocol Ω and list the same multilateral IIA in their Notifications, but a third party to these instruments has not listed the IIA.
 - E. Two MIIR parties that both accede to Protocol Ω and list the same IIA in their Notifications, but they provide conflicting details as to how Protocol Ω would modify the listed IIA.
 - F. Two MIIR parties that both accede to Protocol Ω and provide consistent details in their Notifications as to how Protocol Ω would modify the listed IIA, but the IIA itself contains incompatible provisions regarding its modification.
4. We map possible solutions to these six scenarios, which are summarized in a *Table* at the end of this paper. In brief, to strike the best balance between coherence and flexibility in designing a multilateral framework for ISDS reform, **our main recommendations are fivefold.**
5. First, the MIIR should include a provision deeming two or more matching Notifications to have formed an ***inter se* modification** to a multilateral IIA.
6. Second, an optional or mandatory **template Notification** should be included in the MIIR to reduce the risk of conflicting descriptions of how Protocol Ω would modify a listed IIA, in tandem with a mechanism for **binding joint interpretations**. An *Annex* to this paper proposes language for such a template.

⁷ We use this neutral term to refer to any Protocol included in the final MIIR, rather than any of the specific Protocols that were designated in Art. 2 of the draft MIIR.

7. Third, the MIIR should **clarify the legal effect of matching Notifications**, specifically by providing that any incompatible clause regarding modification or non-derogation in the original IIA would be suspended by accession to Protocol Ω.
8. Fourth, the Advisory Centre on International Investment Dispute Resolution should be designated under the MIIR to **assist parties in preparing their Notifications** as part of the Advisory Centre's technical assistance and capacity-building function.
9. Finally, the Protocol Opt-In Mechanism should not apply to a **core package of essential Protocols**, which all MIIR parties would be required to accept without derogation. This recommendation is grounded in evidence from the first years of implementation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ('BEPS MLI'), which suggests that the MIIR's impact on IIA modification would be limited without a mandatory foundation of essential Protocols.
10. However, if there is no political appetite to designate a core package of essential Protocols, then greater coherence may need to be achieved by requiring MIIR parties to list all their IIAs upon accession to Protocol Ω, with an opt-out mechanism, which would preserve the ability of parties to choose which IIAs are modified by Protocol Ω.

Scenario A: MIIR party v. non-MIIR State

11. The first scenario envisages a situation in which one State becomes a party to the MIIR, while the other refrains from accession.
12. The cornerstone principle of *pacta sunt servanda* obliges States to comply in good faith with any treaty commitments that are in force.⁸ The MIIR, as a multilateral treaty, would not be binding between the MIIR party and the non-MIIR State. It would not alter or supersede the obligations arising from an applicable IIA. Consequently, under Scenario A, the existing IIA obligations between the two States would remain operative and unaffected by the MIIR or its Protocols.

⁸ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, in force 27 January 1980) 1155 UNTS 331 [VCLT], Art. 26.

Scenario B: MIIR party (acceded to Protocol Ω) v. MIIR party (not acceded to Protocol Ω)

13. A second scenario is that the two MIIR parties opt into different Protocols. Would one State's accession to Protocol Ω have any consequence for their bilateral treaty relations under an applicable IIA?
14. As above, the treaty law is straightforward. Two MIIR parties' obligations under an existing IIA would be modified only if they *both* opted into Protocol Ω under Article 3 of the MIIR *and* made unilateral Notifications in respect of that IIA under Article 6. The existing IIA between two MIIR parties that do not both accede to Protocol Ω would thus be unmodified, as for Scenario A.
15. However, because the dual opt-in mechanism would allow States to choose different packages of Protocols, and to choose different IIAs to which those Protocols would apply, it may be the case that very few commitments would actually match between MIIR parties. This would result in limited modification of existing IIAs and the MIIR would fail in its purpose of promoting a 'holistic and coherent approach' to ISDS reform.⁹
16. Evidence for this risk comes from recent empirical research on the first three years (2018–2021) of implementation of the BEPS MLI, a multilateral instrument to modify double taxation treaties.¹⁰ We supplemented this evidence with our own data for the period 2021–2025.¹¹
17. Once all parties to a double taxation treaty have notified the BEPS MLI depository that the treaty is a Covered Tax Agreement ('CTA'), BEPS MLI parties commit to an essential package of obligations that apply to all CTAs, described as 'minimum standards'.¹² Beyond the minimum standards, parties 'reserve the right' for additional obligations under the BEPS MLI not to apply to their CTAs, such that these optional provisions are implemented only if both parties to a CTA choose not to make unilateral reservations.¹³
18. There is strong similarity between the BEPS MLI and the IIA Opt-In Mechanism. However, the MIIR contains a prior Protocol Opt-In Mechanism, whereas BEPS MLI requires parties to opt out of obligations in the form of a reservation to its

⁹ Draft MIIR, Preamble.

¹⁰ Antonia Hohmann, Valeria Merlo and Nadine Riedel, 'Multilateral Tax Treaty Revision to Combat Tax Avoidance: On the Merits and Limits of BEPS's Multilateral Instrument' (2024) 40 *Economic Policy* 427.

¹¹ This data may be made available on request.

¹² Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (adopted 24 November 2016, in force 1 July 2018) [BEPS MLI], Arts 6–7, 16.

¹³ BEPS MLI, Arts 3–5, 8–15, 17–18. Reservations are further addressed in Scenario E below.

instrument of accession or ratification.¹⁴ These mechanisms may seem functionally equivalent, since both instruments require a State to choose whether or not to commit to the optional provisions. But the Protocol Opt-In Mechanism is bound to increase transactions costs, relative to the BEPS MLI, because each and every Protocol of the MIIR must be positively selected and may have additional accession requirements.

19. A significant difference with the BEPS MLI is that the draft MIIR contains no obligatory provisions; all Protocols are optional. The implementation of the BEPS MLI between 2018 and 2025 suggests that the MIIR would have limited success in its proposed form, at least in the short- to mid-term.

20. Out of the 1,798 CTAs modified by BEPS MLI, the vast majority of these were as the result of the minimum standards. Depending on the relevant provision of the BEPS MLI, optional provisions have had little impact in modifying existing CTAs. Certain optional provisions, such as Article 5 regarding elimination of double taxation, resulted in the modification of as little as 123 or 6.8% of CTAs, while even the most successful optional provisions, such as Articles 12–14 regarding permanent establishment status, modified only around one third of CTAs.¹⁵ This evidence suggests that the Protocol Opt-In Mechanism under the MIIR—in the absence of a core package of Protocols—would run the risk of poor uptake by States in its early years of operation and, consequentially, failure to modify IIAs due to mismatched commitments.

21. Two solutions are possible: first, an opt-out mechanism for a set of ‘default’ Protocols or, second, a package of ‘essential’ Protocols to which all MIIR parties accede automatically and cannot opt out.¹⁶

22. The first solution is that the MIIR designates a *default* package of Protocols to which every MIIR party accedes automatically unless they expressly decide to

¹⁴ For each party’s list of reservations, see *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: status as of 1 June 2025* (OECD, 2025) www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-ml/beps-ml-signatories-and-parties.pdf (accessed 5 June 2025).

¹⁵ For the period 2018–2021, see Hohmann et al., 466. We followed their methodology in collecting data for the period 2021–2025, drawing from IBFD’s data catalogue and the BEPS MLI Matching Database.

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

opt out. Protocols outside this default package would remain subject to the IIA Opt-In Mechanism currently proposed in the draft MIIR. This solution would preserve the flexibility of the draft MIIR but should reduce transaction costs by requiring the default Protocols to be addressed in the original instrument of ratification or accession to the MIIR itself, rather than separate accession procedures.

23. The strengths and weaknesses of opt-in versus opt-out mechanisms were addressed in 2022 by several experts who were invited by the UNCITRAL Secretariat to comment on treaty law options for the MIIR, who generally agreed that there should be some ‘core provisions or minimum standards’ that all MIIR parties must accept.¹⁷ Indeed, other treaty regimes have successfully used opt-in mechanisms with default options to coordinate State decisions, such as dispute settlement under Part XV of the UN Convention on the Law of the Sea (‘UNCLOS’) or multilateral environmental agreements with optional protocols.¹⁸
24. A second solution would mirror the success of minimum standards under BEPS MLI by specifying a package of *essential* Protocols that form a non-derogable core of the MIIR. It is beyond the scope of this paper to speculate whether it is politically feasible to designate any Protocol(s) as essential, akin to minimum standards under BEPS MLI.¹⁹ However, if this solution is to be legally effective, it would be important for the MIIR to affirm that parties may not opt out of the essential Protocols by way of unilateral reservation, which is presumptively prohibited by the draft MIIR,²⁰ or by way of *inter se* agreement between two or more MIIR parties.²¹ While this solution would constrain the discretion left to States—and potentially chill accession to the MIIR framework—it would ensure a minimum floor of matching commitments among those States that do accede to the MIIR.
25. We believe that either solution—but more so the essential Protocols—would reduce the transaction costs of multiple accessions and promote a higher degree of coherence and consistency in ISDS reform than the current draft

¹⁷ This point was addressed by Dr Danae Azaria, Professor Makane Moïse Mbengue and Professor Malgosia Fitzmaurice, though not by Professor Duncan Hollis or Professor Jan Klabbers: *Multilateral Instrument on ISDS Reform: Comments on A/CN.9/WG.III/WP.194* (2022) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_experts_0.pdf (accessed 5 June 2025) [*Treaty law expert comments*].

¹⁸ See the survey in Makane Moïse Mbengue, ‘Potential Options for a Multilateral Instrument – Pros & Cons’ (13 May 2022) in *Treaty law expert comments*.

¹⁹ Some observers have noted that ‘flexibility is fundamental’ for the negotiators at UNCITRAL Working Group III, which may make it difficult to agree on a package of default or essential Protocols: Anthea Roberts and Taylor St John, ‘Complex Designers and Emergent Design: Reforming the Investment Treaty System’ (2022) 116 *American Journal of International Law* 96, 132–137.

²⁰ Draft MIIR, Art. 8.

²¹ See Scenario D below.

MIIR. The Protocol Opt-In Mechanism would remain for whichever Protocols are not deemed to be default options or essential commitments.

Scenario C: MIIR party (acceded to Protocol Ω , listed bilateral IIA) v. MIIR party (acceded to Protocol Ω , unlisted bilateral IIA)

26. A third scenario is that two States accede to both the MIIR and Protocol Ω but only one party lists their bilateral IIA under Article 6 of the MIIR as one to which Protocol Ω shall apply. This scenario accordingly focuses on the IIA Opt-In Mechanism.
27. State practice under BEPS MLI suggests that MIIR parties are unlikely to list all their IIAs for modification under Protocol Ω . On average, BEPS MLI parties listed 80% of their CTAs, though this proportion dropped as low as 10% for some States.²² We identify two potential grounds to expect at least the same degree of selectivity in respect of IIAs. First, there is the administrative burden of identifying, cataloguing all IIAs, and detailing how each would be modified by Protocol Ω . This burden is likely to be even greater for IIAs than for CTAs.²³ Second, States may adopt a selective strategy, choosing treaties based on factors such as the substantive compatibility of specific IIAs with Protocol Ω 's objectives, or the political desirability and feasibility of aligning with certain treaty partners.
28. As explained above, the modification of an IIA occurs only if all parties to that IIA have listed it in their unilateral Notifications regarding Protocol Ω . Conversely, where one MIIR party fails to list their IIA under Protocol Ω , the original terms of their bilateral obligations remain unaltered under Scenario C.
29. There are two possible solutions to the problem of MIIR parties not choosing to apply Protocol Ω to their IIAs, akin to the proposed solutions under Scenario B: first, to abandon the IIA Opt-In Mechanism and require MIIR parties to list all their IIAs upon accession to Protocol Ω , with an opt-out mechanism; or, second, to require every party to Protocol Ω to list all its IIAs on a non-derogable basis.
30. Similar trade-offs would need to be considered as for amending the Protocol Opt-In Mechanism: on one hand, the possibility of a lower number of parties to Protocol Ω if accession constitutes an offer to modify all IIAs (or, at least,

²² Hohmann et al., 439.

²³ The OECD and UN model tax conventions have had a harmonizing influence on the drafting of bilateral tax treaties, which is relatively absent in the fragmented investment treaty regime. Compare Elliott Ash and Omri Marian, 'The Making of International Tax Law: Empirical Evidence from Tax Treaties Text' (2020) 24 *Florida Tax Review* 151; Yoram Z Haftel, Morr Link and Tomer Broude, 'Last Year's Model? Investment Arbitration, Negotiation, and the Gap between Model BITs and IIAs' (2023) 26 *Journal of International Economic Law* 483.

requires a party to opt out in respect of specific IIAs); on the other hand, greater effectiveness in implementing ISDS reform among those MIIR parties that do accede to Protocol Ω . However, whereas a core package of default or essential Protocols would reduce the transactions costs of multiple accessions, the solutions for Scenario C must be considered alongside the obligation to detail how Protocol Ω would modify the listed IIAs.²⁴ MIIR parties would thus face higher transaction costs if they were required to consider every single IIA when acceding to Protocol Ω , rather than opting in on a rolling basis.

31. As a supplementary solution to alleviate such administrative burden, the Advisory Centre on International Investment Dispute Resolution could be designated under the MIIR to assist parties in preparing their Notifications as part of the Advisory Centre's technical assistance and capacity-building function.²⁵ The Statute of the Advisory Centre could thus form part of a non-derogable package of essential Protocols under the MIIR, which should be the least controversial of all Protocols because the Statute would not itself modify any IIAs.²⁶ In any event, the Advisory Centre should be made available to assist with Notifications.
32. In the overall balance between flexibility and coherence, we recommend that the IIA Opt-In Mechanism should be kept as the main flexibility mechanism, with greater coherence in ISDS Reform to be achieved through our suite of other recommendations.
33. However, if there is no political appetite to designate a core package of default or essential Protocols as we have recommended, then greater coherence would need to be achieved by replacing the IIA Opt-In Mechanism. We suggest the first solution is preferable—that is, requiring MIIR parties to list all their IIAs upon accession to Protocol Ω , with an opt-out mechanism—because it would promote coherence in ISDS reform while preserving the ability of parties to choose which IIAs are modified by Protocol Ω .
34. Regardless of the preferred solution, we recommend that the Advisory Centre is designated to assist MIIR parties in preparing their Notifications.

²⁴ Draft MIIR, Art. 6(3). See further Scenario E below.

²⁵ UNCITRAL, *Draft statute of an advisory centre on international investment dispute resolution: Note by the Secretariat* (25 April 2024) UN Doc. A/CN.9/1184 [Draft Statute], Art. 6.

²⁶ Draft MIIR, para. 13. The Statute would however carry obligations to make minimum financial contributions: Draft Statute, Art. 8.

**Scenario D: MIIR party (acceded to Protocol Ω , listed multilateral IIA)
v. MIIR party (acceded to Protocol Ω , listed multilateral IIA) v. MIIR
party (acceded to Protocol Ω , unlisted multilateral IIA)**

35. A fourth scenario is that two MIIR parties both accede to Protocol and list a multilateral IIA in their Notifications, but a third party to these instruments has not listed the IIA.
36. In its present form, the MIIR does not expressly provide for modification of a multilateral IIA where two or more parties—but not all—have met the requirements of the IIA Opt-in Mechanism. Under Article 7(3) of the draft MIIR, the notifications of these parties would simply be treated as an ‘offer’ to the remaining parties to modify the IIA by applying Protocol Ω .²⁷ However, to promote the implementation of ISDS reform, it is arguable that matching Notifications should modify the multilateral IIA between two or more parties to the IIA that have opted into Protocol Ω and listed the IIA.
37. Under the draft MIIR, the unilateral form of Notifications would not be caught by the general rule on *inter se* modification under Article 41 of the Vienna Convention on the Law of Treaties (‘VCLT’), which contemplates an agreement between two or more States. But there is nothing to prevent the MIIR from setting out special provisions by which two or more matching Notifications are deemed to have formed an *inter se* agreement to a multilateral IIA. Indeed, in February 2025, it was agreed that ‘Article 7(2) should be clarified’ to provide that, ‘in the case of a multilateral [IIA], corresponding notifications by some of the parties to that treaty would constitute an agreement to modify the treaty among them.’ We support this solution, though it may be better to include such amendment in a separate paragraph of Article 7 of the draft MIIR with express reference to Article 41 of the VCLT.
38. If this solution were implemented, the strict conditions under Article 41(1)(b) of the VCLT would still warrant scrutiny in respect of the relevant IIA. In simplified terms, *inter se* modifications must neither be prohibited by the multilateral IIA; nor affect the rights or obligations of other IIA parties; nor relate to a provision from which derogation is incompatible with the effective execution of the object and purpose of the treaty as a whole. It is possible that some *inter se* modifications of a multilateral IIA to implement Protocol Ω —even if expressly enabled by the MIIR—would be impermissible under the terms of the IIA, as some commentators have argued in respect of the Energy Charter Treaty (‘ECT’).

²⁷ Draft MIIR, Art. 7(3).

39. Although this solution would enable MIIR parties to implement ISDS reforms to their bilateral treaty relations under a multilateral IIA, there may be drawbacks for the MIIR to become a framework convention for *inter se* modifications. If only a subset of parties to a multilateral IIA listed it under Protocol Ω , different obligations would be owed under the same IIA. Such fragmentation of existing IIAs may undermine the effectiveness of Protocol Ω and a basic purpose of the MIIR: to establish a holistic and coherent approach to ISDS reform in response to concerns of inconsistency.²⁸
40. Notwithstanding these possible objections, we support the solution of inserting a provision into the draft MIIR that deems two or more matching Notifications to have formed an *inter se* modification to a multilateral IIA.²⁹
41. For completeness, if another State acceded to the multilateral IIA after two MIIR parties had implemented Protocol Ω by way of *inter se* agreement to the IIA, the new party's treaty relations would be governed by the unmodified IIA, unless it also made a matching Notification.³⁰
42. A supplementary solution would be to require MIIR parties to list all their IIAs upon accession to Protocol Ω , as discussed in Scenario C, since Scenario D assumes that a third party has acceded to Protocol Ω but not listed the multilateral IIA. However, this solution would not reduce the risk of fragmented treaty relations under a multilateral IIA where the third party has not acceded to Protocol Ω , let alone a State that has not even become a MIIR party.

Scenario E: MIIR party (Protocol Ω , listed IIA, modification detailed in Notification) v. MIIR party (Protocol Ω , listed IIA, conflicting modification detailed in Notification)

43. A fifth scenario is that two MIIR parties both accede to Protocol Ω , list an applicable IIA in their Notifications, and comply with their obligation to describe the modification to the IIA under Article 6(3) of the draft MIIR. In doing so, however, the unilateral Notifications conflict in detailing how Protocol Ω would modify the IIA.

²⁸ Draft MIIR, Preamble.

²⁹ We observe that some participants felt that the phrase 'deemed to have been modified' in Art. 7(2) of the draft MIIR 'might not be accurate' because, in respect of a bilateral IIA, matching Notifications would be governed by the rules on 'successive treaties' under Art. 30 of the VCLT: *2025 Working Group III report*, paras 39, 58. We revisit this point in Scenario F. However, in respect of a multilateral IIA, a deeming provision may be needed to meet the formal requirements of *inter se* modification under Art. 41 of the VCLT.

³⁰ By analogy to VCLT, Art. 40(5)(b).

44. The purpose of Article 6(3), according to the UNCITRAL Secretariat, is to reaffirm that ‘Parties are responsible for actively clarifying how their investment treaties are to be modified’ by requiring them ‘to specify how the investment treaty would be modified by applying the Protocol (for example, the articles in the treaty that will be replaced by the Protocol)’ and by allowing them ‘to include any additional information (for example, a separate conflict clause).’³¹
45. However, Article 6(3) creates at least two uncertainties as to the legal effect of Notifications when two States disagree on how Protocol Ω would modify their IIA.³²
46. First, mismatched Notifications may give rise to doubt whether there is mutual consent of the MIIR parties to modify their IIA. The legal effect of a Notification is to indicate a MIIR party’s intent to modify its IIA, which is deemed, first, to constitute an offer to include Protocol Ω in the IIA and, once all IIA parties have opted into Protocol Ω , to have accordingly modified the IIA.³³ However, when there is no meeting of the minds, it is unclear whether the modification may be deemed to have taken effect.
47. Second, assuming a modification of the IIA does take effect, any conflict in the substance of the underlying Notifications would create uncertainty for States and investors as to which Notification, if any, correctly details the modification to the IIA. Treaty interpreters would likely approach the mismatched Notifications as one of two types of unilateral statements: ‘reservations’, which exclude or modify obligations, or ‘interpretative declarations’, which specify or clarify obligations. Each is addressed in turn.
48. First, at least one of the mismatched Notifications may be treated as containing a unilateral *reservation* to Protocol Ω . In general, any State may exclude or modify the legal effect of a treaty by way of unilateral reservation when making its notification of accession.³⁴ However, Article 8 of the draft MIIR prohibits any reservations, unless expressly permitted by Protocol Ω .³⁵ Also, because the IIA Opt-In Mechanism deems an IIA to have been modified to include Protocol Ω , it is arguable that reservations would also need to be permitted under the IIA.³⁶

³¹ Draft MIIR, para. 34.

³² *ICLRC comments*, para. 28; *US comments*, 8–10; *2025 Working Group III report*, para. 49.

³³ Draft MIIR, Art. 7(1)–(2).

³⁴ VCLT, Arts 2(1)(d), 19–23; ‘Guide to Practice on Reservations to Treaties’ (2011) II(2) *Yearbook of the International Law Commission* 26 [ILC Guide to Practice on Reservations to Treaties].

³⁵ E.g., UNCITRAL Working Group III, *Possible reform of investor-State dispute settlement (ISDS): Draft statute of a standing mechanism for the resolution of international investment disputes: Note by the Secretariat* (8 February 2024) UN Doc. A/CN.9/WG.III/WP.239, Art. 39, which foresees the possibility of making reservations relating to the jurisdictional scope of the standing mechanism.

³⁶ Reservations are sometimes prohibited by IIAs. See, e.g., Energy Charter Treaty (with Annexes) (adopted 17 December 1994, in force 16 April 1998) 2080 UNTS 95 [ECT], Art. 46.

49. Second—and more likely, given the UNCITRAL Secretariat’s explanation—the mismatched Notifications would be treated as competing *interpretative declarations* that specify or clarify each State’s understanding of the intended meaning or scope of Protocol Ω .³⁷ The distinction between a reservation, which might be prohibited, and a permissible interpretative declaration would be drawn by interpreting the Notification in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying the intention of the MIIR party as to the Notification’s legal effect on Protocol Ω .³⁸
50. Regardless of whether the mismatched Notifications would prevent the implementation of Protocol Ω or instead be viewed as reservations or—most likely—interpretative declarations, none of these possibilities would promote coherence and consistency in ISDS reform.
51. Three solutions appear possible to avoid the problem of MIIR parties detailing how Protocol Ω would modify their IIA in conflicting ways: first, to *delete* Article 6(3) of the draft MIIR; second, to limit the possible content of Notifications based on an optional or mandatory *template*; or, third, to include a provision for *binding joint interpretations*. A combination of the second and third solutions is likely most desirable.
52. First, the risk of mismatched Notifications would be avoided altogether if Article 6(3) were deleted from the draft MIIR, such that the parties would not be obliged to detail in their Notifications how Protocol Ω would modify each IIA. A benefit of this solution may be to decrease the administrative burden on MIIR parties when they make their Notifications. The issue of how Protocol Ω would modify a given IIA would thus be referred to the professional judgement of a wider pool of treaty interpreters, including the legal advisers of investors and, in the last resort, arbitrators or members of a standing or appeal mechanism.
53. However, this solution may not advance the goals of coherence and consistency in the implementation of ISDS reform under the MIIR, nor the emphasis on transparency reflected in the MIIR Secretariat’s obligation to ‘make publicly available’ all Notifications.³⁹ Because each MIIR party is likely to form a view on how Protocol Ω would modify a given IIA before it accedes, the obligation to make that view transparent may be preferred. In any event, the deletion of Article 6(3) would not remove the risk of MIIR parties making unilateral interpretative declarations beyond the framework of the Protocol Opt-In Mechanism.

³⁷ ILC Guide to Practice on Reservations to Treaties, Guideline 1.2.

³⁸ ILC Guide to Practice on Reservations to Treaties, Guideline 1.3.

³⁹ Draft MIIR, Art. 6(6).

54. Second, the risk of mismatched Notifications may be reduced by limiting their possible content to the terms of an optional or mandatory template. Templates have been used to great effect in cognate regimes, such as the ‘Model Clauses’ for inclusion in IIAs developed by the International Centre for Settlement of Investment Disputes (‘ICSID’) and the ‘Template Reservations and Notifications’ under BEPS MLI.⁴⁰ Already the UNCITRAL Secretariat has prepared a ‘sample’ Notification, inviting the Working Group ‘to consider whether such text should be provided in the body of the [MIIR] or in the Protocol.’⁴¹ This sample addresses the obligation under Article 6(3) by restating ‘for greater certainty’ the legal effect of the IIA Opt-In Mechanism, namely that an IIA is modified to include Protocol Ω such that its provisions apply to arbitral proceedings under the IIA.⁴² If such boilerplate restatements are all that is envisaged by Article 6(3), then including a template with optional or mandatory language under Protocol Ω may suffice to mitigate the risk of mismatched Notifications and to reduce the transaction costs of accession.
55. However, the Working Group might wish to consider templates with more precise language, which States would be obliged to use for their Notifications. This would require a revision of Article 6(3) to direct States towards these templates. We consider that Article 6(3) could be amended to read: ‘A Party shall detail how the Protocol(s) would modify the investment treaties listed in the notification, *using the template provided in Annex Z.*’ We suggest language for such a template in the *Annex* to this paper.
56. Third, the problem of mismatched Notifications may be mitigated by adopting a recommendation of the EU and its Members States: to include a mechanism in the MIIR for binding joint interpretations.⁴³
57. In general, any parties to the MIIR or an IIA would be free to issue a joint interpretative declaration, though with variable legal effect. The ‘joint formulation’ of an interpretative declaration by some parties to a multilateral IIA would not affect the unilateral nature of that declaration.⁴⁴ However, a joint declaration by both parties to a bilateral IIA would transform that declaration

⁴⁰ *ICSID Model Clauses* <https://icsid.worldbank.org/resources/content/model-clauses> (accessed 5 June 2025); *Template Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-ml/beps-ml-position-papua-new-guinea.pdf (accessed 5 June 2025).

⁴¹ Draft MIIR, para. 39.

⁴² Draft MIIR, para. 38.

⁴³ For the avoidance of doubt, the proposed mechanism in the MIIR for binding joint interpretations should not be conflated with the debate over Joint Statement Initiatives (JSIs) in international trade law. A closer analogy would be with the mechanism for authoritative interpretations under Art. IX:2 of the Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

⁴⁴ ILC Guide to Practice on Reservations to Treaties, Guideline 1.2.2.

into a collateral agreement, which may be deemed to constitute an ‘authentic interpretation’ of how Protocol Ω modifies the IIA.⁴⁵ In this way, the joint declaration would constitute a ‘subsequent agreement’ to the IIA that must be taken into account by treaty interpreters.⁴⁶ (Protocol Ω itself would constitute a ‘successive treaty’, discussed in Scenario F below.) But it is unclear whether an authentic interpretation in the form of a joint declaration would be treated as conclusive, since the VCLT merely provides that subsequent agreements must be ‘taken into account’ together with context.⁴⁷

58. It is therefore best for parties to provide expressly that their joint interpretation has conclusive effect, either in the original IIA or in their subsequent agreement. Indeed, the EU and its Member States have recommended that the MIIR itself ‘include a provision on joint interpretation that would create a structure in the multilateral instrument for binding interpretations’, which could be ‘optionally applied or utilized both by Parties to the [MIIR] that are parties to the relevant [IIA] but also other parties (whether Parties to the [MIIR] or not).’⁴⁸ Although the EU proposal does not address the risk of mismatched Notifications under Article 6(3) of the draft MIIR, its proposed mechanism for binding joint interpretations could be designated as the only permissible means of specifying or clarifying a MIIR party’s understanding of the meaning or scope of Protocol Ω , to the exclusion of unilateral interpretative declarations in the form of a Notification or otherwise.⁴⁹

59. The United States, on the other hand, has recommended that the IIA Opt-In Mechanism be amended to allow only for joint—not unilateral—Notifications by two or more parties to an IIA.⁵⁰ In a proposed amendment to Article 6(3), ‘the notifying Parties shall describe in detail how the Protocol(s) applies to and/or affects the Parties’ rights and obligations under the [IIAs] identified in the joint notification.’⁵¹ Certainly, this requirement would abolish the risk of mismatched Notifications. However, other participants in Working Group III have observed

⁴⁵ ILC Guide to Practice on Reservations to Treaties, Guideline 1.2.8; ‘Reservations to Treaties’ (1999) II(2) *Yearbook of the International Law Commission* 89, 125–126.

⁴⁶ VCLT, Art. 31(3)(a).

⁴⁷ ‘Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties’ (2018) II(2) *Yearbook of the International Law Commission* 23, 30–32.

⁴⁸ *Submission from the European Union and its Member States A/CN.9/WG.III/WP.246 – Draft multilateral instrument on ISDS* (14 February 2025) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2025.02.14_submission_mi_joint_interpretation.pdf (accessed 5 June 2025) para. 7. See further 2025 *Working Group III report*, para. 89; Joshua Paine, ‘A Multilateral Instrument on ISDS Reform (MIIR): Selected Design Issues’ (*EJIL:Talk!*, 3 June 2025) www.ejiltalk.org/a-multilateral-instrument-on-isds-reform-miir-selected-design-issues/ (accessed 5 June 2025).

⁴⁹ However, some participants in Working Group III believe that ‘any article on joint interpretation should not deprive the parties of [their general power to issue authoritative interpretations] nor oblige them to take part in the exercise’: 2025 *Working Group III report*, para. 90.

⁵⁰ *US comments*, 8–10.

⁵¹ *US comments*, 9.

that such a requirement would ‘run contrary to the aim of the [MIIR]’, namely ‘to provide a simple mechanism for its Parties to modify existing treaties by indicating the reforms that they wished to apply’, and ‘could pose practical difficulties and be burdensome as it would, in essence, require a renegotiation of existing treaties with multiple counterparts’.⁵² We agree.

60. In summary, we believe that the best response to Scenario E is to combine the second and third solutions. Rather than deleting Article 6(3), or requiring joint notifications, the draft MIIR may be amended to include: an optional or mandatory template for unilateral Notifications, limited to boilerplate restatements of the legal effect of the IIA Opt-In Mechanism; and a mechanism for binding joint interpretations, along the lines proposed by the EU, if the MIIR parties wish to specify or clarify the meaning or scope of Protocol Ω over and above the terms of the template. In designing the mechanism for binding joint interpretations, it would be important to address the question of whether a MIIR party is obliged to formulate a joint interpretation or whether participation is purely discretionary.⁵³

Scenario F: MIIR party (Protocol Ω , listed IIA, modification detailed in Notification) v. MIIR party (Protocol Ω , listed IIA, matching modification detailed in Notification) v. claimant investor (incompatible IIA)

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

62. Under the law of treaties, Protocol Ω would most likely constitute a ‘successive treaty’ on the same subject matter as the existing IIA, such that the IIA would apply only to the extent that its provisions are compatible with Protocol Ω .⁵⁴ Article 7(2) of the draft MIIR reflects this general rule, which provides that the IIA is ‘deemed to have been modified’ by Protocol Ω once all parties have met the requirements of the IIA Opt-In Mechanism.

63. While this scenario in principle is clear, a conflict may arise if the IIA contains a special rule of procedure regarding its amendment or modification and those rules were not followed prior to the entry into force of Protocol Ω between the

⁵² 2025 Working Group III report, para. 40.

⁵³ 2025 Working Group III report, para. 41. Cf. *Republic of Ecuador v United States of America*, PCA Case No. 2012-05, Award (29 September 2012) paras 225–228.

⁵⁴ VCLT, Art. 30(3).

two MIIR parties.⁵⁵ In a future dispute, a claimant investor may thus seek to avoid the ISDS reform implemented by Protocol Ω. However, if the IIA was merely bilateral, the MIIR itself may be treated as a successive treaty that takes priority over the original rule regarding amendment or modification.

64. Alternatively, the IIA may contain a special conflict rule on non-derogation, such that the earlier IIA takes priority over successive treaties to the extent of any inconsistency.⁵⁶ Such a rule would conflict with Article 7(5) of the MIIR, which provides that Protocol Ω shall prevail in the event of any incompatibility with the IIA. A different rule of treaty law would seemingly apply to this conflict: a subsequent treaty shall terminate or suspend a prior treaty that relates to the same subject matter, either if that is the intention of the parties or if the provisions of the treaties are not capable of being applied at the same time.⁵⁷ To avoid the extreme consequence of wholesale termination or suspension of the IIA, it may be possible for the MIIR to provide expressly that any such conflict merely results in the suspension of the special rule on non-derogation.⁵⁸
65. A solution to these possible conflicts would thus be to clarify in Article 7 of the MIIR that matching Notifications in respect of Protocol Ω are deemed to constitute a bilateral agreement to modify the IIA to the extent necessary to allow for implementation of Protocol Ω and, in the event of any incompatible clause regarding modification or non-derogation in the original IIA, that clause is suspended. This solution could also apply to multilateral IIAs to the extent that *inter se* modification is enabled by the MIIR, addressed in Scenario D above.
66. A complication may arise where an IIA expressly provides that any modification is without prejudice to rights and obligations that arose before such modification.⁵⁹ The key question would be whether this rare type of survival or sunset clause applies only to arbitral *proceedings* that have already commenced—which is also affirmed by Article 7(6) of the MIIR—or to all *investments* made or to *breaches* alleged to have occurred before modification. If one of the latter two interpretations is correct, then such clauses may impose a meaningful restriction on the ability of certain States to implement ISDS reforms in respect of established investors. However, we make no

⁵⁵ E.g., Bilateral Investment Treaty Between the Government of the Republic of India and the Government of the United Arab Emirates (signed 13 February 2024, in force 31 August 2024), Art. 38.

⁵⁶ E.g., Free Trade Agreement Between the Republic of Korea and the Republic of Colombia (signed 21 February 2013, in force 15 July 2016), Art. 1.2(2). For a multilateral example, see ECT, Art. 16.

⁵⁷ VCLT, Art. 59.

⁵⁸ By analogy to VCLT, Art. 30(3).

⁵⁹ E.g., Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments (signed 22 October 1998, in force 17 June 1999), Art. 11.

recommendation to address this complication in the MIIR itself, given the rarity of sunset clauses that apply to modification. Rather the complication may be resolved by the IIA parties in their Notifications or a binding joint interpretation.

Summary of recommendations

67. We have mapped six possible scenarios of mismatched MIIR commitments, many of which would defeat the purpose of the MIIR: to provide a coherent framework for ISDS reform. In particular, recent evidence from the first seven years of implementing BEPS MLI (2018–2025) suggests that the draft MIIR would be ineffective without a minimum floor of default or essential Protocols. However, our **five recommendations** have also sought to maintain a high level of flexibility for States to choose which IIAs are modified by accession to Protocols, mainly by preserving the IIA Opt-In Mechanism.
68. First, the MIIR should include a provision deeming two or more matching Notifications to have formed an ***inter se* modification** to a multilateral IIA.
69. Second, an optional or mandatory **template Notification** should be included in the MIIR to reduce the risk of conflicting descriptions of how Protocol Ω would modify a listed IIA, in tandem with a mechanism for **binding joint interpretations**. An *Annex* to this paper proposes language for such a template.
70. Third, the MIIR should **clarify the legal effect of matching Notifications**, specifically by providing that any incompatible clause regarding modification or non-derogation in the original IIA would be suspended by accession to Protocol Ω .
71. Fourth, the Advisory Centre on International Investment Dispute Resolution should be designated under the MIIR to **assist parties in preparing their Notifications** as part of the Advisory Centre's technical assistance and capacity-building function.
72. Finally, the Protocol Opt-In Mechanism should not apply to a **core package of essential Protocols**, which all MIIR parties would be required to accept without derogation.
73. The *Table* below summarizes the six scenarios and 10 possible solutions in the light of treaty law. The solutions in bold are those reflecting our five recommendations, which we believe would strike the best balance between coherence and flexibility in designing a multilateral framework for ISDS reform.

74. However, if there is no political appetite to designate a core package of essential Protocols, then greater coherence may need to be achieved by requiring MIIR parties to list all their IIAs upon accession to Protocol Ω , with an opt-out mechanism, which would preserve the ability of parties to choose which IIAs are modified by Protocol Ω .

75. Regardless of whether our recommendations are adopted, we consider that it is vital for the MIIR Secretariat (or another appropriate and well-resourced body) to maintain a 'Matching Database', as the OECD Secretariat does for the BEPS MLI, which would provide up-to-date information on the application of the MIIR and its Protocols to the vast network of existing IIAs.⁶⁰ Without such a service, the MIIR would run the risk of further complicating the network of legal norms that States, investors, and other actors must navigate to determine the applicable legal rule.

⁶⁰ *BEPS MLI Matching Database* (OECD, 2025) www.oecd.org/en/data/tools/beps-ml-matching-database.html (accessed 5 June 2025).

TABLE

Ten possible solutions to six scenarios of mismatched MIIR commitments, with recommended solutions in bold

Scenario	Solution 1	Solution 2	Solution 3	Relevant rules
A. MIIR party v. non-MIIR party	–	–	–	VCLT, Art. 26
B. MIIR party (acceded to Protocol Ω) v. MIIR party (not acceded to Protocol Ω)	Default Protocols on accession to MIIR, <i>with</i> opt-out mechanism.	Essential Protocols on accession to MIIR, <i>without</i> opt-out mechanism.	–	BEPS MLI
C. MIIR party (acceded to Protocol Ω , listed bilateral IIA) v. MIIR party (acceded to Protocol Ω , unlisted bilateral IIA)	All IIAs listed on accession to Protocol Ω , <i>with</i> opt-out mechanism.	All IIAs listed on accession to Protocol Ω , <i>without</i> opt-out mechanism.	Advisory Centre to assist MIIR parties in preparing their Notifications.	BEPS MLI
D. Scenario D: MIIR party (acceded to Protocol Ω , listed multilateral IIA) v. MIIR party (acceded to Protocol Ω , listed multilateral IIA) v. MIIR party (acceded to Protocol Ω , unlisted multilateral IIA)	Insert provision deeming two or more matching Notifications to have formed an <i>inter se</i> modification to a multilateral IIA.	As above.	–	VCLT, Arts 40(5)(b), 41
E. Scenario E: MIIR party (Protocol Ω , listed IIA, modification detailed in Notification) v. MIIR party (Protocol Ω , listed IIA, conflicting modification detailed in Notification)	Delete Article 6(3) of the draft MIIR.	Amend Article 6(3) to limit the content of Notifications to optional or mandatory language in an annexed template.	Insert mechanism for binding joint interpretations.	VCLT, Art. 31(3)(a); ILC Guide to Practice on Reservations to Treaties
F. Scenario F: MIIR party (Protocol Ω , listed IIA, modification detailed in Notification) v. MIIR party (Protocol Ω , listed IIA, matching modification detailed in Notification) v. claimant investor (incompatible IIA)	Insert provision clarifying the effect of matching Notifications by providing that incompatible clause in IIA is suspended by accession to Protocol Ω.	–	–	VCLT, Arts 30(3), 59

ANNEX

Proposed Templates for Notification of Modification under Article 6(3)

If an IIA does not include provisions that address the same subject matter as Protocol Ω , a party's notification shall be limited to the following language:

'Protocol Ω shall supplement the provisions of [IIA].'

If an IIA includes provisions that address the same subject matter as Protocol Ω , the notification shall be limited to the language of the following two options:

Option 1: *'Protocol Ω shall supplement Articles [x] to [y] / Chapter [z] of [IIA].'*

and/or

Option 2: *'Protocol Ω shall prevail over Articles [x] to [y] / Chapter [z] of [IIA].'*

Accordingly, an example notification of a MIIR party ('State L') that chooses to list two of its IIAs ('IIA Σ ' and 'IIA Λ ') might be as follows:

'In accordance with Article 6 of the Convention, State L submits this notification with regard to Protocol Ω , to which the State has deposited its instrument of ratification on DD/MM/YYYY.'

List of investment treaties to which Protocol Ω applies and relevant modifications:

- 1. IIA Σ : Protocol Ω shall prevail over Articles [x] to [y] of IIA Σ .*
- 2. IIA Λ : Protocol Ω shall supplement Chapter [z] of IIA Λ .'*