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Marc Bungenberg
August Reinisch

Special Issue:

From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court

Options Regarding the Institutionalization of Investor-State Dispute Settlement

Second Edition

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Options Regarding the Institutionalization of Investor-State Dispute Settlement

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Preface

On 20 March 2018, the Council of the EU gave the EU Commission a mandate to negotiate the creation of a new multilateral court for investment disputes. In an important development, on 30 April 2019, the Court of Justice of the European Union decided that the ISDS mechanism provided for by the free trade agreement between the EU and Canada (CETA) is compatible with EU law. Already in 2017, the United Nations Commission on International Trade Law (UNCITRAL) decided to discuss a reform of investment arbitration, including the possible establishment of a Multilateral Investment Court (MIC). This new development is intended to provide a response to the strong criticism of international investment law, in general, and of ad hoc arbitration between investors and states, in particular, which has been expressed in recent years. UNCITRAL Working Group III was mandated to: first, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to UNCITRAL. The decision to develop solutions was taken at the 37th session in New York (1–5 April 2019). The option of an institutionalized as well as multilateralised investor-state dispute settlement mechanism will now be discussed in detail. This "now freely available" perhaps study is supposed to be a starting point for discussions at a time where still only few other comprehensive proposals for a future ISDS system after a structural reform are tabled. This book is by no means meant to be the result; rather, it is one point of departure for discussions.

The first edition of this "feasibility study" was originally launched in the course of 2017. The second edition with open access was prepared in spring 2019. It is intended to contribute to a broader discussion on the option of establishing a new international special court for investment protection. Although based on the debate about a reform of investment arbitration, it does not discuss the advantages and disadvantages of replacing the current system of investor-state arbitration. Rather, it presents options for a potential institutionalized form of investor-state dispute settlement and for the design of an MIC.

The "cornerstones" of such a new permanent court are its strict rule of law-orientation, which includes the highest demands on the judicial appointment

procedure as well as on the personal integrity, independence and qualification of the judges. Second, the costs should be significantly lower compared to the status quo. Third, transparency considerations and aspects of consistency of case law should receive particular attention. Fourth, decisions of an MIC would have to be effectively enforceable.

This study was originally written in German with the support of Dr. Anja Trautmann, LL.M., Mag. Céline Braumann, LL.M. and Mag. Sara Mansour Fallah. The update for the second edition was assisted again by Mag. Céline Braumann, and furthermore by Anna Holzer, Angshuman Hazarika and Andrés Eduardo Alvarado Garzón. We are thankful for the good cooperation with Springer and the *European Yearbook of International Economic Law* for accepting this publication as a Special Issue.

Saarbrücken, Germany — Marc Bungenberg
Wien, Austria — August Reinisch
June 2019

Contents

Abbreviations

AB	Appellate Body
ACtHPR Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights
ASEAN	Association of Southeast Asian Nations
ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
BIPA	Bilateral Investment Promotion and Protection Agreement
CCJ Agreement	Agreement establishing the Caribbean Court of Justice
CEPA	Comprehensive Economic Partnership Agreement
CECA	Comprehensive Economic Cooperation Agreement
CETA	Comprehensive Economic and Trade Agreement
DSU	Dispute Settlement Understanding
ECT	Energy Charter Treaty
EP	European Parliament
EU	European Union
FTA	Free Trade Agreement
IACtHR	Inter-American Court of Human Rights
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
IUSCT	Iran-United States Claims Tribunal
SME	Small- and Medium-Sized Enterprises
MFN	Most Favored Nation
MIAM	Multilateral Investment Appellate Mechanism

MIC	Multilateral Investment Court
MNE	Multinational Enterprises
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
OAS	Organization of American States
OECD	Organisation of Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
SOEs	State-Owned Enterprises
TPP	Trans-Pacific Partnership
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Transparency Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Chapter 1
Executive Summary

In March 2018 the Council of the European Union (EU Council or Council) gave the Commission of the EU (EU Commission or Commission) a mandate to negotiate a Multilateral Investment Court (MIC).[1] Since July 2017 the United Nations Commission on International Trade Law (UNCITRAL) Working Group III has been discussing different options for a reform of Investor State Dispute Settlement (ISDS).[2] The UNCITRAL Working Group III was mandated to: **1**

First, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[3]

Consensus to develop solutions (thus, enter stage 3) was reached at the Thirty-seventh session in New York from 1 to 5 April 2019.[4] On 30 April 2019 the Court of Justice of the European Union decided that the ISDS mechanism provided for by the free trade agreement between the EU and Canada (Comprehensive Economic and Trade Agreement—CETA) is compatible with EU Law.[5] The option of a institutionalized as well as multilateralised investor state dispute settlement mechanism will now be discussed in detail.

This study assesses both the option of a two-tiered MIC and of a Multilateral Investment Appellate Mechanism (MIAM). Both models provide for a permanent, pre-appointed judiciary according to rule of law standards. As yet, there are no other **2**

[1] Council of the EU (2018).

[2] UNCITRAL (2017a).

[3] UNCITRAL (2017b), para. 264 and 447.

[4] UNCITRAL (2019).

[5] CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341.

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comprehensive and in-depth analyses in academic literature[6] regarding the models being put forward in this study which have been deemed visionary or even revolutionary. Therefore, this study was one of the first feasibility studies considering both models. Meanwhile, since these first statements and proposals of very general ideas and announcements in the first edition of this study, the EU Commission has also come up with in depth analyses[7] that make proposals at least similar to those that can be found in this study.

3 The starting point of this study is to take a look at the announcements of the EU Commission and the respective plans in the CETA,[8] the EU-Singapore Investment Protection Agreement (IPA),[9] the EU-Mexico Global Agreement[10] and the EU-Vietnam IPA[11] to establish an MIC. The United Nations Conference on Trade and Development (UNCTAD) made the following observation[12]:

> A standing investment court would be an institutional public good serving the interests of investors, States and stakeholders. The court would address most of the problems outlined above; it would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and accuracy of decisions and ensure independence and impartiality of investors. However, this solution would also be the most difficult to implement as it would require a complete overhaul of the current regime through a coordinated action by a large number of states. [. . .]

4 A multilateral solution, whatever the form it might take, could result in more substantive coherence and predictability as well as legal certainty for all concerned and thus lead to increased acceptance of decisions. Still, the existing network of mostly Bilateral Investment Treaties (BITs), which contain the substantive standards of protection, would remain applicable and serve as the material basis for the institutionalized as well as multilateralized Investor-State dispute settlement system.

5 Should a multilateral consolidation of these substantative standards appear necessary and feasible at some point in the future, it could be attained by a separate opt-in convention. It would probably be easier to combine such an opt-in convention on standards of protection with an MIC than with a standalone appellate mechanism.

6 Establishing an MIC or a MIAM entails challenging negotiations and significant financial costs. Compared to other international courts, it could be run with a budget within the low double-digit millions. By sharing the premises and staff/secretariat of

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[6] But see on reform and structural reform options Kaufmann-Kohler and Potestà (2016, 2017), Howse (2017), Happ and Wuschka (2017), Brown (2017), Calamita (2017) and Hoffmeister (2017).

[7] European Union (2019) and European Commission (2017).

[8] Art. 8.29, Comprehensive Economic and Trade Agreement, OJ L 11, 14.1.2017, p. 23.

[9] Art. 3.12, EU-Singapore IPA (draft for signature) as on 2 April, 2019.

[10] Art. 14, Section- Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019.

[11] Art. 3.41, EU-Vietnam IPA (draft for signature) as on 2 April, 2019.

[12] UNCTAD (2013), p. 9; see also Howse (2017): "A multilateral court system is best suited to offering standing or intervention to a wide range of actors who have concerns of international justice that relate to foreign investment."

institutions like the International Centre for Settlement of Investment Disputes (ICSID), the International Tribunal for the Law of the Sea (ITLOS) or the Permanent Court of Arbitration (PCA), costs could be reduced even further. Under the assumption that investment arbitration costs approximately EUR 800,000 per case (excluding the costs for legal counsel), even shifting only a small fraction of the currently initiated cases to the MIC could lead to cost neutrality if the losing party had to pay for those costs based on appropriate rules on fees.

7 An MIC/MIAM requires a new approach in contrast to the current bilateral Investment Court System (ICS) as stipulated by the EU in CETA, the EU-Mexico Global Agreement, the EU-Singapore IPA or the EU-Vietnam IPA. Although the ICS offers a good approach for reform in many aspects, a multilateral mechanism for dispute settlement calls for additional, institutionally reinforced methods. A new system of legal redressal for investment disputes that is functioning, efficient, broadly legitimized and that follows the principles of the rule of law can only be created with considerable commitment.

8 A two-tiered court offers certain advantages compared to a mere appellate mechanism in terms of the implementation of rule of law considerations and systemic coherence, as there would be no shift from investment arbitration to an international court between the first and second instance. A two-tiered MIC is also preferable to a MIAM as an MIC would reform the current system of investment arbitration more holistically and coherently. Nevertheless, the MIAM would still be a significant improvement; however, it is advisable to pursue the creation of an MIC if this proves to be realistic.

1.1 Preliminary Considerations Regarding the Establishment of the MIC/MIAM

9 The MIC as well as the MIAM could take the form of an independent international organisation on the basis of a treaty, with its own organs and with separate legal personality.

10 From an economic perspective, an MIC might only make sense with a minimum of approximately 40 members—thus, in addition to the EU with its 28 members, an extra 10+ member states—as only then could there be certain savings on payments made to the judges in comparison to the payments made to the arbitrators and the judges in bilateral bodies such as ICS under the current system. The statute for an MIC should only enter into force once it has a certain number of ratifications in order to prevent the mere addition of another dispute settlement institution.

1.2 Organisational Structure

11 Incorporating the MIC or the MIAM into another organisation does not appear to be advisable as other organisations are either completely different in their structure or it may require certain procedures to amend their statutes which might be too difficult to achieve in practice. This is not to suggest that the MIC could not share the infrastructure of other institutions.

12 A statute for the establishment of an MIC or a MIAM would constitute an international treaty that should allow the accession of all states, independent customs unions or Regional Economic Integration Organisations (REIOs) as well as territories with independent powers (Hong Kong, Macao, Taiwan).

13 The members of the new international organisation MIC/MIAM would be represented in a plenary organ. This plenary organ would be responsible for the appointment of judges and would set the budget. It could also adopt necessary secondary law, in particular procedural rules, the remuneration of judges and the rules for increasing the number of judges.

14 The new judges would have to be highly qualified, particularly in international law, economic law and public/constitutional law, as well as independent and, as full-time judges, be available on a permanent basis. Appropriate procedures for the election and appointment of judges must reflect these qualifications. The MIC/MIAM Statute should contain a code of conduct for the judges.

15 The MIC/MIAM should have a president and a vice-president who represent the court externally. Additionally, for the purposes of decision making, chambers should be established in advance and for an extended period of time. A party should only be able to apply for a decision by the plenary (or grand chamber) under specific circumstances. The criteria for the formation of the chambers should be stipulated in the rules of procedure.

16 There should also be a Secretariat. Among other tasks, the Secretariat would support the judges, administer the procedures, prepare translations and would be in charge of the public relations work of the court. The Secretariat is crucial to the transparency of the MIC or MIAM.

17 Furthermore, an Investment Advisory Centre (IAC) could be established as an independent organ. The IAC could support small and medium-sized enterprises and developing countries by preventing and settling disputes and offering legal advice during arbitration.

18 It is recommended that the working language of the MIC/MIAM be English. In addition to establishing a legal seat in the treaty, a headquarters agreement with the host state covering privileges and immunities should be concluded.

19 The members will fund the MIC/MIAM and the concrete share of the budget paid by each member could be determined by reference to the respective member's share of global foreign direct investment.

1.3 Procedure of the MIC

The procedure of the MIC should be two-tiered and similar to the procedure of administrative courts. There should be the requirement of an application procedure and the parties should have a right to an efficient and expedient procedure and it should be conducted in an inquisitorial manner. The requirements of the UNCITRAL Transparency Rules and the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention) regarding transparency should be fully incorporated in the procedural rules. Thus, procedural documents should generally be published as long as this does not prejudice essential interests like business secrets or the security interests of the parties. Hearings should be open to the public and third parties should have the opportunity to deliver statements. **20**

There should be a maximum duration for the proceedings of both the first and the second instance. Only in exceptional cases should a prolonged duration be permissible—as full-time judges hear the cases, the maximum duration of proceedings should be shorter than in *ad hoc* cases. **21**

The MIC determines its own jurisdiction. The personal and subject-matter jurisdiction of the MIC should for the most part derive from International Investment Agreements (IIAs) that have allegedly been violated. The claimant and the respondent must both have agreed to the jurisdiction of the MIC. In the case of the investor, this agreement can be inferred from the submission of the claim itself. As for the respondents, their agreement can derive from IIAs which explicitly provide for the MIC's jurisdiction; the MIC Statute may also stipulate its jurisdiction over already existing investment treaties, as long as the respondent is an MIC member and the home state/territory has also ratified the MIC statute. Furthermore, the drafters of the MIC must decide whether its jurisdiction extends to claimants who are not from MIC member states and whether parties can establish the MIC's jurisdiction ad hoc if neither the investor nor the respondent is (from) an MIC member state. However, this should be accepted only if the rules on court fees are adapted accordingly. **22**

The MIC Statute could also stipulate rules aimed at preventing abuse of process or treaty shopping. **23**

The costs of proceedings shall be allocated to the parties depending on the outcome of the case; however, MIC members should cover the permanent costs of the court, as it would be difficult to allocate the costs to specific proceedings. Fixed MIC fees could be foreseen to shift part of the financial burden to the parties. Small and medium-sized enterprises and individual investors should not be deterred from initiating justified cases before the MIC as a result of court fees. **24**

Decisions should be in writing and fully reasoned to make them comprehensible for future reviewers. If none of the parties appeals the decision, it can become binding and enforceable. **25**

An appeal should suspend the binding effect of a decision of a chamber of first instance. The appeals chamber could review the facts as well as the legal reasoning of decisions. Moreover, appeals chambers should have further competences in **26**

addition to being able to annul decisions, for example on the grounds contained in Article 52 of the ICSID Convention. It is generally preferable for the appeals chamber to possess extensive powers instead of remanding decisions back to the chamber of first instance to decide again.

27 The judges of the second instance should also sit in chambers and an application to have the proceedings before the plenary of judges should remain the exception.

28 The Statute should provide for the financing of procedural costs and legal aid. The plenary organ or its members could later decide on details through secondary laws. This secondary law could also regulate the admissibility of counterclaims, preliminary injunctions and other interim relief as well as mass actions.

1.4 Applicable Law of the MIC

29 The substantive law of the MIC should be the applicable investment treaties and their respective standards of protection. The presence of permanent judges will lead to increased consistency in the application of these standards of protection and the MIC Statute could also include provisions that require the judges to apply the protection standards consistently. Additionally, the MIC Statute could contain an instruction to take general principles of international law into account. An explicit reference to the right to regulate could also be included in the MIC Statute.

30 Due to the special role of the Court of Justice of the European Union (CJEU) in the Union's system of legal protection, EU law—with the exception of the MIC statute and specific free trade and investment agreements and investment treaties of the EU[13]—should not qualify as applicable substantive law of the MIC.

31 Through its plenary organ, the MIC could adopt its own procedural law. The MIC statute may already provide for core procedural principles, such as the principles of transparency, accelerated proceedings, public disclosure and efficiency, an inquisitorial model, rules on procedural costs and rules against abuse of process.

1.5 Legal Remedies and Enforcement of MIC Decisions

32 The decisions of the MIC should be limited to (declaratory) findings of violations of applicable IIAs and the award of damages and/or compensation.

33 As the MIC procedure is not a procedure covered by the ICSID Convention, the enforcement mechanism of the ICSID Convention will not apply to MIC decisions.

34 Enforcement pursuant to the New York Convention would require that MIC decisions embody arbitral awards as defined by this Convention. Although this could be stipulated in the Statute (similar to Article 8.41(5) CETA), it is currently

[13]From an EU perspective, these investment treaties are an integral part of EU law.

unclear whether such a provision would be accepted as binding by the domestic courts of the enforcement state, especially with respect to enforcement in non-member states of the MIC. In light of the desire for legal certainty, the MIC should have its own enforcement mechanism, which would be more effective with a greater number of MIC member states.

One could also consider the establishment of a fund (enforcement fund) to which all MIC members have to contribute and which could serve to expeditiously satisfy final claims up to a certain amount. Claims against the losing party arising from an MIC decision would be subrogated to the fund. The fund or the MIC could then enforce these subrogated claims against the party in arrears. **35**

1.6 Establishment of a Standalone Multilateral Investment Appellate Mechanism (MIAM)

Another, "smaller" solution would be the establishment of a MIAM. This would entail a single-tier court system within a new independent international organisation. **36**

The organs of the MIAM would be identical to those of the MIC. This is particularly true for the judiciary and the plenary organ. The Secretariat might turn out to be smaller than that of an MIC. **37**

The applicable administrative and procedural law and the enforcement of MIAM decisions could be designed similarly to what has been suggested for the MIC. **38**

References

Brown CM (2017) A multilateral mechanism for the settlement of investment disputes. ICSID Rev Foreign Invest Law J 32:673–690

Calamita NJ (2017) The challenge of establishing a multilateral investment tribunal at ICSID. ICSID Rev Foreign Invest Law J 32:611–624

Council of the EU (2018) Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 ADD 1 DCL 1, 20.3.2018

European Commission (2017) Impact assessment – multilateral reform of investment dispute resolution, SWD(2017)302 final, 13.9.2017

European Union (2019) Possible reform of investor-state dispute settlement (ISDS), Submission from the European Union and its Member States, A/CM.9/WG.III/WP.159/Add.1, 24 January 2019

Happ R, Wuschka S (2017) From the Jay Treaty Commissions towards a Multilateral Investment Court: addressing the enforcement dilemma. Indian J Arbitr Law 6:113–132

Hoffmeister F (2017) The EU contribution to the progressive development of institutional aspects in international investment law. Revue Belge de Droit International 2:566–590

Howse R (2017) International investment law and arbitration: a conceptual framework. IILJ Working Paper 2017/1

Kaufmann-Kohler G, Potestà M (2016) Can the Mauritius Convention serve as a model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?

Kaufmann-Kohler G, Potestà M (2017) The composition of a Multilateral Investment Court and of an appeal mechanism for investment awards
UNCITRAL (2017a) Possible future work in the field of dispute settlement: reforms of investor-State dispute settlement (ISDS)- Note by the Secretariat, A/CN.9/917, 20 April 2017
UNCITRAL (2017b) Report of the United Nations Commission on International Trade Law, Fiftieth Session (3–21 July 2017), A/72/17, 2017
UNCITRAL (2019) Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019), A/CN.9/970 (draft document)
UNCTAD (2013) Reform of investor-state dispute settlement: in search of a roadmap. IIA Issues Note No. 2, June 2013

Chapter 2
Introduction

In March 2018 the Council of the European Union (EU Council or Council) gave the Commission of the EU (EU Commission or Commission) a mandate to negotiate a Multilateral Investment Court (MIC).[1] Furthermore, since July 2017 the United Nations Commission on International Trade Law (UNCITRAL) Working Group III[2] is discussing different options for the reform of Investor State Dispute Settlement (ISDS).[3] The UNCITRAL Working Group III was mandated to:

First, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[4]

Consensus to develop solutions (thus enter stage 3 of the UNCITRAL WGIII mandate) was reached at the Thirty-seventh session in New York from 1 to 5 April 2019[5]; the option of an institutionalized as well as multilateralised investor state dispute settlement mechanism will now be discussed in detail inside and outside UNCITRAL. This is all the more the case after the Court of Justice of the European Union (CJEU) has given its Opinion 1/17 confirming the compatibility of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Investment Court System with the EU Treaties. The CJEU recalled "that an international agreement providing for the creation of a court responsible for the interpretation of

[1]Council of the EU (2018).

[2]UNCITRAL Working Group III is composed of the 60 member States of the Commission and attended by observers from other UN member States, non-member States, intergovernmental organizations and invited non-governmental organizations.

[3]UNCITRAL (2017a).

[4]UNCITRAL (2017b), para. 264 and 447.

[5]UNCITRAL (2019).

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its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions".[6]

This study assesses both the option of a two-tiered MIC as well as of a Multilateral Investment Appellate Mechanism (MIAM). Both models provide for a permanent, pre-appointed judiciary according to rule of law standards. The structure of the new dispute settlement mechanism should pursue the following objectives:

- procedures adhering to the rule of law,
- independence and neutrality of judges,
- publicly appointed judges,
- uniform interpretation of the law,
- efficient and expedient procedures,
- protecting states' right to regulate,
- transparency,
- an appeal mechanism.

Fulfilling these objectives would satisfy both the rule of law requirements which must be taken into account when formulating international legal protection and the legitimacy criteria.[7]

40 EU Commissioner Malmström mentioned the "Multilateral Court" for the first time on 18 March 2015 in the Committee on International Trade (INTA Committee) and at an informal meeting of the Council (Foreign Affairs) on 25 March 2015.[8] Finally, UNCITRAL decided on 10 July 2017 to work on a reform of the investment dispute settlement mechanism, including the possible establishment of an MIC.[9]

41 The EU Commission is currently investigating the feasibility of an MIC due to the modernisation of investment protection and the ISDS mechanism[10] in the CETA,[11]

[6]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 106.

[7]Cf. for instance, Kastler (2017), p. 265.

[8]Malmström (2015): "However, I believe that we should aim for a court that goes beyond TTIP. A multilateral court would be a more efficient use of resources and have more legitimacy. That makes it a medium-term objective to be achieved in parallel to our negotiations with the United States. I hope for Parliament's support and advice as we try to achieve it." Cf. in connection also European Commission (2015), pp. 3 and 13; cf. previously already the proposals of Krajewski (2015) and the French proposal, Vers un nouveau moyen de régler les différends entre États et investisseurs, May 2015; thereto Fouchard Papaefstratiou (2015).

[9]European Commission (2017b).

[10]European Commission (2017a).

[11]Art. 8.27 and 8.29, Comprehensive Economic and Trade Agreement, OJ L 11, 14.1.2017, p. 23.

the EU-Singapore Investment Protection Agreement (IPA),[12] the EU-Mexico Global Agreement[13] and the EU-Vietnam IPA.[14]

Since the first proposals in spring 2015, the discussion about an Investment Court System (ICS) and multilateralisation has sparked an enormous debate.[15] The Commission presented the first basic structures of a bilateral investment court system in a position paper in May 2015[16] and proposed this system to the United States of America (US) in autumn 2015 in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations.[17] At the same time, the EU Commission managed to successfully introduce this dispute settlement system into the CETA negotiations with Canada as well as into the EU Free Trade Agreement with Vietnam at a relatively late stage. Also the EU-Singapore agreement was revised again after negotiations had actually already been finished, also due to the "necessity" to isolate investment law from trade law in these agreements due to a new Commission approach as a consequence of the Singapore Opinion of the CJEU.[18] This bilateral approach on the ICS chosen by the Commission is also seen as a test or pilot phase for a future multilateral system.[19] **42**

In addition to the bilateral investment court systems introduced in the CETA, the EU-Vietnam IPA, the EU-Singapore IPA and the EU-Mexico Global Agreement, it was stated in each agreement in almost the same wording that the parties to the agreement intend to transfer the respective bilateral investment court system to a multilateral system: **43**

> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[20]

[12] Art. 3.9 and 3.12, EU-Singapore IPA (draft for signature) as on 2 April, 2019.

[13] Art. 11 and 14, Section- Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019.

[14] Art. 3.38 and 3.41, EU-Vietnam IPA (draft for signature) as on 2 April, 2019.

[15] Cf. European Commission (2016), Ghahremani and Prandzhev (2017), Blair (2017), Ambrose and Naish (2017), Kaufmann-Kohler and Potestà (2016, 2017), Howse (2017a), Happ and Wuschka (2017), Hoffmeister (2017), Brown (2017), Katz (2016), Alvarez Zarate (2018), Ghori (2018), Howard (2017), Howse (2017b), Brower and Ahmad (2018), Benedetti (2019), Schill (2019) and Calamita (2017).

[16] European Commission (2015).

[17] Cf. under http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[18] CJEU, Opinion 2/15, ECLI:EU:C:2017:376; on this see, *inter alia* Bungenberg (2017), Hindelang and Baur (2019) and Usynin and Gáspár-Szilágyi (2018).

[19] Pauwelyn (2015).

[20] Article 8.29 CETA, Establishment of a multilateral investment tribunal and appellate mechanism; Art. 3.41, EU-Vietnam IPA (draft for signature) as on 2 April, 2019; Art. 14, Section- Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019; Art. 3.9, EU-Singapore IPA (draft for signature) as on 2 April, 2019.

44 A number of procedural elements have also been included in the relevant agreements and in the Investment Protection Agreements between the EU and Singapore, EU and Vietnam and in the EU-Mexico Global Agreement in order to achieve greater transparency and to reject clearly inadmissible or unjustified complaints at an early stage. The rule on cost distribution states that the losing party has to bear the costs. These provisions already constitute a number of innovative elements in investment protection in comparison to the existing agreements of the EU Member States, as well as to almost all other existing agreements.

45 The European Parliament "shares the ambition of establishing, in the medium term, a multilateral solution to investment disputes."[21] Thus, in its resolution on the TTIP negotiations in 2015, the Parliament recommended the following:

> to ensure [. . .] to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives[22]

46 This feasibility study aims to illustrate options for the organisational and procedural design of an MIC. For the specific design of this new system, the requirements of Article 21 of the Treaty on European Union (TEU) are a decisive prerequisite from the EU's perspective.[23] Accordingly, this provision already indicates that the EU shall plead primarily for multilateral solutions. At the same time, it stresses the particular importance of complying with the EU's rule of law principle.[24] In light of these rule of law considerations, procedural equality of arms should be ensured.[25] For example, the G20 Guiding Principles for Global Investment Policymaking also

[21]European Parliament resolution (2016), para. 68.

[22]European Parliament resolution (2015), para. 2.d)xv).

[23]The significance and compulsory consideration of Article 21 TEU was last emphasised again by the Court of Justice of the European Union (CJEU) in its Singapore opinion. Cf. CJEU, Opinion 2/15, Singapore FTA, ECLI:EU:C:2017:376, para. 142 et seq.: "One of the features of this development is the rule laid down in the second sentence of Article 207(1) TFEU that 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. Those principles and objectives are specified in Article 21(1) and (2) TEU [. . .]. The obligation of the European Union to integrate those objectives and principles into the conduct of its common commercial policy in apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU." See in regard to the relevance of rule of law considerations etc. CETA, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 105 et seq.

[24]Thereto in general, Schröder (2016) and Bungenberg and Hazarika (2019).

[25]On the aspect of "equality of arms" as an aspect of the rule of law, cf. Fleiner and Basta Fleiner (2004), p. 250; hereto also for example the jurisprudence on Article 6 European Convention on Human Rights (ECHR), cf. European Court of Human Rights (ECtHR), No. 2689/65, *Del-court v. Belgium*; ECtHR, No. 8562/79, *Feldbrugge v. the Netherlands*; ECtHR, No. 14448/88, *Dombo Beheer B.V. v. the Netherlands*; ECtHR, No. 17358/90, *Bulut v. Austria*; ECtHR, No. 13645/05, *Ko-kelvisserij e.a. v. the Netherlands*; thereto in the literature Safferling (2004), p. 181 et seqq.; Grabenwarter and Struth (2015), Article 6, para. 46 et seqq.

provide that "dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse."[26] In various papers,[27] the Council of Europe has developed basic requirements concerning the rule of law for judicial systems, which must be duly respected while designing the MIC.

This study discusses the option of a two-tiered system as well as a multilateral system of appeals. Both options bring ISDS in line with constitutional requirements of the rule of law and the protection of fundamental rights.[28] The views and positions on these proposed systems of other entities with international legal personality as well as of third countries are being taken into consideration. In the long term, setting up an MIC may also require convincing 'heavyweights' in the area of protection of foreign investment such as China or the US, in addition to the EU and its current 28 Member States including their respective International Investment Agreement (IIA) networks, of the advantages of such a system. Canada, Vietnam, Singapore and Mexico have already committed themselves in this respect. **47**

The two-tiered solution and the mere appellate mechanism discussed below are both different models of a multilateral approach. **48**

References

Alvarez Zarate JM (2018) Legitimacy concerns of the proposed multilateral investment court: is democracy possible. BCL Rev 59:2765–2790

Ambrose H, Naish V (2017) An investment court system or an appeals mechanism? The EU's 2017 consultation on multilateral reform of ISDS. Arbitration Blog of 15.2.2017

Benedetti JPC (2019) The proposed Investment Court System: does it really solve the problems? Revista Derecho del Estado 42:83–115

Blair C (2017) A global investment court for a changing era of trade. Financial Times of 24.1.2017

Brower CN, Ahmad J (2018) From the two-headed nightingale to the fifteen-headed Hydra: the many follies of the proposed International Investment Court. Fordham Int Law J 41:791–820

Brown CM (2017) A multilateral mechanism for the settlement of investment disputes. ICSID Rev Foreign Invest Law J 32:673–690

Bungenberg M (2017) The Common Commercial Policy, Parliamentary participation and the Singapore Opinion of the CJEU. ZEuS 20:383–395

Bungenberg M, Hazarika A (2019) Rule of law in the EU legal order, ZEuS 22:383–404

Calamita NJ (2017) The challenge of establishing a Multilateral Investment Tribunal at ICSID. ICSID Rev Foreign Invest Law J 32:611–624

Council of Europe (2014) Consultative Council of European Judges (CCJE), the evaluation of judges' work, the quality of justice and respect for judicial independence. Opinion No. 17 (2014) of 24.10.2014

Council of Europe (2016) Consultative Council of European Judges (CCJE), the role of court presidents. Opinion No. 19 (2016) of 10.11.2016

[26]G20 Guiding Principles for Global Investment Policymaking, July 2016, para. III: "Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse."

[27]Cf. for instance Council of Europe (2014, 2016).

[28]Schill (2015), p. 8.

Council of the EU (2018) Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 ADD 1 DCL 1, 20.3.2018
European Commission (2015) Concept paper – investment in TTIP and beyond – the path for reform, May 2015
European Commission (2016) A future multilateral investment court. Factsheet of 13.12.2016
European Commission (2017a) Impact Assessment- Multilateral reform of investment dispute resolution, SWD(2017) 302 final, 13.9.2017
European Commission (2017b) Factsheet of 10.7.2017. http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf
European Parliament (2015) Resolution of 8.7.2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 2014/2228(INI)), P8_TA(2015)0252
European Parliament (2016) A new forward-looking and innovative future strategy for trade and investment, resolution of 5.7.2016, P8_TA-PROV(2016)0299
Fleiner T, Basta Fleiner L (2004) Allgemeine Staatslehre, Über die konstitutionelle Demokratie in einer multikulturellen globalisierten Welt. Springer, Heidelberg
Fouchard Papaefstratiou A (2015) TTIP: the French proposal for a permanent European Court for investment arbitration. Kluwer Arbitration Blog of 22.7.2015
Ghahremani S, Prandzhev I (2017) Multilateral investment court: a realistic approach to achieve coherence and consistency in international investment law? EFILA Blog of 14.3.2017
Ghori U (2018) The international investment court system: the way forward for Asia. Int Trade Bus Law Rev 21:205–229
Grabenwarter C, Struth K (2015) 6 Justiz- und Verfahrensgrundrechte. In: Ehlers D (ed) Europäische Grundrechte und Grundfreiheiten, 4th edn. De Gruyter, Berlin, pp 198–238
Happ R, Wuschka S (2017) From the Jay treaty Commissions towards a multilateral Investment Court: addressing the enforcement dilemma. Indian J Arbitr Law 6:113–132
Hindelang S, Baur J (2019) Stocktaking of investment protection provisions in EU agreements and Member States' bilateral investment treaties and their impact on the coherence of EU policy. Committee on International Trade (INTA)- European Parliament
Hoffmeister F (2017) The EU contribution to the progressive development of institutional aspects in international investment law. Revue Belge de Droit International 2:566–590
Howard DM (2017) Creating consistency through a World Investment Court. Fordham Int Law J 41:1–52
Howse R (2017a) International investment law and arbitration: a conceptual framework. IILJ Working Paper 2017/1
Howse R (2017b) Designing a multilateral investment court: issues and options. Yearb Eur Law 36 (1):209–236
Kastler HA (2017) Föderaler Rechtsschutz: Personenbezogene Daten in einem Raum der Freiheit. Springer, Heidelberg
Katz RL (2016) Modeling an International Investment Court After the World Trade Organization Dispute Settlement Body. Harv Negot Law Rev 22:163–188
Kaufmann-Kohler G, Potestà M (2016) Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?
Kaufmann-Kohler G, Potestà M (2017) The composition of a Multilateral Investment Court and of an appeal mechanism for investment awards
Krajewski M (2015) Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA. Bundesministerium für Wirtschaft und Energie
Malmström C (2015) Speech: remarks at the European Parliament on Investment in TTIP of 18.3.2015. http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153258.pdf
Pauwelyn J (2015) Why the US should support the EU Proposal for an "Investment Court System". Georgetown Journal of International Law Online of 24.11.2015

Safferling C (2004) Audiatur et altera pars – die prozessuale Waffengleichheit als Prozessprinzip? Neue Zeitschrift für Strafrecht 24(4):181–188
Schill S (2015) Reforming Investor-State Dispute Settlement (ISDS): conceptual framework and options for the way forward, E15 Initiative. International Centre for Trade and Sustainable Development, Geneva
Schill S (2019) From investor-state dispute settlement to a multilateral investment court? Evaluating options from an EU law perspective. Committee on International Trade (INTA)- European Parliament
Schröder W (ed) (2016) About strengthening the rule of law in Europe, from a common concept to mechanisms of implementation. Hart Publishing, Oxford
UNCITRAL (2017a) Possible future work in the field of dispute settlement: reforms of investor-State dispute settlement (ISDS)- Note by the Secretariat, A/CN.9/917, 20 April 2017
UNCITRAL (2017b) Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017), A/72/17, 2017
UNCITRAL (2019) Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019), A/CN.9/970 (draft document)
Usynin M, Gáspár-Szilágyi S (2018) The growing tendency of inducing investment chapters in PTAs. In: Netherlands Yearbook of International Law 2017, vol 48. pp 267–304

Chapter 3
Targets for the Reorganisation of the Investment Protection Regime

A reorganisation of the investment protection regime by introducing a two-tiered court system or a multilateral appellate body could offer advantages in comparison to the current system.[1] In a first step, the expected positive effects of the new approach are discussed. In a second step, the two options of a two-tiered MIC and a MIAM are compared based on the outcomes of the previous discussion. **49**

3.1 Positive Effects of a New Approach

Depending on the design of the system, it appears possible through enhanced institutionalization[2] to achieve greater consistency of decisions, to reinforce the independence and neutrality of adjudicators, to improve expedience of investment disputes, to limit costs for the parties involved, to ensure more accessibility for Small and Medium Enterprises (SMEs) and finally, to offer greater transparency than in current ISDS.[3] These aspects are also related to the increased emphasis on the rule of law—according to Articles 2 and 21 TEU.[4] **50**

An international investment court, in the sense of a permanent institutional court, can facilitate streamlined procedures through its efficient organisation. The organs of the court may deliver summons, execute the serving of documents and offer its premises for negotiations and translation services, including simultaneous interpretation. This can also reduce procedural problems which may occur if, for example, **51**

[1] On this see also, European Union (2019), para. 40.

[2] Hereto in particular Schill (2015).

[3] European Union (2019), paras. 40 et seqq. A discussion on the problems which the EU seeks to solve through the ICS and MIC can be seen in Alvarez Zarate (2018), pp. 2767 et seqq.

[4] Also emphasised in European Commission (2017), p. 38.

M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-662-59732-3_3

the parties prefer not to make use of the services of the International Centre for Settlement of Investment Disputes (ICSID) Secretariat, the International Criminal Court or the Permanent Court of Arbitration (PCA). In addition, the MIC proposed here can provide its own procedural rules, adapted to the specific needs of the disputes, and can envisage its own mechanism for the implementation (recognition and enforcement) of its decisions.[5]

3.1.1 Consistency of Decisions

52 Nowadays, a large number of arbitral awards are publicly available and they facilitate the interpretation of individual clauses of investment protection treaties in future cases.[6] These awards are often said to be inconsistent—even in cases with identical facts.[7] Even substantive protection standards with nearly identical wording have been interpreted in a contradictory manner in individual cases,[8] such as the applicability of the most-favored nation clause to procedural provisions in other IIAs of the host state,[9] the scope of so-called umbrella clauses[10] or the attribution of umbrella clauses,[11] but also rules of procedure, like the possibility of a waiver of rights.[12] At the same time, however, it is noteworthy that a consistent application of many substantive as well as procedural investment law standards has evolved. This is remarkable considering the lack of binding precedence of arbitral awards, the absence of review through an appeal mechanism and the diverging compositions of the benches of arbitral tribunals. What is clear is that a smaller group of judges, as well as an appeals mechanism can help to prevent inconsistent decisions.[13] In fact, a standing court with a permanent pool of judges can lead to a higher degree of

[5] On this see also, European Union (2019), para. 30.

[6] Publications of decisions and the status of individual proceedings on the ICSID website, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx.

[7] Cf. for instance *CME v. Czech Republic* and *Lauder v. Czech Republic*; see thereto Carver (2004), pp. 23 et seqq.

[8] Cf. thereto in detail Griebel and Kim (2007), pp. 188 et seqq.

[9] On the application of the most-favoured nation (MFN) clause to dispute settlement agreements, cf. *Maffezini*-decision on the one hand and *Plama v. Bulgaria* on the other hand; thereto Schill (2016), pp. 251 et seqq.; Gaillard (2005); Douglas (2011), p. 97; Maupin (2011), p. 157; Paparinskis (2011), pp. 14 et seqq.

[10] Cf. thereto *SGS v. Pakistan*, ICSID Case No. ARB/01/13 and *SGS v. Philippines*, ICSID Case No. ARB/02/6; thereto also Alexandrov (2004), pp. 555 et seqq.; Chung (2007), pp. 961 et seqq.; Schreuer (2004), pp. 231 et seqq.; Sinclair (2004), pp. 411 et seqq.; Wälde (2005), pp. 183 et seqq.

[11] See thereto in particular *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11.

[12] Cf. thereto for instance *SGS v. Philippines*, ICSID Case No. ARB/02/6 on the one hand and *LANCO v. Argentina*, ICSID Case No. ARB/97/6 on the other hand; see also European Union (2017), paras. 22 et seqq.

[13] See also European Union (2019), paras. 43 et seqq.; European Commission (2017), p. 39.

jurisprudential consistency, even without binding precedence.[14] In any event, binding precedence could not be based on inconsistent interpretations of or diverging substantive law.

Proper consistency of judicial decisions can only be achieved if a multilateralisation of the substantive law, as the basis of the decisions, is also implemented. Nevertheless, the presence of permanent judges as well as a consultation mechanism between judges of different chambers can prevent contradictory decisions (see paras. 119 et seqq.). **53**

3.1.2 Greater Legitimacy

The current discussion also invokes the question of sufficient legitimacy and control of international dispute resolution. Without engaging in the discussion as to whether this criticism is justified,[15] it is said that judges can enjoy a high degree of legitimacy at international courts if they have passed a predetermined selection process and have ultimately been elected or confirmed by states.[16] Therefore, guidelines, in particular those of the Council of Europe, should play a special role when designing a new institution.[17] This would add to the legitimacy of the judges through the selection process in addition to the legitimacy derived from the international treaty on which the dispute settlement is based. **54**

3.1.3 Independence and Neutrality of Judges

Arbitrators have recently been repeatedly accused of a lack of independence and neutrality[18] since they are at least partly appointed by private claimants and sometimes act as legal counsel in other proceedings.[19] In addition, they are often accused of showing an investor-friendly attitude.[20] The validity of the latter point has not **55**

[14]For similar views, see, European Union (2019), para. 41; European Union (2017), para. 7; European Commission (2017), p. 28; Howard (2017), pp. 32 et seqq.

[15]Cf. thereto inter alia Steinbach (2016), pp. 1 et seqq.

[16]See for instance von Bogdandy and Krenn (2015), p. 420; von Bogdandy and Venzke (2012), pp. 32 et seqq. See also European Commission (2017), p. 46; European Union (2019), para. 22.

[17]Parliamentary Assembly of the Council of Europe, Committee on the Election of Judges to the European Court of Human Rights, Procedure for electing judges to the European Court of Human Rights, Information document prepared by the Secretariat of 21.2.2017, AS/Cdh/Inf(2017)rev3.

[18]Cf. UNCTAD (2013), p. 4; Eberhardt (2014), p. 3; Schill (2017), p. 2; European Union (2019), para. 6(ii); UNCITRAL (2018b), paras. 66 et seqq.; European Commission (2017), p. 28.

[19]Cf. UNCTAD (2013), p. 4; Paulsson (2010), pp. 339 et seqq.

[20]Cf. van Harten (2010), pp. 441 and 445; Brower and Schill (2009), p. 489: "arbitrators 'will be influence[d] by their self interest in reappointed in future cases'."

been proven empirically.[21] Furthermore, the generally applicable International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration[22] set relatively high standards for the independence and impartiality of arbitrators. Notwithstanding these guidelines, these concerns could be further diminished by reforms if judges are appointed by states in advance, independent of a specific dispute, and for a long period of time.[23] It is generally acknowledged that a permanent court with permanent judges would strengthen independence and neutrality.[24]

3.1.4 Lack of a Control Mechanism

56 In connection with the independence of the arbitrators, the problem of a non-existent or very limited control mechanism is often mentioned,[25] which can lead to the above-mentioned inconsistent jurisprudence and lack of control by certain stakeholders. Formally, an appellate body can review erroneous or questionable decisions on procedural or substantive aspects of a case.[26] The mere possibility of such a review would presumably increase the legitimacy of decisions in ISDS.

3.1.5 Cost Efficiency

57 International arbitration proceedings may lead to considerable costs.[27] According to the Organisation for Economic Cooperation and Development (OECD), the average total procedural costs (including legal counsel costs) are around US$8 million per case.[28] Besides the procedural costs in the sense of the term defined in arbitration law, such as costs for the arbitrators, interpreters and secretariats, legal fees and other costs accrued for the representation of the parties, there are also other costs for legal experts and other experts for the calculation of damages. In current arbitration

[21] Wuschka (2015); Franck (2009), pp. 435 et seqq. Similarly, Alvarado Garzón (2019), p. 484.

[22] IBA Guidelines on Conflicts of Interest in International Arbitration, Resolution of the International Bar Association Council of 23.10.2014.

[23] European Union (2019), paras. 18 et seqq.

[24] Cf. van Harten (2008), pp. 21 et seqq.; Howard (2017), pp. 26 et seq.; European Union (2019), para. 47; see also, European Union (2017), para. 8.

[25] Hueckel (2012), p. 611; Chung (2007), pp. 967 et seqq.; UNCTAD (2013), pp. 3 et seq. Similarly, Alvarado Garzón (2019), p. 488.

[26] On this see also UNCITRAL (2018a), para. 40; for a discussion on scope of review see, European Union (2019), para. 14; European Commission (2017), p. 48.

[27] European Union (2017), paras. 33 et seq.; European Commission (2017), p. 14.

[28] Gaukrodger and Gordon (2012), p. 19.

practice, tribunals are hesitant to order a full assumption of these costs by the losing party.[29]

58 In spite of an increase in arbitration proceedings, investor-state arbitration is not an everyday instrument for redressing violations of investment law due to the high costs of the procedures. SMEs in particular have problems to cover the costs of investor-state arbitration.[30] In addition, they cannot rely on compensation of their expenses for the arbitration even if they win the case.

59 Apart from financial risks for the plaintiffs, the high costs are also an enormous burden for developing countries.[31] Accordingly, it is argued that states have to bear high costs for their defense, which can lead to a regulatory chill even in the event that they win the case. Therefore as a starting point and in the interest of a more efficient and cost-effective procedure, the establishment of an Advisory Center should be considered.[32] Furthermore, a limitation of the object of dispute, the introduction of a principle of official investigation and by the possibility of imposing a limitation on the 'necessary costs' etc. could lead to a reduction of procedural costs.

3.1.6 Access for SMEs

60 As just pointed out, the question of cost-efficiency is directly related to the access for SMEs to investment protection.[33] On the one hand, the access of SMEs to investment protection is currently considered desirable.[34] On the other hand, so-called Third-Party Funding, mass as well as class actions etc. are considered extremely problematic developments in international investment protection.[35] A new multilateral institution could constitute an opportunity to make institutionalized investment protection 'more suitable' for SMEs, for example through cost reduction, access to legal aid and/or procedural support through an advisory center and the acceleration of proceedings. A further possibility would be to allow class actions by SMEs and individual investors with respect to identical claims.[36]

[29] Hodgson (2015), pp. 749 et seqq.

[30] European Union (2017), para. 34; UNCITRAL (2018b), para. 111; European Commission (2017), p. 53.

[31] UNCITRAL (2018c), paras. 8 and 94; UNCITRAL (2018b), para. 111.

[32] On this see also UNCITRAL (2018c), para. 101; UNCITRAL (2018b), para. 119; UNCITRAL (2018a), para. 149; European Commission (2017), p. 54.

[33] See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, paras. 205 et seqq.

[34] UNCITRAL (2018b), para. 131.

[35] Cf. Hindelang (2015), p. 20; See also, UNCITRAL (2019), para. 16.

[36] On this see also UNCITRAL (2018a), Annex. p. 15.

3.1.7 Transparency

61 The majority of existing IIAs do not require any public access to procedures (even though decisions of the arbitral tribunals are generally published), resulting in the allegation of a lack of transparency dominating the current criticism and discussion.[37] The Mauritius Convention[38] adopted by the UN General Assembly in 2014 should ensure greater transparency going forward. With this convention, the UNCITRAL transparency rules[39] will be extended to existing IIAs.[40] These rules require *inter alia* public hearings and the publishing of essential procedural documents (memoranda, decisions) of investor-state arbitration proceedings. To date, the Mauritius Convention has been signed by 23 states (including Germany), ratified by five states (Cameroon, Canada, the Gambia, Mauritius and Switzerland) and entered into force on 18 October 2017.[41] The European Parliament has also called for increasing transparency.[42] Possible future models should explicitly take these recent developments in transparency into account in their procedural rules—as was done in the CETA, and planned for in the EU-Mexico Global Agreement and the EU-Vietnam IPA.[43]

3.1.8 Time Efficiency

62 The long duration of arbitration proceedings is being increasingly criticised, particularly due to the heavy workload of arbitrators.[44] Compared to WTO Dispute Settlement Procedures (with an average of 15 months for the panel procedure and

[37]Cf. for instance UNCTAD (2013), p. 3; European Union (2017), para. 35; European Commission (2017), p. 15; Peterson (2001), p. 13; Schill (2011), p. 66; Bastin (2012), pp. 223 et seq., 227; Public Statement on the International Investment Regime—31 August 2010, http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/; Wuschka (2016), pp. 32 et seqq.

[38]United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention on Transparency), which was adopted on 10.12.2014 and entered into force on 18.10.2017.

[39]UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency), which are in force since 1.4.2014.

[40]European Commission (2017), p. 15.

[41]Cf. www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Conventionstatus.html.

[42]European Parliament resolution (2013), para. 43.

[43]See, Art. 8.36, CETA, OJ L 11, p. 23, 14.1.2017; Art. 19, Chapter: Resolution of Investment Disputes, EU-Mexico Global Agreement (Draft agreed in principle on 21 April 2018); Art. 3.46, Chapter 3: Dispute Settlement, EU-Vietnam IPA (Draft for signature as of August, 2018).

[44]Recently, the *Yukos*-process has caused sensation here, where apparently the presiding arbitrator has transferred a large part of the actual tasks incumbent on himself to a co-worker. Cf. thereto Newman and Zaslowsky (2015).

a further 100 days for the procedure before the Appellate Body (AB)),[45] current investor-state arbitration proceedings are lengthy—and therefore cause considerable costs. In 2012, ICSID procedures took 5 years on average,[46] while another study indicates an average duration for investment procedures of 3 years and 8 months.[47]

A permanent bench of judges with far-reaching powers to control the procedures could clearly contribute to the acceleration of proceedings, once the availability of the judges is assured.[48] Furthermore, the implementation of a maximum duration for specific procedural stages should be considered in this context (see paras. 287 et seqq.). 63

3.2 Advantages of the Two-Tiered MIC Option

In the current discussion, a two-tiered MIC and a MIAM are principally, and for good reason, considered as alternative solutions. Both options are discussed in the following passages as both could constitute improvements in comparison to the existing system. However, certain arguments speak in favour of a two-tiered court (MIC)[49] as opposed to a standalone appeal mechanism (MIAM), even if the latter might, according to some literature, be easier to realise.[50] 64

Some scholars emphasise in particular that a standalone multilateral appellate body would not be sufficient to fully solve the legitimacy crisis of international investment law.[51] 65

In the long term, an MIC could develop a consistent interpretation of the overall system of investment protection standards and could lead to consistency and thus to legal certainty and predictability of decisions.[52] Moreover, a particularly important difference of the MIAM solution relates to concerns with respect to *ad hoc* arbitrators, who are partly appointed by investors; they would still be the 'first instance' of such a MIAM system and thus would have the power to decide on the legality of 66

[45] Johannesson and Mavroidis (2016), pp. 12 et seq.

[46] Raviv (2014), p. 6.

[47] European Federation for Investment Law and Arbitration (2014), p. 8; Hodgson (2014). Cf. also European Commission (2015), p. 1: "The overall proceedings under the ICS, including appeal, are limited to 2 years (the Tribunal of First Instance must decide within 18 months and the Appeal Tribunal within 6 months). As a comparison, the average duration of proceedings under existing investment treaties is 3–4 years, with annulment or set-aside (for procedural grounds) potentially adding around another 2 years, meaning that the total length is often around 6 years (with many taking longer)."

[48] On this see also European Commission (2017), p. 58.

[49] See also Howse (2017), p. 233; European Union (2019), paras. 39 et seqq.

[50] Schill (2015), p. 8.

[51] Voon (2017), pp. 7 et seqq.; European Commission (2017), pp. 28 et seq.

[52] Schill (2015), p. 8; European Commission (2017), pp. 57 et seqq.; European Union (2019), paras. 44 et seqq.

regulations by the state. This, in addition to the varying and thus inconsistent composition of the tribunals' benches, would remain a weak point, as these are considered to be the main reasons for inconsistency of decisions. The decision-making process of a permanent investment court may therefore be more 'morally binding'.[53]

67 Furthermore, a standing appellate mechanism may suspend decisions of the first instance tribunal, if those decisions were otherwise enforceable through the ICSID Convention or the New York Convention (NYC). This possibility of enforcement would likely be forgone when bringing an appeal before the appellate body. Regarding the appellate court solution, there is a risk that an appeals decision rendered by the MIAM would be undermined by its lack of enforceability in states not member to the MIAM.

68 The WTO Dispute Settlement System is often discussed in the context of the two-tiered solution,[54] although—on closer examination—the WTO system rather constitutes a mixture of the two alternatives, since the adjudicators of the WTO's first instance panels are appointed *ad hoc*, and only after the dispute has emerged and not based on a predetermined composition. However, the institutional and procedural design of both the first instance (panel) and the second instance (Appellate Body) are defined as a whole in the Dispute Settlement Understanding (DSU).[55] Therefore, a full adoption of the WTO System for the resolution of investment law disputes would entail that arbitrators of the first instance tribunal, administered by the MIC, be appointed *ad hoc*, whereas permanent, full-time judges would sit on the bench of the MIC's Appellate Body.[56]

69 Overall, the following chapters on the design of a two-tiered MIC and a MIAM will discuss the advantages as well as the challenges of the implementation of the respective solutions.

References

Alexandrov SA (2004) Breaches of contract and breaches of treaty – the jurisdiction of treaty-based arbitration tribunals to decide breach of contract claims in SGS v Pakistan and SGS v Philippines. J World Invest Trade 5:555–578

Alvarado Garzón AE (2019) Designing a multilateral investment court: blueprints for a new route in investor-state dispute settlement. ZEuS 22:475–500

[53]Cf. Schütze (2016), p. 15 on the advantages of institutional arbitration over ad hoc arbitration.

[54]See also Katz (2016), pp. 181 et seqq.; Alvarez Zarate (2018), pp. 2784 et seqq.; Ghori (2018), pp. 209 et seqq.

[55]Understanding on Rules and Procedures Governing the Settlement of Disputes, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

[56]Most investment agreements which call for the establishment of an Appellate Tribunal provide for a permanent tribunal with permanent, full-time judges. On this see, Art. 3.10 EU-Singapore IPA (draft for signature), Art. 3.39 EU-Vietnam IPA (draft for signature) and Art. 12 EU-Mexico Global Agreement (draft for signature) as on February, 2019.

Alvarez Zarate JM (2018) Legitimacy concerns of the proposed Multilateral Investment Court: is democracy possible. B C L Rev 59:2765–2790
Bastin L (2012) The Amicus Curiae in investor-state arbitration. Cambridge J Int Comp Law 1:208–234
Brower CN, Schill S (2009) Is arbitration a threat or a boom to the legitimacy of international investment law? Chicago J Int Law 9:471–498
Carver J (2004) How to avoid conflicting awards – the Lauder and CME case. J World Invest Trade 5:23–29
Chung O (2007) The lopsided international investment law regime and its effect on the future of investor-state arbitration. Va J Int Law 47:953–999
Douglas Z (2011) The MFN clause in investment arbitration: treaty interpretation off the rails. J Int Dispute Settlement 2:97–113
Eberhardt P (2014) Investitionsschutz am Scheideweg, TTIP und die Zukunft des globalen Investitionsrechts, Internationale Politikanalyse, May 2014
European Commission (2015) Why the new EU proposal for an Investment Court System in TTIP is beneficial to both States and investors, MEMO/15/6060 of 12.11.2015
European Commission (2017) Impact assessment – multilateral reform of investment dispute resolution, SWD(2017) 302 final, 13.9.2017
European Federation for Investment Law and Arbitration (2014) TTIP consultation submission
European Parliament (2013) Resolution of 9.10.2013 on the EU-China negotiations for a bilateral investment agreement (2013/2674(RSP))
European Union (2017) Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union, A/CN.9/WG.III/WP.145, 12 December 2017
European Union (2019) Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, 24 January 2019
Franck SD (2009) Development and outcomes of investment treaty arbitration. Harv Int Law J 50:435–489
Gaillard E (2005) Establishing jurisdiction through a most-favoured-nation clause. N Y Law J 233 (105)
Gaukrodger D, Gordon K (2012) Investor-state dispute settlement, a scoping paper for the investment policy community. OECD Working Papers on International Investment 2012/03
Ghori U (2018) The International Investment Court System: the way forward for Asia. Int Trade Bus Law Rev 21:205–229
Griebel J, Kim Y (2007) Zwischen Aufbruch, Stillstand und Rückschritt – Überlegungen zur Zukunft des internationalen Investitionsrechts. SchiedsVZ, pp 186–195
Hindelang S (2015) Grundzüge eines modernen Investitionsschutzes – Ziele und Handlungsempfehlungen, Ein realpolitischer Vorschlag zur Reform des Investitionsschutzes zwischen CETA-Text und den Kommissionsvorschlägen zu TTIP, Harnack-Haus Reflections
Hodgson M (2014) Investment treaty arbitration: how much does it cost? How long does it take? Allen Overy Publications of 18.2.2014
Hodgson M (2015) Costs in investment treaty arbitration: the case for reform. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system: journeys for the 21st century. Brill, Leiden, pp 748–759
Howard DM (2017) Creating consistency through a World Investment Court. Fordham Int Law J 41:1–52
Howse R (2017) Designing a Multilateral Investment Court: issues and options. Yearb Eur Law 36 (1):209–236
Hueckel J (2012) Rebalancing legitimacy and sovereignty in international investment agreements. Emory Law J 61:601–640
Johannesson L, Mavroidis PC (2016) The WTO dispute settlement system 1995–2016: a data set and its descriptive statistics. EUI Working Paper RSCAS 2016/72

Katz RL (2016) Modeling an International Investment Court after the World Trade Organization Dispute Settlement Body. Harv Negotiation Law Rev 22:163–188
Maupin JA (2011) MFN-based jurisdiction in investor-state arbitration: is there any hope for a consistent approach? J Int Econ Law 14:157–190
Newman LW, Zaslowsky D (2015) The Yukos case: more on the fourth arbitrator. New York Law Journal of 28.5.2015
Paparinskis M (2011) MFN clauses and international dispute settlement: moving beyond Maffezini and Plama. ICSID Rev 26:14–58
Paulsson J (2010) Moral hazard in international dispute resolution. ICSID Rev 25:339–355
Peterson LE (2001) Challenges under bilateral investment treaties give weight to calls for multilateral rules. World Trade Agenda 29(2001):12–14
Raviv A (2014) Achieving a faster ICSID. In: Reform of investor-state dispute settlement: in search of a roadmap. TDM 1(2014)
Schill S (2011) Enhancing international investment law's legitimacy: conceptual and methodological foundations of a new public law approach. Va J Int Law 52:57–102
Schill S (2015) Reforming Investor-State Dispute Settlement (ISDS): conceptual framework and options for the way forward. E15 Initiative
Schill S (2016) Maffezini v. Plama: reflections on the jurisprudential schism in the application of most-favored-nation clauses to matters of dispute settlement. In: Kinnear M, Fischer G, Minguez Almeida J, Torres LF, Uran Bidegain M (eds) Building international investment law: the first 50 years of ICSID. Wolters Kluwer, Alphen aan den Rijn. Chapter 18
Schill S (2017) Sind Regelungen Zur Investor-Staat-Streitbeilegung in EU-Freihandelsabkommen sinnvoll? Amsterdam Law School Research Paper No. 2017-06
Schreuer C (2004) Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road. J World Invest Trade 5:231–256
Schütze RA (2016) Schiedsgericht und Schiedsverfahren, 6th edn. C.H. Beck, München
Sinclair AC (2004) The origins of the umbrella clause in the international law of investment protection. Arbitr Int 20:411–434
Steinbach A (2016) Investor-Staat-Schiedsverfahren und Verfassungsrecht. Rabels Zeitschrift für ausländisches und internationales Privatrecht 80(1):1–38
UNCITRAL (2018a) Possible reform of investor-State dispute settlement (ISDS) – Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018
UNCITRAL (2018b) Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), A/CN.9/964, 6 November 2018
UNCITRAL (2018c) Possible reform of investor-State dispute settlement (ISDS) — cost and duration – Note by the Secretariat, A/CN.9/WG.III/WP.153, 31 August 2018
UNCITRAL (2019) Possible reform of investor-State dispute settlement (ISDS) – Third-party funding – Note by the Secretariat, A/CN.9/WG.III/WP.157, 24 January 2019
UNCTAD (2013) Reform of investor-state dispute settlement: in search of a roadmap. IIA Issues Note No. 2, June 2013
van Harten G (2008) A case for an international investment court. Society for International Economic Law, Conference Paper
van Harten G (2010) Perceived bias in investment treaty arbitration. In: Waibel M, Kaushal A, Chung KH, Balchin C (eds) The backlash against investment arbitration: perceptions and reality. Kluwer Law International, Alphen aan den Rijn, pp 433–454
von Bogdandy A, Krenn C (2015) Zur Parlamentarisierung der Richterauswahl, Warum der Europarat der EU den Weg weist. In: Franzius C, Mayer FC, Neyer J (eds) Modelle des Parlamentarismus im 21. Jahrhundert, Neue Ordnungen von Recht und Politik. Verlagsgesellschaft mbH & Co. KG, Bochum, pp 409–429
von Bogdandy A, Venzke I (2012) In whose name? An investigation of international courts' public authority and its democratic justification. Eur J Int Law 23:7–41

Voon T (2017) Consolidating international investment law: the mega-regionals as a pathway towards multilateral rules. World Trade Rev 17(1):33–63
Wälde TW (2005) The "Umbrella" clause on investment arbitration – a comment on original intentions and recent cases. J World Invest Trade 6:183–236
Wuschka S (2015) Investitionsschiedsverfahren: Individualrechtsschutz oder "anti-demokratische Konzern-herrschaft"? Völkerrechtsblog of 20.4.2015
Wuschka S (2016) Investionsschiedsverfahren: Individualrechtsschutz oder "anti-demokratische Konzernherrschaft"? In: Buszewski SE, Martini S, Rathke H (eds) Freihandel vs. Demokratie, Grundsätze transnationaler Legitimation: Partizipation, Reversibilität, Transparenz. Nomos, Baden-Baden, pp 15–36

Chapter 4
Design and Implementation of a Two-Tiered MIC

The EU Commission introduced a two-tiered investment court system to the debate in 2015 and has since been able to implement it in three agreements—CETA, the EU-Vietnam IPA as well as the EU-Singapore IPA. Similarly, the negotiated renewed EU-Mexico Agreement provides for an investment court system. In its 'Trade for All' communication, the Commission also stated that all future agreements concluded with the EU should contain this system for investment protection.[1] Therefore, this ICS can be used as a starting point for the following assessment, while also considering that this system should be converted into a multilateral system if possible.[2] **70**

CETA, the EU-Vietnam IPA and the EU-Singapore IPA provide for a first instance tribunal and an appeal mechanism. The same system will most likely be foreseen in the EU-Mexico Trade Agreement. These agreements also set out the size of the court system, the qualifications of the judges, the duration of their appointment, their remuneration and the limitations on the scope of their professional engagements outside the court, the applicable law and the scope of the appellate body's review of the first instance decision, as well as time limits for lodging an appeal and a maximum duration of the procedure.[3] **71**

In addition, in the following discussion, other proposals for investment courts (see, for example, the International Law Association (ILA) Draft Statutes of the **72**

[1] European Commission (2015), p. 24; This position was confirmed in European Commission (2017), p. 27.

[2] Article 8.29 CETA, Establishment of a multilateral investment tribunal and appellate mechanism; Article 3.41 EU-Vietnam IPA (draft for signature) as on 2 April, 2019; Article 3.12 EU-Singapore IPA (draft for signature) as on 2 April, 2019; see also, Article 14 Section- Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019 EU-Mexico Agreement (under negotiation). These versions of the EU-Singapore IPA, the EU-Vietnam IPA and the EU-Mexico Global Agreement have been used throughout the Chapter.

[3] Cf. thereto for instance Article 8.18 et seqq. CETA.

M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-662-59732-3_4

Arbitral Tribunal for Portfolio Investment and the Foreign Investment Court of 1948),[4] already established investment courts (Arab Investment Court),[5] permanent arbitration tribunals (Iran-US Claims Tribunal[6] (IUSCT), United Nations Compensation Commission[7](UNCC)), as well as other international courts (with a special focus on the International Court of Justice[8] (ICJ), the ITLOS,[9] the International Criminal Court,[10] the European Court of Human Rights[11] (ECtHR) and the Court of Justice of the European Union[12] (CJEU)) are taken into consideration from a comparative law perspective. The aim is to adopt aspects in the implementation of the MIC which are considered positive and/or functioning.

[4]Draft Statutes of the Arbitral Tribunal for Foreign Investment and of the Foreign Investment Court, printed in: UNCTAD, International Investment Instruments: A Compendium Volume III—Regional Integration, Bilateral and Non-governmental Instruments, 1996, p. 259 et seqq.

[5]The Unified Agreement for the Investment of Arab Capital in the Arab States, printed in: UNCTAD, International Investment Instruments: A Compendium, Volume II, Regional Instruments, 1996, p. 211 et seqq.; see also, Hamida (2006).

[6]Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981 (a copy of the official declaration can be downloaded from http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf); for more information on the IUSCT, see, http://www.iusct.net/.

[7]UNSC Resolution No. 687 (1991), UN Doc. S/RES/687, 8 April, 1991 (a copy of this resolution can be downloaded from https://www.un.org/Depts/unmovic/documents/687.pdf); for more information on the UNCC, see, https://uncc.ch/home.

[8]Statute of the International Court of Justice (ICJ Statute), 1945, 39 AJIL Supp. 215 (1945) (a copy of the statute can be downloaded from http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf); for more information on the ICJ, see, https://www.icj-cij.org/.

[9]Statute of the ITLOS, 1833 U.N.T.S. 561 (a copy of the statute can be downloaded from https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf); for more information on the ITLOS, see, https://www.itlos.org/.

[10]Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (a copy of the statute can be downloaded from http://legal.un.org/icc/statute/romefra.htm); for more information on the ICC, see, https://www.icc-cpi.int/.

[11]European Convention on Human Rights, 213 U.N.T.S. 221 (a copy of the ECHR can be downloaded from https://treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf); for more information on the ECtHR, see, https://www.echr.coe.int/Pages/home.aspx?p=home.

[12]Protocol on the Statute of the Court of Justice of the European Union (CJEU Statute), OJ C 203, 7.6.2016, p. 72 (a copy of the statute can be found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:203:FULL&from=EN); for more information on the CJEU, see, https://curia.europa.eu/jcms/jcms/j_6/en/.

4.1 Institutional and Procedural Design

To be functional, an international organization like the MIC should envisage both an effective institutional structure and an effective decision-making process. The system proposed here aims to achieve an effective and legitimised dispute settlement mechanism that adheres to the rule of law. This section therefore addresses the members and the respective organs of an MIC, its general procedure and other features. **73**

The organisational requirements should be set out in a statute (hereinafter MIC Statute). Detailed questions such as the procedural rules, the Code of Conduct for judges and other MIC staff etc. can be provided for either in a then very comprehensive MIC Statute or specified and in more detail in secondary law, if the MIC Plenary Body is vested with the required law-making powers. **74**

A possibility of specification and amendment by the adoption of secondary law by decisions of the Plenary Body could be established; such law-making powers would have to be provided for in the MIC Statute. Alternatively, the details could also be regulated in the MIC's primary law. However, in the latter case, primary law provisions should also facilitate simplified amendments of procedural rules by the contracting parties in order to ensure the overall functioning of the new organisation or take changes in the membership structure into account. **75**

Ideally, more detailed procedural rules would be regulated through secondary law as this would provide for more flexibility, in case amendments are needed. Amendments to primary law usually prove to be more problematic, since they are often linked to further substantive issues, among others. The institutional framework of other international courts—such as the ICJ, CJEU or ECtHR—is also legally structured in this way. Moreover, a legal framework that is divided into primary and secondary law can contribute to greater transparency. **76**

4.1.1 Members of an MIC

Membership should include all entities with international legal personality that may be parties to IIAs. Of course, the members of an MIC should in particular comprise states. The WTO also permits autonomous customs territories to become members.[13] However, unlike WTO law, a reference to customs territories is not applicable in the context of investment law because in the latter, the impairment to foreign investments is tied to the exercise of territorial jurisdiction. Therefore, international (supranational) organisations vested with autonomous regulatory powers like the **77**

[13]Cf. Article XII:1 sentence 1 WTO-Agreement: "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO."

EU should be able to become members of an MIC. The same applies to atypical entities with international legal personality or to actors such as special administrative regions[14] which are entities with only a partial international legal personality. In that regard, it should also be possible for Macau, Hong Kong and Taiwan[15] to become independent members of an MIC.

78 The EU can only negotiate and conclude international treaties to the extent that its Member States have transferred corresponding competences to it. Whether the EU alone or the EU together with its Member States are to take part as Members of the MIC was at least partially clarified by the Singapore Opinion of the CJEU[16] and by the CJEU's response as to what extent the EU enjoys shared and/or exclusive competence to enter into treaties in the field of investment protection.

79 According to this opinion, the EU is not exclusively competent to regulate the settlement of disputes between investors and states, but shares this competence with its Member States.[17] In particular, portfolio investments are not covered by the exclusive competence of the EU. Since IIAs typically do not distinguish between direct investments and portfolio investments and as the MIC's jurisdiction should cover the entire scope of IIAs (see para. 195 et seqq.), the EU as well as its Member States should all become independent members of the MIC.

4.1.2 Plenary Body

80 A general Plenary Body exists in a large number of international dispute settlement organisations, albeit with different names. In the WTO, for example, this Plenary Body is the Dispute Settlement Body (DSB), the General Assembly at the UN, the Assembly at the World Health Organization (WHO) or the General Conference at the International Labour Organization (ILO).[18] In general, a Plenary Body makes all central decisions within the respective organisation or institution. It can *de facto* deal with all issues that fall within its mandate. Thus, plenary bodies could also, in a broader sense, manage dispute resolution as a whole, i.e. appoint judges, assign them to chambers or even adopt internal procedural rules. Furthermore, if the MIC Statute or the rules of procedure permit, the Plenary Body may step in where issues of enforcement of compensation awarded to a claimant arise. For example, payouts from a member-financed fund could be approved by the Plenary Body (see para. 538 et seqq.), while the Secretariat should be in charge of the administrative supervision of the payout. 'Sanctions' of a different nature—such as a suspension of membership rights—could also be imposed by the Plenary Body.

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[14] Ahl (2009), p. 98 et seqq., in particular. p. 114 et seq.

[15] Heuser (2010), p. 115 et seqq.; Craven (2014), p. 241.

[16] CJEU, Opinion 2/15, *Singapore FTA*, ECLI:EU:C:2017:376.

[17] CJEU, Opinion 2/15, *Singapore FTA*, ECLI:EU:C:2017:376, para. 285 et seqq.

[18] Cf. Ruffert and Walter (2009), para. 296.

Plenary bodies of comparable institutions are generally composed of representatives of member states. Accordingly, the MIC's Plenary Body would be composed of representatives of all its Members, which also entails independent administrative entities and international organisations. Regarding the transfer of competences from EU Member States, at least concerning most aspects of foreign investment[19] (as has been the case with the WTO since its establishment in 1995 despite the incomplete transfer of competences to the European Communities (EC)),[20] the EU should 'speak with one voice', i.e. come to an internal agreement and be represented externally by a single, common representative. The representation of the EU within the WTO could serve as a model. However, all EU Member States should be represented individually in the Plenary Body. Here too, as in the WTO, a parallel membership of the EU and its Member States should be sought. The WTO System has proven itself in this regard. **81**

The Plenary Body should also be able to form further internal subdivisions within the scope of its competence. For example, they should be able to constitute committees that develop internal procedural rules, draft codes of conduct and evaluate candidate judges. The adoption of interpretative statements for the future—which, however, could only be of a general nature until the MIC applies uniform substantive law—could constitute a counterweight or corrective to the case law of the MIC. The MIC Plenary Body or its committees could only render interpretative statements for an authentic interpretation of the multilateral legal instruments of the MIC; interpretations of bilateral IIAs can only be issued by the respective parties to the agreement or by the committees established through these IIAs (see para. 108 et seqq.).[21] **82**

The plenary sessions of all international organisations occur periodically at predetermined intervals, but there is also the possibility of extraordinary sessions.[22] This practice should also be adopted for the MIC Plenary Body. **83**

4.1.2.1 Appointment of Judges Through the Plenary Body

Number of MIC Judges

Only very few international courts require that each member state must be represented by their own judge for plenary decisions (the CJEU and the ECtHR constitute such exceptions). The ICJ has 15 judges (with 193 UN-Members) and the ITLOS has 21 judges (with 168 United Nations Convention on the Law of the Sea **84**

[19]Thereto inter alia Bungenberg (2010), p. 135 et seqq.; Reinisch (2016), p. 3 et seqq.; Dimopoulos (2011), p. 65 et seqq.

[20]ECJ, Opinion 1/94, *WTO*, ECLI:EU:C:1994:384.

[21]Schill (2015), p. 9.

[22]Cf. at the WTO, the meeting of the Ministerial Conference at least once every 2 years, and the General Council, composed of representatives of the Member States, whenever appropriate, Article IV of the WTO Agreement.

(UNCLOS)-Member States). The number of MIC Judges should be limited, also for cost reasons. The number of judges should not be based primarily on the number of MIC Members, but rather on the number of cases brought before the MIC.[23] Nevertheless, all major legal traditions or jurisdictions should be taken into account in the composition of the bench (see para. 96 et seqq.).

85 A multilateral court with at least 40 Member States should envisage a limited number of judges. The CETA rules on the appointment of judges, where each of the two parties proposes a number of judges, who are then appointed by the mixed CETA Committee,[24] should therefore not be transferred to an MIC.

86 It can be assumed that only a certain number of cases will be heard under the second instance and finally be decided by the Appellate Body. Therefore, the number of judges in the second instance can be lower than in the first instance (see para. 340 et seqq.). An MIC could, for example, envisage 15 judges in the first and 9 judges in the second instance, as well as provide for the option and respective procedure for increasing the numbers depending on the number of MIC Members and/or the workload.[25]

Nomination of Candidate Judges

87 It is put forth by some academics that decisions of states as to which judges to nominate are influenced by the expected judicial behaviour,[26] i.e. they would only nominate candidates who are particularly mindful of states interests.[27] The opposing view argues that an investment court would, due to its very existence, privilege investor interests.[28] However, the prevailing view is the fear that an MIC could be disadvantageous for investor interests.[29] Therefore, the manner in which judges are nominated will be important for the independence and acceptance of the MIC, especially by investors.

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[23]This approach is followed by European Commission (2017), p. 40 and discussed in UNCITRAL (2017), para. 35. Similarly, Alvarado Garzón (2019), p. 485.

[24]Cf. Article 8.27 para. 2 CETA: "The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada [Footnote: Either Party may instead propose to appoint up to five Members of the Tribunal of any nationality. In this case, such Members of the Tribunal shall be considered to be nationals of the Party that proposed his or her appointment for the purposes of this Article] and five shall be nationals of third countries." Similarly, Article 3.9 para. 2 EU-Singapore IPA, Article 11 para. 2 Section- Resolution of Investment Disputes, EU-Mexico Global Agreement and Article 3.38 para. 2 EU-Vietnam IPA.

[25]This approach is followed by European Commission (2017), p. 40.

[26]Voeten (2009), p. 396 et seqq.

[27]Mackenzie (2014), p. 741.

[28]Woods (2016).

[29]Cf. American Bar Association Section on International Law (2016), Executive Summary & Conclusions and Recommendations, p. 13; Roberts (2017); Bernardini (2017), p. 48; Koeth (2016), p. 12.

For the selection of judges, it is usually the members that nominate a pool of candidates[30] and an international committee/body that subsequently chooses and appoints the judges.[31] As a result, this election process also proves to be inherently political. The decisive factor is that there is a sufficient number of sufficiently qualified candidates to choose from, even if it is a political decision. **88**

An alternative would be for the governments of the MIC Members to nominate candidates, which would then be confirmed by the Plenary Body, without leaving a choice from a larger pool of proposed candidates. But such an approach has been repeatedly criticized for lacking transparency in terms of how states pick the nominees. Therefore, the Plenary Body choosing from a larger pool of suitable candidates proposed by the MIC Members is the preferred solution. **89**

Accordingly, the Plenary Body could develop and adopt guidelines on how to select nominees on the national level. In this regard, the practice of the Council of Europe with regard to the ECtHR could serve as a point of reference.[32] For the selection of ECtHR judges, it is emphasised that even the national preselection has to comply with a number of fundamental principles ("must reflect the principles of democratic procedure, transparency and non-discrimination").[33] In various areas, states are now beginning to advertise vacant posts so that candidates can apply through a national preselection process.[34] The states then choose which of these applicants they nominate as candidates. This nomination by home states is envisaged, for example, for the selection of candidates for the WTO Appellate Body,[35] for **90**

[30]Like this, Article 4 para. 1 ICJ Statute: "The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions." and Art. 4 para. 1 ITLOS Statute: "Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated."

[31]Mackenzie (2014), p. 738; Abi-Saab (1997), pp. 176 and 178; Mackenzie et al. (2010), p. 100 et seqq.

[32]Cf. hereto von Bogdandy and Krenn (2014), p. 529 et seqq.

[33]Cf. in this sense also the Council of Europe Assembly Resolution 1646 (2009), Nomination of candidates and election of judges to the European Court of Human Rights; Committee on the Election of Judges to the European Court of Human Rights, Procedure for electing judges to the European Court of Human Rights, AS/Cdh/Inf(2017)01rev4 of 27.4.2017.

[34]Cf. last in the EU to fill the "EU" AB position: European Commission, EU Launches Selection of Candidates for the position of WTO Appellate Body member, Press release of 26.10.2016; as well as the public tenders in Germany and Austria for the new appointment of their ECtHR judges' offices: Richter mit Ruf gesucht, Handelsblatt of 24.11.2009; Straßburger Richter: Sechs Bewerber, Die Presse of 3.11.2014.

[35]Article 17 DSU, cf. thereto WTO, WTO receives seven nominations for Appellate Body post, News Items of 23.3.2016; European Commission, EU Launches Selection of Candidates for the position of WTO Appellate Body member, News archive of 26.10.2016.

the International Criminal Court[36] and for the ITLOS.[37] It is also foreseen for the International Law Commission (ILC).[38]

91 Another alternative would be a direct application of potential candidates to the organisation itself, which has been disfavoured in comparison to the option discussed above. To date, the possibility of direct applications exists only in the Civil Service Tribunal of the EU.[39]

92 From an investor's perspective, this alternative of direct applications would have the advantage that the influence of the home states of the candidates would be reduced. In addition, this mechanism could avoid 'vote trading' between governments.[40] However, there is an issue of acceptance of such a system of direct application if the elected judges primarily rule over state actions and their compatibility with investment protection standards without any possibility for the Members to influence the selection process. In addition, such a direct application procedure could lead to a very high number of potential candidates, which could result in administrative problems in the process.

93 In case the members decide in favour of a nomination of candidates by the members, time limits should be set and the names of the candidates together with the documents required for an appointment—curriculum vitae, proof of professional qualifications etc.—should be accessible to all voting members. The latter also applies, of course, if the decision is made in favour of direct applications.

Screening Committee

94 Prior to the actual election of judges by the Plenary Body—and after the nomination of candidates by the Members or direct application by the potential candidates—a committee can be established to vet the qualifications, including expertise and

[36]Article 36 para. 4 lit. a) Rome Statute: "Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either: (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court [. . .]."

[37]Cf. Article 4 para. 1 ITLOS Statute: "Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated."

[38]Article 3 ILC-Statute: "The members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations."

[39]Cf. indeed Article 3 para. 2 Annex I to the Council decision of 2.11.2004 establishing the European Union Civil Service Tribunal, OJ L 333 of 9.11.2004, p. 7: "Any person who is a Union citizen and fulfils the conditions laid down in the fourth paragraph of Article 225a of the EC Treaty and the fourth paragraph of Article 140b of the EAEC Treaty may submit an application. The Council, acting by a qualified majority on a recommendation from the Court, shall determine the conditions and the arrangements governing the submission and processing of such applications."

[40]Mackenzie (2014), p. 124.

general suitability (independence, integrity and neutrality) of the candidates.[41] Such a committee now exists for the CJEU[42] and the ECtHR.[43] This additional instance to mitigate the possibility of politically motivated and non-transparent national nominations of candidates, to prevent the candidacy of unsuitable persons could take the form of a sub-committee of the Plenary Body (Screening Committee). This Committee would screen the candidates for their personal suitability, i.e. professional qualifications, ethical standards as well as independence and neutrality.[44]

Such an intermediate preliminary examination would strengthen the legitimacy and acceptance of the MIC and would contribute to greater transparency and objectivity in the appointment procedure.[45] This would also ensure that member states already set sufficiently high standards in their internal nomination procedures.[46] The election of the judges could then proceed from this pool of candidates determined by the Screening Committee. **95**

Diversity Among Judges

To increase the acceptance of the MIC, the election process should ensure that the various legal systems are represented within the judiciary.[47] The judges should reflect the legal systems and regions of the Members and seek gender balance—and at the same time have the highest professional qualifications.[48] The WTO **96**

[41]Cf. for instance Article 36 para. 4 lit. c) Rome Statute: "Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court." See hereto Resolution ICC-ASP/10/Res.5 of 21.12.2011, Strengthening the International Criminal Court and the Assembly of States Parties, para. 20.

[42]See thereto Art. 255 Treaty on the Functioning of the European Union (TFEU): "A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254. The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice." Cf. consequently Council decision of 11.2.2014 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (2014/76/EU), OJ L 41 of 12.2.2014, p. 18.

[43]Cf. Resolution on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, CM/Res(2010)26 of 10.11.2010.

[44]Examples of unsuitable but elected judges of the ECHR in Engel (2012), p. 486 et seqq.

[45]Cf. insofar Hackspiel (2015), Art. 255 TFEU, para. 3 et seq.

[46]Cf. Hackspiel (2015), Art. 255 TFEU, para. 2; cf. insofar also already the European Convention, CONV 734/03 of 2.5.2003, Art. 224a.

[47]Diversity is equally supported by European Union (2019), para. 50 and UNCITRAL Working Group III (2018a), p. 6. See also Howse (2017b), p. 224.

[48]Cf. Article 8 ILC-Statute: "At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the

Appellate Body members represent the full range of WTO Members,[49] including geographic distribution, levels of development and legal systems.[50] Hence, the appointed judges must reflect the membership of the MIC so that judges mirror the various legal and cultural backgrounds of MIC Members. As a consequence, and taking into account the aspired number of member states, there should not be two judges of the same nationality.[51]

97 In practice, the representation of the various legal systems is achieved through an appointment of a certain number of judges per regional group.[52] This requirement of regional or geographical distribution exists in the statutes of numerous international judicial bodies[53] and is attained, for example, by certain quotas for regional groups. Fair regional representation within the ITLOS is ensured by taking recourse to the five geographical groups of the UN General Assembly (African, Asian, Eastern European, Latin American and Caribbean and Western European and other countries).[54]

98 To date, no international statute stipulates a fixed assignment of judges to specific states. At the same time, it is informally accepted that certain states are guaranteed to always have a judge of their nationality appointed if they nominate a candidate. For

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Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured." Article 36 para. 8 lit. a) Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges." Article 9 ICJ Statute: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

[49] Article 17.3 sentence 3 DSU: "The Appellate Body membership shall be broadly representative of membership in the WTO."

[50] In this sense, Weber (2007), p. 135; Preparatory Committee to the WTO, Sub-Committee on Institutional, Procedural and Legal Matters, Establishment of the Appellate Body, Recommendations, PC/IPL/13 of 8.12.1994, para. 6: "[. . .] Therefore factors such as different geographical areas, levels of development, and legal systems shall be duly taken into account. The question of how this balance is to be achieved is best left to be worked out during the actual consultation and selection procedures."

[51] See for instance Article 3 para. 1 ICJ Statute: "The Court shall consist of fifteen members, no two of whom may be nationals of the same state." Article 52 para. 2 American Convention on Human Rights (ACHR); Article 3 para. 1 sentence 1 ITLOS Statute.

[52] Mackenzie (2014), p. 744.

[53] Article 2 para. 2 ITLOS Statute: "In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured." Article 36 para. 8 lit. a) Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation [. . .]". Article 9 ICJ Statute: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

[54] See https://www.itlos.org/en/the-tribunal/members/.

example, the five permanent Members of the UN Security Council have always appointed an ICJ Judge, although there is no such privilege stipulated in the ICJ Statute (an exception to this occurred in 2017 for the first time). The same applies to the WTO Appellate Body, in which since the founding of the WTO in 1995, the US and the EU have always been "represented".[55] Such a fixed assignment of judges cannot be included in the MIC Statute. Nevertheless, within certain regional groups, members could be picked that will always send a judge to the MIC, whereas other seats of the bench will be filled with judges from the remaining states of these regional groups according to a rotation scheme.

Within the EU, there could be a nomination of suitable candidates by the Member States, possibly after a 'job posting' and an internal screening procedure. Member States would then notify the Commission of their choice of candidates, which would in turn conduct internal hearings and select the persons to be proposed to the MIC Plenary Body as suitable candidates. **99**

As an alternative to the formation of regional groups, a free choice could be made exclusively on the basis of the qualifications of candidates without an allocation of seats on the bench to regional groups. **100**

The latter alternative, however, entails the danger that politically strong states will usually be able to place their nationals on the bench, but developing countries may face real problems in this regard. On the one hand, specifying certain geographical and other criteria for a fair distribution of judges might result in a deviation from the principle that the most qualified candidates should prevail. On the other hand though, this may be necessary because otherwise the MIC would encounter a lack of states willing to become members of the MIC and diminished acceptance throughout the various legal systems. **101**

Concerning the option of selecting judges through regional groups, the commonly accepted election procedure for the ILC could be used as a model for an appointment procedure for MIC Judges. The ILC candidates, as is the case with the election of the ICJ Judges,[56] are assigned to specific regional groups.[57] From each regional group, the plenary body (in this case, the UN General Assembly) elects a certain number of judges. Therefore, elections in the MIC Plenary Body would be organised through regional groups; all Members of the Plenary Body would vote in their respective regional group and the candidates with the most votes of each **102**

[55]Mackenzie (2014), p. 745.

[56]Cf. Article 5 para. 1 ICJ Statute: "At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court."

[57]Cf. Article 3 para. 2 ILC-Statute: "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations." See also Article 3 para. 2 ITLOS Statute: "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations."

regional group would be elected as judges.[58] The elections would be held by secret ballot.[59]

103 In principle, it would be possible for the regional groups to reduce the influence of third countries with regard to the election of judges within that regional group by nominating only a number of candidates pursuant to the regional quota and agreeing on an internal rotation scheme regarding the allocation of candidates. Of course, this would have consequences for the legitimacy as well as for the independence of the judges.

104 The formation of regional groups of an MIC with (initially) 15 judges in the first instance could follow the model of the ICJ.[60] At the ICJ, there are three judges from Africa, two from Latin America and the Caribbean, three from Asia, five from Western Europe and other countries and two from Eastern Europe.[61] As either EU Member States or EU nationals will be involved in proceedings before the MIC in many cases and as the EU and its 27 or 28 independent Member States will also make up a large fraction of MIC Members for a certain period of time during the formation phase of the MIC, the EU and its Member States should also be represented by an adequate number of judges in order to incorporate EU or European legal traditions in the long-term legal development or interpretation of the MIC. However, other potential MIC Members should not be discouraged due to an overrepresentation of the EU, but should also be represented on the bench in a well-balanced, fair manner. The following regional distribution should therefore be proposed for the allocation of seats on the judges' bench: three Asian, two African, three Latin American and Caribbean, six Western European, North American and Oceanian and one Eastern European. In the group of Western European and other countries, the EU should fill at least two seats. Such a regional approach for the appointment of judges would correspond best to the desired multilateral and universal orientation of the MIC.

105 A relatively recent development is the aim for a balanced appointment of judges from a gender perspective.[62]

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[58]Cf. Article 9 ILC-Statute: "1. Those candidates, up to the maximum number prescribed for each regional group, who obtain the greatest number of votes and not less than a majority of the votes of the Members present and voting shall be elected. 2. In the event of more than one national of the same State obtaining a sufficient number of votes for election, the one who obtains the greatest number of votes shall be elected, and, if the votes are equally divided, the elder or eldest candidate shall be elected."

[59]Cf. on the difficulties in choosing the ICJ judges in 2014, Akande (2014).

[60]Nevertheless, it must be highlighted that even the elections of ICJ judges can be criticised as political. In this regard see Brower and Ahmad (2018), p. 793.

[61]Cf. http://www.icj-cij.org/court/index.php?p1=1&p2=2.

[62]See here Article 36 para. 8 lit. a) sublit. iii Rome Statute: "A fair representation of female and male judges."; cf. also Art. 12 para. 2 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (ACtHPR Protocol): "Due consideration shall be given to adequate gender representation in nomination process." Cf. with regard to ECHR Mowbray (2008), p. 549. For the MIC, following the example of Howse (2017b),

4.1.2.2 Adoption of Specific Secondary Rules

The Plenary Body should be considered as the political organ of the MIC. Through the Plenary Body, the Members may, inter alia, pass further procedural rules either by a qualified majority or unanimously and interpret the MIC Statute in a legally binding manner, insofar as such a legislative power is provided for in the MIC Statute. **106**

Adoption of Internal Procedural Rules, Budget etc.

The Plenary Body should be allowed to adopt supplementary procedural rules or schedules of responsibilities, such as the remuneration of judges, procedural arrangements for the organisation of the court of first and second instance, guidelines for oral proceedings, regulations concerning procedural costs, codes of conduct for MIC staff (so-called staff regulations, see para. 183), pension schemes for the MIC staff, budgetary regulations and the adoption of the annual budget. **107**

Interpretation, Including Subsequent/Authentic Interpretation

The issue of rules of interpretation by the parties and, in the case of an MIC, by the Plenary Body, is generally a controversial topic of discussion. Subsequent agreements on interpretation are intended to eliminate 'uncertainties' regarding the interpretation of the agreement in question and, in particular, to 'readjust details'. For example, interpretation agreements or decisions on matters of jurisdiction regulated in the MIC Statute would be conceivable. Interpretation arrangements that are independent of ongoing procedures also seem generally possible in light of constitutional rule of law requirements. However, such interpretative decisions by the Plenary Body could only affect the MIC Statute itself and only insofar as the Plenary Body would be vested with a corresponding interpretative mandate. For example, terms used in the MIC Statute could be explained using this interpretative mechanism. **108**

An interpretation by the MIC Members of the various IIAs on which the dispute settlement will be based is in principle not possible. IIAs can only be interpreted by their respective contracting states. However, an interpretation of the underlying IIAs by the MIC Members is possible if the parties to the IIAs have expressly consented to it, for example through corresponding provisions in the MIC Statute. In this case, the multilateral MIC Statute would amend the substantive bilateral agreements (see in this respect also Article 39 Vienna Convention on the Law of Treaties (VCLT)). **109**

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p. 225, MIC Members could be required to nominate equal number of men and women to fill the vacancies of MIC Judges.

The Plenary Body could be vested with a narrow interpretative competence for the IIAs to this extent.

110 In principle, agreements on interpretation by the MIC Members can be problematic during ongoing proceedings if the new interpretation were to apply to these proceedings retrospectively. The facts on which the MIC has to decide would have already been set at that point in time and the applicable law or its interpretation would thus change *post facto*. One possible solution to this problem is to provide for the possibility of a third party intervention by the parties that are interested in clarifying the law in the MIC Statute; they could voice their legal point of view in the current proceedings. This interpretation would of course not be binding.

Subsequent Increase of the Number of Judges

111 In case the workload of the MIC rises in such a way that it can no longer be handled by the original number of judges, it should be the responsibility and within the mandate of the Plenary Body to increase the number of judges in the first instance and, if necessary, in the second instance and to decrease it further if appropriate (see para. 86). For this purpose, the additional number of judges could be predetermined in the MIC Statute.

112 Since the MIC Statute should not allocate a specific number of judges per State/Member, the appointment of additional judges could initially occur irrespective of accession of further Member States. However, a balanced regional representation should also be taken into account in this regard. It should als be considered to introduce a mechanism to be able to react to stronger participation in the MIC from different regions of the world and adjusting in this regard the suggested key of judges per region (see above para. 104). In order to facilitate a simplified amendment of the regional distribution quotas—which of course does not constitute an allocation of judges to specific Member States—in the case of changes of membership of the MIC, the quotas should be stated in the procedural law, *i.e.* in the MIC's secondary law.[63]

4.1.2.3 Requirement of Majority for Decision Making

113 The decision-making process of the Plenary Body could envisage decisions that can be taken with a qualified majority. The Dispute Settlement Body of the WTO generally operates under the principle of consensus. However, if consensus cannot be reached, it is possible to pass decisions by a three-quarters majority. In any case, certain matters are reserved for consensus.

[63] In a similar way, Howse (2017b), p. 226, suggests that the MIC should have a provision allowing to add new judges when required.

The requirement of unanimity may in fact lead to a veto by a single member. Therefore and in order to ensure the functioning of the MIC, a qualified majority should be stipulated for the above-mentioned decisions regarding procedural rules and the increase in the number of judges. **114**

In this context, it should be taken into account that—depending on the number of MIC Members—if the EU and its Member States become Members of the MIC, they should at least have a veto even if the requirement for a qualified majority exists as far as the EU and its Member States "speak with one voice" like in the WTO. **115**

4.1.2.4 Transparency in Proceedings of the Plenary Body

Minutes of the Plenary Body's sessions should be published online on the MIC homepage as promptly as possible. Whether the sessions of the Plenary Body will be held in public should be considered, also with regard to available space for such sessions. In the WTO, the consistent objective is to improve the transparency of the organisation. In the EU context, Article 15 of the Treaty on the Functioning of the EU (TFEU) also stipulates for all institutions to generally respect of the principle of transparency[64]; the European Parliament meets in public, as does the Council when it deliberates or votes on legislation. **116**

4.1.2.5 Seat of the Plenary Body and Frequency of Meetings

The seat of the Plenary Body should be chosen. This would, in principle, make it necessary to first decide whether all institutions of the MIC should be located at the same seat or, as in the EU, have different seats. It should be a place where the competent ministers or other representatives of the members already meet regularly. This would be the case during the meetings of the WTO General Council in Geneva, for example. **117**

In terms of the frequency of meetings, a flexible solution, like at the WTO, should be considered. An annual meeting of the Plenary Body could be set as a minimum requirement and further sessions could then be organised according to actual needs. However, the Plenary Body should not handle tasks of day-to-day administration of pending proceedings; rather, the Secretariat would be in charge of this. **118**

[64] Article 15 para. 1 and 2 TFEU: "(1) In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. (2) The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act."

4.1.3 Judges at the MIC

119 The judges' qualifications as well as their election process and, consequently, their independence should be considered the core of a future MIC. The MIC Judges will decide on matters of state interest. Thus, the election process should be subject to high standards; only highly qualified judges ensure the necessary quality and thus acceptance of the new multilateral institution. Personal and professional standards have to be taken into consideration during the election process (see para. 124 et seqq.). The design of the election procedure of the judges should be of particular importance in the establishment of the MIC.[65] There should be a division of judges between the first and the second instance.

4.1.3.1 Full- or Part-Time Judges

120 One question is whether the judges will be employed full-time or part-time. In the latter case, the judges could be available on demand, as is currently the case for the first-instance judges for example in the CETA ICS.[66]

121 In addition to their work at the MIC, part-time judges could also engage in other professions, for example as judges at national or international courts, as university professors or in legal consulting. They could be paid a 'stand-by lump sum' as well as an appropriate additional salary for the work they actually perform at the MIC.

122 Full-time judges, on the other hand, should focus fully on their work at the MIC. Therefore, parallel occupations should be minimal. Accordingly, the remuneration of full-time judges—in particular from the point of view of securing full judicial independence (see para. 130 et seqq.)—should be regulated accordingly.

123 The alternative of part-time employment is likely to be less expensive initially. By contrast, full-time employment would foster an effective, independent and high quality judiciary that would likely lead to expedient procedures.[67] Prompt and (in terms of quality) 'good' decisions of the MIC will contribute to its acceptance—and should thus also lead to an increase in the caseload of the MIC in the medium term, which should render the question of part-time or full-time employment of the judges superfluous in the long run. It should also be noted that overhead costs for secretaries, employees etc. would give rise to expenses for the MIC—irrespective of full- or part-time judges. In addition, even in the case of a smaller caseload, the overhead costs for full-time judges would probably not be much higher than those for part-time judges who receive a lump sum fee plus *per diem* allowances

[65] Mackenzie (2014), p. 738 with reference to Caron (2000), p. 21 et seq.

[66] Article 8.27 para. 12 CETA: "In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee." The same applies to the second instance in Article 8.28 para. 7 lit. d. CETA.

[67] Europeam Union (2019), para. 16 suggests similarly that MIC judges should be full-time adjudicators.

comparable to those of ICSID arbitrators. Full-time employment of judges would, at least, provide no incentives for prolonging the processes.

4.1.3.2 Qualification

CETA, the EU-Vietnam IPA and the EU-Singapore IPA already state qualification requirements for judges, on which the MIC provisions could be based: **124**

> The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.[68]

In addition to expertise in public international law, in particular investment protection and trade law as well as dispute resolution, it should also be taken into account that the MIC in principle decides on state actions directed against foreign investors. In many cases, these are public law decisions that judges have to make based on the protection standards provided for in the IIAs.[69] Even though national law should only be taken into account as a question of fact, it is also important for the proper application of the governing law whether the judges have more of a private law or rather a public law background. When interpreting the standards of protection and deciding whether there are violations, these are matters of balancing interests that are often comparable to the examination of fundamental rights violations under national law. This is where the difference between investment arbitration and commercial arbitration becomes apparent; such considerations have only been taken into account to a minimum extent in past appointments of investment arbitral tribunals. Corresponding professional requirements should be requested in the case of MIC judges.[70] In addition to knowledge of international law, especially in trade and investment law, there could be a requirement of experience in national administrative and constitutional law.[71] **125**

Existing courts allow for the appointment of judges with varying professional qualifications.[72] Since the establishment of chambers should be assumed for the **126**

[68]Cf. Article 8.27 para. 4 CETA, Article 3.38 para. 4 EU-Vietnam IPA and Article 3.9 para. 4 EU-Singapore IPA.

[69]In a similar way it has been addressed that ISDS cases touch upon public interest or public policy. See UNCITRAL Working Group III (2018a), para. 31. Similarly, European Union (2019), para. 49 states the need of a public international law background, given the foundations of investment law.

[70]American Bar Association Section on International Law (2016), Executive Summary & Conclusions and Recommendations, p. 7.

[71]See also Howse (2017b), p. 224.

[72]Article 36 para. 8 lit. b) Rome Statute: "States Parties shall also take into account the need to include judges with legal expertise on specific issues [. . .]."

MIC Statute and since the relevant facts may come from different subject areas due to the very broad definition of 'investment' and the applicable protection standards, there should be no requirement of specialist qualifications, such as in tax law, environmental law etc. Even CETA abstains from a requirement for such sector-specific specialist knowledge.[73]

127 CETA,the EU-Vietnam IPA and the EU-Singapore IPA require for the first and the second instance that the members of the Tribunal are qualified to hold the office of judges in their respective countries or are highly regarded jurists.[74] It should be noted that these are only bilateral agreements; the MIC, on the other hand, would constitute a multilateral court which will contribute to the development of a consolidated body of international investment law. Therefore, the judges should be assumed to have the highest qualifications.[75] A specification of these prerequisites could be made individually by the nominating Members and explained individually to the screening committee. For pragmatic reasons, a future MIC Statute should state a very broad description of the required qualifications for judges in the form of general prerequisites.[76] Additionally, regarding the judges at the ICS, it could be suggested that the MIC Judges at the second instance (appeals) should be more qualified and have more expertise and experience than the MIC judges at the first instance in order to address the allegedly incorrect decisions of first instance.

128 Setting a minimum or maximum age for judges should be looked at with regard to the issue of age discrimination and should thus be considered with great restraint,[77] especially given that a screening committee can review the capabilities of each individual candidate.

129 It remains an open question whether the eligibility/appointment of MIC Judges should be made contingent on the home state of the potential candidate being a member of the MIC.[78] To allow MIC Judges to have the nationality of non-MIC States would demonstrate the inclusiveness of the MIC towards other potential member states. The eligibility requirements should rather depend on the qualifications and independence of the individual than on a certain nationality.

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[73]Article 8.27 para. 4 CETA just mentions "[i]t is **desirable** they have expertise in particular in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements." (emphasis added). Similarly in Article 3.38 para. 4 EU-Vietnam IPA and Article 3.9 para. 4 EU-Singapore IPA.

[74]Cf. Article 8.27 para. 4 and Article 8.28 para. 4 CETA Article 3.38 para. 4 and Article 3.39 para. 7 EU-Vietnam IPA and Article 3.9 para. 4 and Article 3.10 para. 4 EU-Singapore IPA.

[75]The importance of having adjudicators with the highest qualifications is recognised by European Union (2019), para. 20.

[76]See also Wilske et al. (2017), p. 94.

[77]Neither WTO-AB, nor ICJ provide for age limits; the ECtHR provides for an age limit of 70 years, cf. Article 23 para. 2 ECHR.

[78]This is not a requirement of the ILC, but so far no person has ever been elected to the ILC whose home state is not a UN member.

4.1.3.3 Independence

Generally, the independence of judges and their autonomy should be essential.[79] This means that all government representatives would be unsuitable to serve as MIC Judges. Accordingly, WTO Law states that AB Members shall be "unaffiliated with any government."[80] Even though domestic judges or university professors are also financially dependent on states, their independence is to be assumed because they do not fulfil government tasks under the instructions of and subordinated to the government and are not directly involved in government actions, unless specific objections concerning this independence arise in particular cases.[81] **130**

In addition to individual professional qualifications and independence from their home states, it should be clarified that the judges appointed to the MIC do not act as representatives of states, especially not of their home states, but perform an 'international task'. Judges of the ECtHR, for example, act in their individual capacity in accordance with Article 21 para. 2 of the European Convention on Human Rights (ECHR); they do not represent their home countries, but are "completely independent from any instructions." An appropriate remuneration of the judges should also ensure their financial independence (see para. 145 et seqq.). **131**

Another question in relation to independence is whether judges should be allowed to resume any kind of occupation in other areas of law after their terms at the MIC or whether a cooling-off period should be required (see para. 141). **132**

4.1.3.4 Ethics

Judges will only be able to contribute to the acceptance of the MIC if they meet the highest ethical and moral standards and possess the necessary integrity.[82] Almost all international courts explicitly require this.[83] Ethical rules can be defined directly in **133**

[79] On this see also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 223 et seqq.

[80] Article 17 para. 3 sentence 2 DSU.

[81] On the harmlessness in these cases of state affiliation at the WTO-AB cf. Preparatory Committee to the WTO, Sub-Committee on Institutional, Procedural and Legal Matters, Establishment of the Appellate Body, Recommendations, PC/IPL/13 of 8.12.1994, para. 7: "[...] Members of the Appellate Body should not therefore have any attachment to a government that would compromise their independence of judgment. This requirement would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government". The CJEU held that Members of Tribunals such as law professors who receive renumeration from a state but are not however involved in the determination of the policies of the government of the state does not make that person ineligible, see CJEU, Opinion 1/17 30 April 2019, ECLI: EU:C:2019:341, para. 240.

[82] The need to guarantee impartiality and independence of MIC adjudicators was highlighted by European Commission (2017), p. 45.

[83] Cf. insofar for instance Article 2 ICJ Statute: "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to

the MIC Statute or be adopted by the Plenary Body as specific secondary law. As most attention is paid to the independence and neutrality of judges in current debate in the area, core provisions concerning the suitability and behaviour of judges should be regulated directly in the Statute.

134 The Bangalore Principles of Judicial Conduct[84] could possibly serve as a starting point for the substantive ethics requirements for MIC Judges.[85] The Bangalore Principles, which have been compiled by working groups and endorsed by a UN Resolution, can be seen as the model rules of judicial conduct requirements, with particular emphasis on independence, objectivity and impartiality, integrity, propriety and equal treatment of all parties to the procedure.

135 The opinion of the European Judges Council (CCJE) No. 3 on the principles and rules governing judges' professional conduct, in particular their ethics, incompatible behaviour and impartiality, is based on the Bangalore Principles.[86] Essential standards of conduct include impartiality, equal treatment and equality of arms of the parties, diligence in the performance of judicial duties and in interactions with the media, restraint, in particular in the exercise of political activities and also appropriate behaviour in private life. Furthermore, the opinion emphasises that the rules should be prescribed in written form.

136 Article 8.30 CETA[87] comprises rules of ethics that refer to the IBA Guidelines on Conflicts of Interest in International Arbitration.[88] This should be taken into consideration.[89] The first part of the IBA Guidelines state seven general standards as well as provisions (impartiality, independence, disclosure requirements for arbitrators and parties, waivers of the possibility to challenge adjudicators, scope of

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the highest judicial offices, or are jurisconsults of recognized competence in international law." Cf. also Article 36 para. 3 lit. a) Rome Statute; Article 4 para. 1 Statute of the Inter-American Court of Human Rights (IACtHR Statute); Article IV para. 11 Agreement Establishing the Caribbean Court of Justice (CCJ Agreement).

[84]The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25–26.11.2002.

[85]International Bar Association's Human Rights Institute Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals of 31.10.2011.

[86]CCJE(2002)OP3DE of 19.11.2002.

[87]Article 8.30 para. 1 CETA: "The Members of the Tribunal shall be independent. They shall not be affiliated with any government. [Footnote: For greater certainty, the fact that a person receives remuneration from a government does not in itself make that person ineligible.] They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement."

[88]IBA Guidelines on Conflicts of Interest in International Arbitration, Resolution of the International Bar Association Council of 23.10.2014.

[89]For a different opinion see Howse (2017b), p. 228.

application etc.). The second part describes various examples for the application of these principles. These examples are assigned in a 'traffic light system'; from a red (absolute exclusion or serious reasons for disqualification), to an orange (legitimate doubts about independence or impartiality), to a green list (no appearance of bias). The EU Commission's ICS proposal also already contains a 'Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators'[90] in Annex II. This document could be used as an initial starting point for a future MIC Code of Conduct.

In the rules of ethics, *inter alia*, the following should be regulated: **137**

- independence,
- impartiality and neutrality,
- obligations for former judges after the termination of their term,
- confidentiality,
- basic code of conduct to protect the reputation of the court,
- sanctions in case of misbehavior, e.g. corruption of judges and their affiliates,
- other obligations.

In addition, disclosure requirements of possible reasons for bias should also be stipulated, as well as the prohibition to delegate judicial tasks to others etc. **138**

Disclosure requirements should apply to all facts that could affect judicial impartiality or independence.[91] A breach of these disclosure requirements in a proceeding should be penalised and should lead to a *prima facie* disqualification in this procedure due to bias. However, it should be considered whether a list of hypothetical cases constituting problematic cases should be contemplated. In this case, only an exemplary instead of an exclusive list would be recommended. These requirements could be modelled after the IBA Guidelines.[92] **139**

Furthermore, judges should not be allowed to comment on political issues[93] as this could affect their independence. Judges must guarantee independence; therefore, great restraint must be demanded from them concerning statements and comments outside the court. **140**

The rules of ethics should also determine whether and under what circumstances the judges may resume their professional activities as party representatives **141**

[90]Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce, Chapter II—Investment, Annex II, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[91]This was acknowledged as well by European Union (2019), para. 18.

[92]IBA Guidelines on Conflicts of Interest in International Arbitration, Resolution of the International Bar Association Council of 23.10.2014, General Standard 3—Disclosure by the Arbitrator in connection to the Orange List.

[93]Cf. insofar also Article 16 para. 1 ICJ Statute: "No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature." See thereto also Art. 4 sentence 1 Statute of the Court of Justice of the EU (CJEU Statute): "The Judges may not hold any political or administrative office."

immediately after their term. WTO Law establishes clear cooling-off periods.[94] Stipulating a cooling-off period during which the former judges may not engage in certain occupations would speak for the quality and independence of the MIC. The duration of the cooling-off period should be well-balanced and limited.[95] However, as far as such a requirement (which is also contained in the Commission's ICS proposal)[96] goes, an adequate compensation for the loss of earnings should also be granted to the former judges. In any event, any participation in cases already pending before the MIC at the time of the termination of the appointment should be excluded. In this context for example, the CJEU obliges its members to observe a cooling-off period of 3 years, within which they are not allowed to participate as party representatives in proceedings before the EU court system.[97]

142 Breaches of rules of ethics should be penalised. The combination of rules of ethics and disciplinary action is considered an option, especially in the case of serious misconduct, provided that the principle of proportionality is complied with and the possibility of judicial review is provided for.[98] The legal consequences would depend on the specific case; in the event of serious breaches, such as a breach of confidentiality or the delegation of judicial tasks to employees, a removal from office should also be possible, as is the case with the CJEU if judges no longer fulfil their obligations.[99]

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[94]In this sense, Voon (2017), p. 27 et seq. WTO, Post-Employment Guidelines: Communication from the Appellate Body, WT/AB/22 of 16.4.2014.

[95]Here one could also mention § 100 para. 2 No. 4 Aktiengesetz (German Stock Corporation Act) or Article 42 para. 2 RL 2006/43/EG comparatively, because if this is the case in commercial law, then this should *a fortiori* also apply in the area of binding arbitration. These regulations are based on 2-year periods.

[96]Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce, Chapter II—Investment, Annex II, Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators, Article 6: "All former members must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decision or award of the tribunal or Appeal Tribunal."

[97]See also BVerwG (Federal Administrative Court), Judgment of 5.5.2017, Case Number 2 C 45.16, according to which the appearance of a retired judge as a lawyer in the court in which he previously worked confuses the concern that the service is adversely affected and therefore justifies him to prohibit him from doing so for a transitional period. A background consultation is however possible.

[98]Cf. Consultative Council of European Judges (2002).

[99]Article 6 CJEU Statute: "A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned. The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council. In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification."

4.1.3.5 Availability

Only those who can ensure that they will be available for office should be appointed as judges. This is to ensure that they are actually able to be present and allocate the necessary time to complete their tasks. It has already been stated above that a full-time judiciary is the preferred option. As far as a judge habitually engages in another occupation, such as being a university professor, the respective university management could grant sabbatical or part-time leave to the professor, based on which a temporary exemption from all duties as professor could be arranged if necessary to engage in procedures before the MIC. **143**

In conjunction, an obligation for the judges to reside at the seat of the MIC could be stipulated, provided that the judges are employed full-time at the MIC. Such an obligation would serve the proper functioning of the MIC and is envisaged for other international courts too.[100] **144**

4.1.3.6 Remuneration

Working as an MIC Judge is likely to boost the reputation and renown of the individuals. Therefore, it can be assumed that professionally and morally suitable persons can be found who would not refuse to work at the MIC purely for the lack of great financial gain. The exact amount of remuneration can be determined by the Plenary Body and then periodically increased depending on whether the judges are in fact working full-time or, until the MIC has reached its full capacity, they would only be available on call. **145**

The proposal made by the EU Commission for an ICS has already set forth concrete sums: EUR 2000 per month for judges in the Court of First Instance and EUR 7000 for judges in the Appellate Body.[101] These are merely stand-by fees, to which a remuneration according to daily allowances would be added. No concrete **146**

[100] Cf. Article 14 CJEU Statute: "The Judges, the Advocates General and the Registrar shall be required to reside at the place where the Court of Justice has its seat." Article 12 para. 3 Statute of the International Tribunal for the Law of the Sea (ITLOS Statute): "The President and the Registrar shall reside at the seat of the Tribunal."

[101] Article 9 para. 12 TTIP: "In order to ensure their availability, the Judges shall be paid a monthly retainer fee to be fixed by decision of the [. . .] Committee. [Note: the retainer fee suggested by the EU would be around 1/3rd of the retainer fee for WTO Appellate Body members (i.e. around € 2,000 per month)]." Article 10 para. 12 TTIP: "The Members of the Appeal Tribunal shall be paid a monthly retainer fee and receive a fee for each day worked as a Member, to be determined by decision of the [. . .] Committee. [Note: the retainer and daily fee suggested by the EU would be around the same as for WTO Appeal Tribunal members (i.e. a retainer fee of around € 7,000 per month)]."

amount can be found in CETA,[102] in the EU-Vietnam IPA[103] or in the EU-Singapore IPA.[104] In these three agreements, the respective Joint Committee determines the amount of remuneration.

147 The remuneration of MIC Judges may, if they are full-time judges, be based on the remuneration of other international courts (ICJ,[105] ITLOS[106] and International Criminal Court Judges[107]). However, in this case the remuneration would be well below the salary of CJEU Judges.[108]

148 At the national level, the incomes of judges are generally paid out of public funds, since judges exercise state functions. Accordingly, the MIC Judges' renumeration should also be paid by the parties to the agreement, *i.e.* the members of the MIC and would thus be borne by public funds, not by the respective parties to the dispute; at most, they might have to contribute to the costs through court fees (see para. 306 et seqq.).

4.1.3.7 Oath of Office

149 The appointed judges should take an oath of office before commencing their activity; for example, as in the case of the CJEU, this could be done in a public session of the Court[109] or even before the Plenary Body. The oath of office is designed to make the

[102] Article 8.27 para. 12 CETA: "In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee." Article 8.28 para. 7 lit. d) CETA: "The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal: (d) remuneration of the Members of the Appellate Tribunal".

[103] Article 3.38 para. 14 EU-Vietnam IPA: " In order to ensure their availability, the Members shall be paid a monthly retainer fee to be fixed by decision of the Committee." Article 3.39 para. 17 "(. . .) The Committee shall fix their remuneration and related organisational matters."

[104] Article 3.9 para. 12 EU-Singapore IPA: " In order to ensure their availability, the Members shall be paid a monthly retainer fee to be fixed by decision of the Committee."

[105] International Court of Justice, Members of the Court, http://www.icj-cij.org/court/?p1=1&p2=2: "Each Member of the Court receives an annual salary consisting of a base salary (which for 2010 amounts to US$ 166,596) and post adjustment, with a special supplementary allowance of US$ 15,000 for the President."

[106] International Tribunal for the Law of the Sea, Finances, www.itlos.org/general-information/finances/: "The President of the Tribunal, who resides at the seat of the Tribunal, receives an overall annual remuneration of US$ 168,878 and a special annual allowance of US$ 15,000."

[107] For instance, Conditions of service and compensation of the judges of the International Criminal Court, ICC-ASP/2/10, para. 1: "The annual remuneration of full-time judges will be € 180,000 net."

[108] Gartland (2016): "Judges at the Court of Justice of the European Union have received a pay increase of 2.4 per cent this year, bringing their basic salaries to almost € 256,000." Conversely, European Commission (2017), p. 40 considers that the estimated that the remuneration of one adjudicator at the MIC per year should be around EUR 285.000, which is higher than for CJEU judges.

[109] Cf. Article 2 CJEU Statute: "Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court."

judges swear to exercise their functions consciously and impartially, as well as to adhere to confidentiality requirements at all times, even after the termination of their appointment.

4.1.3.8 Immunity

Judges should be granted immunity in relation to all acts connected with their duties, as is provided for by various international courts.[110] It should be provided that such immunity could—like the removal from office—only be waived by the MIC as a plenary in order to ensure the independence of MIC Judges. **150**

4.1.3.9 Parallel Engagements

The currently widely discussed issue[111] of whether parallel engagements for judges should be permissible or impermissible is directly related to the topics of availability, independence and neutrality. As discussed and recommended above, appointed judges should, if possible, exercise their predominant activity preferably in their main position at the MIC. However, parallel engagements should still be considered permissible.[112] The limit of the scope of parallel engagements should be drawn where the other activity could affect the judicial activity. Thus, for example, the Judges of the German Federal Constitutional Court are prohibited to engage in a parallel occupation in principle; the only exception is teaching at universities. ECtHR and ICJ Judges are also limited in the type of occupation they may devote themselves to.[113] In fact, the ICJ Judges have now decided that they will frame rules governing their participation in arbitration proceedings and will 'not normally accept **151**

[110]For instance Article 19 ICJ Statute: "The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities." Article 15 para. 1 IACtHR Statute: "The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents under international law. During the exercise of their functions, they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties."

[111]See, inter alia, Bundesrichter mit lukrativen Nebenjobs setzen sich Grenzen, FAZ of 3.4.2017, p. 17; Die fragwürdigen Gehaltsexzesse der Bundesrichter, Welt.de of 5.1.2017.

[112]Wieduwilt (2017): "Genehmigungspflichtige Nebentätigkeiten sind zu versagen, wenn der Richter mehr als 40 Prozent seines Jahresgehalts nebenbei kassiert." (Authorisation for secondary activities shall be refused if the judge collects more than 40% of his annual salary on the side). See also the instructions of the Federal Finance Court. However, rather, the source of ancillary earnings and the type of activity should be crucial—the amount cannot play a significant role.

[113]Article 16 para. 1 ICJ Statute: "or engage in any other occupation of a professional nature". Article 21 para. 3 ECHR: "During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office [. . .]."

to participate in international arbitration', in particular, investor-state arbitration or commercial arbitration.[114]

152 If the decision was taken in favour of stand-by and part-time employment of judges due to the MIC's light caseload, there would be no need for the prohibition of other professional activities, as long as it would not affect the availability of the judges. Nevertheless, all parallel professional engagements should be subject to approval. For instance, the parallel activity as an arbitrator is neither expressly prohibited under the TTIP proposal nor under CETA, the EU-Vietnam IPA or EU-Singapore IPA. Rather, it could even be regarded as appropriate.

153 For the authorisation of a parallel occupation, temporal limitations should be introduced and the issue of independence should be taken into account. The line between permissible and impermissible engagements would probably be blurred in principle. As an abstract basic rule, parallel engagements could be declared permissible only if they do not jeopardise the "confidence in the independence, impartiality or objectivity" of the judges.[115] As stated in the German Civil Service Law, a distinction could be made between parallel occupations subject to notification and those subject to approval; for the reasons stated above, the latter should be the rule.

154 Teaching at public institutions should, for example, not give rise to any issues. As the MIC's judiciary would comprise of highly qualified and/or specialised persons, there is in principle no reason to disallow them to continue engaging in scientific activities insofar as this is compatible with their work at the MIC and as long as they would not deal with pending cases or cases to be decided by the MIC in the near future. The representation of parties as legal counsel in other investment law procedures should be considered impermissible.[116] Debates in recent years have made this clear; the reason for this is the danger of bias or that a person may wear a 'double hat'.

4.1.3.10 Appointment/Election by the Parties to the Agreement

155 The procedure for electing judges has a direct impact on the quality and acceptance of the entire court,[117] as well as its proper functioning, but also on its

[114] Yusuf (2018), p. 11.

[115] Cf. Article 1 of the "Verordnung über die Nebentätigkeit der Richter im Bundesdienst" (Regulation on the Secondary Employment of Judges in the Federal Service) of 15.10.1965 (BGBl. 1965 I, 1719), last changed by Article 209 para. 3 of the law of 19.4.2006 (BGBl. 2006 I, 866).

[116] Similarly also at the ICJ, cf. Article 17 para. 1 ICJ Statute: "No member of the Court may act as agent, counsel, or advocate in any case."

[117] Cf. Institut de Droit International, Resolution on the Position of the International Judge, 6 RES EN FINAL of 9.9.2011, Art. 1 para. 1: "The quality of international courts and tribunals depends first of all on the intellectual and moral character of their judges. Therefore, the selection of judges must be carried out with the greatest care. Moreover, States shall ensure an adequate geographical representation within international courts and tribunals. They shall also ensure that judges possess the required competence and that the court or tribunal is in a position effectively to deal with issues

effectiveness[118] and possibly even on the enforceability of decisions (see para. 479 et seqq.). Acceptance requires independent and neutral judges, effectiveness necessitates them to be highly qualified. The Plenary Body should therefore carry out the appointment of judges (see para. 84 et seqq.); the direct appointment by the parties to the agreement would only be appropriate if every MIC Member appointed one judge, as is the case with the CJEU and the ECtHR.[119] A direct appointment by the states might trigger doubt regarding the judges' independence, especially if a re-election or extension of the term of office should be possible.[120]

4.1.3.11 Duration of Appointment and Rotating Reappointment

ICJ and ECtHR Judges are appointed for a term of 9 years each.[121] Under WTO Law, members of the Appellate Body (the panels of the first instance are appointed on an *ad hoc* basis, thus they are not suitable for comparison for the MIC) are initially appointed for 4 years and can be reappointed once.[122] This approach has been recently strongly criticized.[123] However, the possibility of being re-appointed after a (too) short term raises a problem of judicial independence, if the re-election depends in particular on the consent of the respective home state,[124] but also if a **156**

of general international law. The ability to exercise high jurisdictional functions shall nonetheless remain the paramount criterion for the selection of judges, as pointed out by the Institute in its 1954 Resolution."

[118]Mackenzie (2014), p. 738; De Baere et al. (2015), p. 51.

[119]Also the provisions in the Algeria Accords on the establishment of the IUSCT, in CETA, in the EU-Vietnam IPA and in the EU-Singapore IPA are not suitable for taking on the arbitrators or judges' appointment, since in these bilateral agreements one of the two contracting parties can appoint one third of the judges and the last third should come from a third state. Cf. Article 8.27 para. 2 CETA: "The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries."

[120]In a similar sense, European Commission (2017), p. 46ff recommends an independent body to be in charge on the appointment of judges at the MIC.

[121]Article 13 para. 1 ICJ Statute with the possibility of re-election; Article 23 para. 1 ECHR without the possibility of re-election.

[122]Article 17.2 DSU: "The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once." Recently, a change was discussed (prolongation without possibility of re-appointment), but blocked by the US, cf. Statement by the United States at the Meeting of the WTO Dispute Settlement Body of 23.5.2016, The Issue of Possible Reappointment of one Appellate Body Member, in particular. p. 7.

[123]United States (2016); Bacchus (2018), p. 10; For further discussion on this issue, see, Payosova et al. (2018), Damme (2017) and WTO (2016).

[124]Possibility of re-appointment for instance also for CJEU Judges (Article 253 TFEU), but also in the current CETA, Vietnam-EU IPA and EU-Singapore IPA ICS, cf. Article 8.27 para. 5 sentence 1 CETA, Article 3.38 para. 5 sentence 1 EU-Vietnam IPA, Article 3.9 para. 5 sentence 2 EU-Singapore IPA.

judge appears to have decided 'against the interests of a state'.[125] An extension of the term of office to 9 or 12 years without the possibility of re-appointment would contribute to the solution of this problem.[126] Various court statutes have recently pursued this logic.[127] In addition, the prolonged term of appointment would further strengthen the consistency of decisions. However, this benefit is to be weighed against the above-mentioned re-election, which may be related to a stronger dependency on nominating states.[128]

157 Nevertheless, if the MIC is initially set up with fewer Members, potential new Member States could be deterred due to the long term of the serving judges' appointment. Therefore, it would be advisable to provide for a shorter term for some of the judges in order to at least be able to promise new acceding states or groups of states that their region and thus their legal culture will be represented adequately in the MIC's judiciary. As soon as the amount of Members exceeds a higher number and states of all regions of the world are represented, a longer term of office could be stipulated for all judges.

158 In the case of a larger number of Members, it should be taken into account that after a certain period of time a certain proportion of the judges will be replaced, each time according to the principle of seniority. If the MIC started to work immediately with a larger number of long-term judges, the first replacements could be drawn by lot.[129] In that regard, it could be stipulated that one-third of the judges must be re-appointed every 3 years for terms of 9 years.

4.1.3.12 Decisions on Instances of Bias by Judges

159 Judges of the second instance should have jurisdiction over possible instances of bias by judges of the first instance. Additionally, and to ensure the independence of the MIC, the plenary of the second instance should decide on the potential bias of judges

[125]The US recently blocked the re-appointment of Seung Wha Chang (Korea) as an AB member, cf. Statement by the United States at the Meeting of the WTO Dispute Settlement Body of 23.5.2016, The Issue of possible Reappointment of one Appellate Body Member.

[126]Hereto inter alia Ulfstein (2009), p. 139. Cf. in the same sense also Institut de Droit International, Resolution on the Position of the International Judge, 6 RES EN FINAL of 9.9.2011, Art. 2.1: "In order to strengthen the independence of judges, it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years. Such terms of office should not be renewable." European Commission (2017), p. 42 follows the same approach of preferring long-term non-renewable appointments.

[127]Article 36 para. 9 lit. a) Rome Statute: "Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election."

[128]It has been held that non-renewable positions increase the perceived impartiality and independence of judges, see in this regard Howard (2018), p. 45ff.

[129]Cf. for instance Article 13 para. 2 ICJ Statute: "The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed."

of the second instance. Alternatively, it would be possible to have a third institution, such as the ICJ, decide on bias within the second instance.[130]

4.1.3.13 Termination of the Appointment

Apart from the regular replacement procedure and the end of a term, the office should end also if a judge resigns, for example, due to health reasons.[131] **160**

4.1.3.14 Removal from Office

Judges should be removed from their office if they no longer fulfil their duties or are 'guilty' of substantial misconduct.[132] There are several alternatives as to who should be in charge of a decision on the removal of individual judges: the Plenary Body, the plenary of the MIC's Judges, a 'disciplinary chamber' at the MIC or even a single judge or a committee of judges of another court. **161**

A removal from office[133] of an MIC Judge by the Plenary Body would constitute an impediment to the independence of judges. This should only be taken into consideration if the basis for a removal was listed and if, in addition, the possibility of an appeal to an independent institution or a third court was provided for. In order to guarantee the independence of the judges, it would therefore be preferable to stipulate a procedure for removal of an MIC judge on request by the President of the MIC, the Plenary Body or by the other judges. The CJEU provides for the possibility of removal from office by the other CJEU Judges through a unanimous decision.[134] A removal by another international court like the ICJ upon the request of one of the aforementioned could also be considered.[135] The removal from office could also result in the loss of pension entitlements. **162**

[130]Cf. also American Bar Association Section on International Law (2016), Executive Summary & Conclusions and Recommendations, p. 14.

[131]Cf. Article 13 para. 4 ICJ Statute; Article 5 para. 4 ITLOS Statute.

[132]Cf. Article 6 CJEU Statute: "A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned [. . .]."

[133]As provided for in the CJEU Statute and the ICJ Statute; cf. Article 6 CJEU Statute; Article 18 para. 1 ICJ Statute.

[134]Cf. Article 6 CJEU Statute.

[135]For other suggestions for cooperation with the ICJ and/or the WTO Appellate Body for the removal of judges see Howse (2017b), p. 229.

4.1.4 President of the Court and Vice President of the Court

163 In principle, the President of the Court and the Vice President of the Court are elected by the members of the respective court.[136] An election for the period of 3 years with the possibility of re-election is provided for in the CJEU.

164 The MIC President should chair all plenary sessions of the MIC, assign individual cases to the chambers, assign judges to chambers, supervise the administration and represent the Court in its external relations. Thus, the Secretariat should be subordinated to the President of the Court. The MIC Judges should elect the President for a term of 3 years. This time period would be sufficient to fulfil these duties, but would not be too long either. The possibility of re-election should exist.

165 There could also be an appointment of several Vice Presidents of the Court. These may each be the presiding judges of the chambers and it could be provided for that they constitute a Grand Chamber; fundamental decisions could be decided by the Grand Chamber. The dual role of the judges as members of the Grand Chamber and as presiding judges of the chambers can contribute to a certain continuity in the jurisprudence of the court.

4.1.5 Plenary Decisions, Chambers and Single Judges

166 International courts often provide for decisions by a bench of a predetermined number of judges[137] and only envisage plenary decisions by all judges in exceptional cases.[138] Commonly chambers consist of three, five or even seven judges. In practice, chambers often consist of five judges (CJEU, Federal Civil Court of Germany, Swiss Federal Court, French Cour de Cassation).

167 The assignment of members to the chambers should reflect the diversity of MIC Members and, if possible, gender balance.[139] The composition of the chambers can be assigned by lot—taking into account regional diversity. The chambers should always be established with an odd number of judges.

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[136] As also provided for in Article 9a CJEU Statute: "The Judges shall elect the President and the Vice-President of the Court of Justice from among their number for a term of three years. They may be re-elected."

[137] Cf. Article 16 CJEU Statute: "The Court of Justice shall form chambers consisting of three and five Judges." Article 25 lit. b) Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14; Article 8.27 para. 6 CETA.

[138] For this see Article 25 para. 1 ICJ Statute: "The full Court shall sit except when it is expressly provided otherwise in the present Statute." It is however provided differently in Article 13 para. 1 of the ITLOS Statute: "All available members of the Tribunal shall sit; a quorum of 11 elected members shall be required to constitute the Tribunal."

[139] Cf. Article 25 para. 2 sentence 2 Rules of Court of the ECtHR: "The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties."

168 The respective presiding judge of the chamber could be determined by the members of the particular chamber[140]; alternatively, the presiding judge of the chamber could be determined by the President of the Court. The respective presiding judge should coordinate the proceedings, chair the hearings and supervise chamber meetings and the drafting of the written decision.[141]

169 The cases should be assigned to the chambers by the President of the Court. The assignment to the chambers should be made on the basis of a scheme predetermined prior to the initiation of proceedings. Such a scheme, namely the prior determination of chamber assignments by means of certain objective criteria, would implement various demands that arise from the general principle of the rule of law.[142] Accordingly, it should be clear in advance and verifiable in retrospect which chamber is assigned to which case.

170 This assignment according to objective criteria could either be attained by lot or the cases could be assigned to the chambers according to predetermined criteria. These criteria could be: the order of receipt of the specific case at the court (each chamber being assigned one after the other on a rotational basis), the various subject areas (if specialised chambers should eventually be formed) or the first letter of the surname of one of the parties. However, it should not be possible for the claimant to influence to be assigned to a specific chamber by selecting a particular name. If specialised chambers are established, it should be decided at the discretion of the President of the Court to assign the cases to them. The creation of specialised chambers would only be required in case of a high annual caseload.

171 In order to provide for a fairly uniform workload of the chambers, in the event of a chamber being overburdened, the President of the Court or a decision by the plenary should result in an allocation of cases which differs from the original allocation scheme.

172 In important proceedings that could create a 'precedent' and upon request of a party to the case, the plenary or the Grand Chamber should decide on the case. In addition, if a chamber considers that a case it is deciding on could be of exceptional importance, the chamber should also be allowed to refer it to the plenary or the Grand Chamber. In that regard, the Grand Chamber should then include the President of the Court and the Vice Presidents of the Court as well as the presiding judges of the other chambers (if they are not simultaneously the Vice Presidents).

173 In principle, the chamber deciding a case should not comprise a judge with the nationality of the claimant investor or the respondent Member State, unless the

[140]Cf. Article 16, CJEU Statute: "The Judges shall elect the Presidents of the chambers from among their number." Working procedures for appellate review, WTO Dispute Settlement procedure, Rule 7.1: "Each division shall have a Presiding Member, who shall be elected by the Members of that division."

[141]Cf. WTO Law, WTO Dispute Settlement procedure, Working procedures for appellate review, Rule 7.2: "The responsibilities of the Presiding Member shall include: (a) coordinating the overall conduct of the appeal proceeding; (b) chairing all oral hearings and meetings related to that appeal; and (c) coordinating the drafting of the appellate report."

[142]On this see also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 238.

claimant and the respondent agree on the inclusion of that particular judge.[143] With a larger amount of chambers this should easily be avoided. The allocation scheme should provide for conflict of interest rules in the event that a judge of the competent chamber has the same nationality as the investor. Corresponding conflict of interest rules should be in place in the event that one of the judges comes from the country, international organization or state institution being sued. As an alternative to the named conflict of interest rules, the subsequently competent chamber should take over the case.

174 It is sometimes argued that judges of an MIC, if in doubt, would decide 'pro-state'[144]; with respect to the current *ad hoc* investment arbitration system it is argued that it is generally investor-friendly.[145] However, both lines of argumentation are not based on any reliable evidence.[146] One way of countering such allegations in the MIC's future could be to allow both the plaintiff investor[147] and the respondent state to appoint further judges *ad hoc*[148] in addition to the permanent judges of an MIC chamber.

175 For cost reasons, it was recently also proposed that, if the claimant is an SME, it should be permitted to request proceedings to be brought before a single judge.[149] However, the costs should not play a role for the disputing parties if the judges receive a set salary from the MIC, paid by the MIC Members. The situation is different if court fees were introduced (see para. 306 et seqq.) and if the amount differed according to whether a single judge, a chamber or a plenary decided the case. Concerning the question of allowing for single judge decisions, it should also be noted that chamber decisions will bear a higher acceptance among claimants and respondents. Only single judge decisions in apparently unequivocal cases—such as in cases of clear inadmissibility (see para. 284 et seqq.)—seem appropriate, since otherwise the likelihood of an appeal of single judge decisions would be high. In any case, an immediate appeal should also exist for decisions taken by single judges.

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[143] In case of the WTO Appellate Body, the members of the Chambers may be nationals of the parties to the proceedings. Cf. Working procedures for appellate review, WTO Dispute Settlement procedure, Rule 6.

[144] EFILA (2016), p. 15. Conversely, it was highlighted at UNCITRAL (2017), para. 36 that if states participate in the election of judges at the MIC it does not necessarily imply a "pro-state" bias, since states are both hosting investments and home states of investors.

[145] Eberhard (2014), p. 9 et seq.; van Harten (2010), pp. 441 and 445; Koeth (2016), p. 12.

[146] Cf. Wuschka (2015); Franck (2009), p. 435 et seqq. Similarly, Alvarado Garzón (2019), p. 484.

[147] Or other possible plaintiffs.

[148] As provided for in Article 31 para. 2 and 3 ICJ Statute; Article 26 para. 4 European Convention on Human Rights: "There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge."

[149] Article 8.23 para. 5 CETA: "The investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low."

4.1.6 Appellate Mechanism

A system based on the WTO Dispute Settlement Mechanism should provide for a court of appeal, similarly as to how CETA, the EU-Vietnam IPA and the EU-Singapore IPA provide for "the establishment of a multilateral investment tribunal and appellate mechanism."[150] Based on the provisions of CETA, the EU-Vietnam IPA and the EU-Singapore IPA, it should be assumed that there will be a separate 'appeal body', unlike the case of the ECtHR, with a distinct set of judges who do not also serve in the first instance (see para. 359 et seqq.). **176**

4.1.7 Secretariat

A large number of international courts and dispute resolution mechanisms also have so-called 'secretariats' in a broad sense: at the WTO it is the WTO Secretariat, at the ICJ the Registry. **177**

Secretariats generally assume the administration of pending cases. They should also be in charge of the linguistic and formal proofreading of decisions, as well as the necessary translation services in this context. In addition, translation services in the form of simultaneous interpretation of statements of party representatives, judges and witnesses during hearings and the monitoring of the necessary technical equipment should be assigned to the Secretariat.[151] Moreover, it could also supervise the enforcement of MIC decisions. **178**

Secretariats can assist the judges, in particular for an expedient progression of procedures and with tasks such as the preparation of memoranda and legal research.[152] Under no circumstances should decisions be drafted by the Secretariat.[153] Judges could also be allocated researchers as direct assistants. For example, all CJEU Judges are supported by three legal research assistants. Depending on the number of pending cases and the total number of judges, an appropriate number of assistants should be provided to ensure the effectiveness of the MIC. It might be **179**

[150] Article 8.29 CETA: "The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements." Similar provisions are set forth in Article 3.41 EU-Vietnam IPA and Article 3.12 EU-Singapore IPA.

[151] The European Commission (2017), p. 49ff equally supports an independent Secretariat at the MIC rather than using the secretariat in an existing organisation.

[152] See also Howse (2017b), p. 227.

[153] According to some authors a large part of the General Agreement on Tariffs and Trade (GATT) and WTO panel reports are derived from work authored by the Secretariat. Cf. Howse (2000), p. 38 et seqq.

appropriate to provide for a lower number of support staff initially and to increase this number in the long term hand in hand with an increase in the number of cases.

180 In addition, some developing country respondents as well as claimant investors could receive administrative support from the Secretariat. However, since the Secretariat should already support the judges, conflicts of interest could arise in the case of simultaneous support to the disputing parties. As a matter of principle, the impartiality of the Secretariat should be ensured and, as a result, support for efficient proceedings should prevail. Therefore, support for disputing parties and developing countries should be provided through an Advisory Center independent from the Secretariat.

181 The Secretariat should be staffed according to the tasks it must perform. For example, the WTO Secretariat employs nearly 70 people for the field of dispute settlement, with the Appellate Body Secretariat employing about 20 additional people.[154]

182 The Secretariat could be run by a Director General, but his or her functions should be clearly distinguished from those of the President of the Court. The Director General should appoint and instruct the Secretariat's staff. The Secretariat should be assigned its own budget to ensure its autonomous functioning.

183 So-called staff regulations could be relevant for the employees of the Secretariat in terms of the service rules. Disputes pertaining to service rules could be decided by a chamber that is, among others, in charge of such matters. In view of the fact that, from an immunity point of view, the employees of the Secretariat would be barred from suing before national courts, such an internal dispute resolution mechanism appears necessary.

184 The Secretariat could be divided into departments: a Legal Support Department to assist judges, a Language Department, a Press and Public Relations Department, a General Administration Department, an Infrastructure and Human Resources Department etc.

185 Secretariat staff, just like the judges, should reflect the nationalities of the MIC Members and their respective legal systems. However, according to a practice recognised in most international organisations, there should be no compulsory, legally binding rule on recruiting in accordance with a regional distribution of posts.[155]

186 Secretariat staff should be subject to a strict obligation of confidentiality and be obliged to adhere to the principle of independence. In this context, employees should be required to take an oath for their employment.

187 Immunities of employees as well as tax exemptions for employees in the state where the seat of the MIC is located must be regulated in an immunity or headquarters agreement (see para. 150).

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[154] Articles 17 para. 7 and 27 DSU. Cf. under https://www.wto.org/english/thewto_e/secre_e/intro_e.htm. Pauwelyn (2015), p. 795 et. seq.

[155] Tietje (2003), p. 54, para. 41; Schermers and Blokker (2011), Art. 500 et seqq., with other sources listed there.

4.1.8 Advisory Centre

An Advisory Center specifically for the support of developing countries and SMEs as well as for providing training and further education could complement the Secretariat.[156] The Advisory Center could be set up as an independent body of the MIC. A strict separation of information and responsibilities should be ensured between the Advisory Center and the other bodies of the MIC. **188**

Developing States in particular could be structurally disadvantaged if sued by multinational enterprises (MNEs) if they lack sufficient trained officials to represent or defend them in proceedings.[157] In addition, the respondent Members could reduce their legal fees through the Advisory Center; United Nations Conference on Trade and Development (UNCTAD) has recently reported that average legal defense costs range between USD 4.4 million and USD 4.5 million.[158] Furthermore, the Advisory Center should provide legal support to the respondents to help to avoid disputes or resolve them during the phase of consultations. **189**

At the same time, it would be advisable to enable SMEs to benefit from the services of the Advisory Center in terms of the principle of 'equality of arms'. If respondents also make use of the services of the Advisory Center, consideration should be given to an internal separation of services in the Advisory Center in order to make this possible without creating issues of bias or confidentiality. **190**

Moreover, the Advisory Center could offer training on international investment law to members of the MIC. **191**

Aspects of the Advisory Center for example its infrastructure, could be basically financed through the MIC's budget. In addition, funding can be secured, for example, by donations of MIC Members—comparable to the WTO Advisory Center. States could, depending on their wealth, pay fees for the use of the Advisory Center. In the case of them prevailing, they would be reimbursed the expenses that they had according to the 'loser pays' principle discussed below. The same would apply of course to investors who want to use the services of the centre. For the sake of efficiency, an Advisory Center could be affiliated with UNCTAD; their current expertise in the area of investment protection could thus be extended.[159] **192**

[156]The European Commission (2017), p. 52 conceives the idea of an Advisory Centre for supporting SMEs at the MIC, although without further details.

[157]The European Commission (2017), p. 53 suggests that the Advisory Centre at the MIC could also assist developing and less-developed countries.

[158]Hodgson (2015), p. 749.

[159]Cf. Advisory Centre of the WTO, www.acwl.ch.

4.2 The Complaints Procedure Before the MIC

193 The procedure before the MIC should in particular comply with rule of law requirements (see para. 46). In the following sections, based on the aim of establishing a two-tiered court, the possible options for the procedure will be discussed.

194 This chapter deals first with issues of jurisdiction, the relationship of the MIC to other dispute resolution forums, general questions about proceedings and finally specific procedural issues, including the applicable procedural law and substantive law. The procedure in the broader sense also includes the (pronouncement of the) decision and its direct consequences.

4.2.1 Jurisdiction of the MIC

195 The jurisdiction of the MIC should be determined within the MIC Statute. In this context, the provisions of the ICJ Statute can serve as a starting point: a multilateral court which decides on cases based on divergent legal instruments as applicable law.

196 Unlike the ICJ, however, the MIC's jurisdiction should be limited to investment law issues in particular. In the area of foreign investment, the jurisdiction of the MIC could later be extended from ISDS to mediation procedures, if appropriate.

197 Disputes should only be covered by the jurisdiction of the MIC if and when the disputing parties have given their consent to a submission to it. Furthermore, it should be decided whether the jurisdiction of the MIC depends on the home states of the claimant and respondent being Members of the MIC. In addition, there should always be substantive, personal and temporal conditions (in particular the categorisation as an investment and whether the investor must have a certain nationality) that must be met to trigger the MIC's jurisdiction. Details will be discussed in the following sections.

198 In addition to the requirements laid down in the respective IIAs for jurisdiction *ratione personae* (personal jurisdiction) and *ratione materiae* (substantive jurisdiction), the MIC Statute could stipulate its own minimum requirements to avoid 'universal jurisdiction' of the MIC, since the role of the MIC is not to solve commercial disputes of all kinds. In that sense, it would in fact be a matter of setting negative jurisdiction requirements.

4.2.1.1 Membership of the Respondent State and of the Home State of the Investor in the MIC

199 The basic requirement for the MIC's jurisdiction should be the membership of the respondent state and the investor's home state to the MIC. A new (specialised) international court in the sense of an international organisation should comprise permanent members to ensure its acceptance, legitimacy, organisation and financing.

For procedures under the ICSID Convention, it is assumed that the home state of the investor or a national institution or body tied to the investor must be a member state to the agreement.[160] In light of the principle of reciprocity and in order to create incentives for joining the MIC and protect nationals investing abroad, the home state of the investor could in principle be required to be a member of the MIC to fall under the MIC's jurisdiction. **200**

However, in certain individual cases—comparable to the Additional Facility of the ICSID—the MIC's jurisdiction over investment disputes could also be established if solely the respondent state is a Member of the MIC. Nevertheless, even in this case an explicit consent to jurisdiction should be required. Jurisdiction could come with mere MIC membership of the respondent, if the MIC Statute explicitly provides for the possibility of unilateral consent to dispute settlement by the investor. The MIC Statute could establish its jurisdiction in the same way as the Mauritius Convention[161] does; for example if only the EU and its Member States as respondent are parties to the MIC, but the claimant's home state is not and if a 'unilateral offer to arbitrate'[162] by the MIC Members was included in the MIC. **201**

However, restraint and caution should be exercised here because if third-state investors were protected, i.e. without an accession of their home states, the incentive for states to join the MIC could decrease (for example, to save costs). Nevertheless, non-acceding states would still run the risk of being sued before an *ad hoc* arbitral tribunal instead of before the MIC, which would deny them the MIC's general, in particular procedural, advantages; if the state lost the case before the *ad hoc* tribunal the state might have to justify why it had not acceded to the MIC. However, in the case of the 'unilateral offer', reservations or restrictions should be imposed from the outset, such as making this 'unilateral offer' subject to certain reservations to be specified by the parties to the agreement.[163] **202**

This MIC jurisdiction by 'unilateral offer' should be added only as an additional option to the dispute resolution mechanism provided for in the underlying IIA, since acceding to the MIC would not be a consensual amendment to the IIA according to Article 30(3) of the VCLT if the home state of the investor has not joined the MIC's **203**

[160] Article 25 para. 1 ICSID Convention: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State. [. . .]" Cf. for example, Griebel (2008), p. 130; Tietje (2009), § 4, para. 56 et seqq.

[161] Cf. Article 2 para. 2 Mauritius Convention: "Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency."

[162] See Kaufmann-Kohler and Potestà (2016), p. 86.

[163] Cf. Article 3 para. 1 lit. c) Mauritius-Convention: "A Party may declare that: [. . .] c) Article 2 (2) shall not apply in investor-State arbitration in which it is a respondent."

Opt-In Convention.[164] This means that the investor would acquire an additional alternative for dispute settlement.

204 However, many MIC Members could consider an MIC open for treaty shopping—*i.e.* to bring the case before the MIC despite the claimant's home country not being a member of the MIC (see para. 585 et seqq.)—to be rather positive as this could avoid *ad hoc* arbitration against them. The investor should then be required to waive all rights to initiate an alternative *ad hoc* arbitration when filing a claim before the MIC. Specific rules on who would have to bear the costs of the procedure should be provided for this case.

205 The jurisdiction of the MIC could also be justified based on an *ad hoc* agreement (compromis) after the dispute between the parties emerged. This could be a subsidiary and optional basis of jurisdiction if one wishes to bring a claim before the MIC in case the previously stated alternatives are not applicable.

206 The possibility of bringing an action before the MIC against a non-member respondent, i.e. jurisdiction through an *ad hoc* agreement, should not be included in the Opt-In Convention and should generally be rejected. It would generally defeat any incentive to join the MIC as a regular member if third-party states could decide on a case-by-case basis in an *ad hoc* manner if they wish to fall under the MIC's jurisdiction. This option would also cause administrative problems—for example in the election of judges (active and passive options/who elects, who may be elected)—as well as financing problems. Furthermore, if the system sets up its own enforcement mechanism, this alternative could lead to significant enforcement problems. In any case, access to the proposed enforcement fund system would have to be denied for awards stemming from non-member proceedings. Furthermore, specific rules on who would have to bear the costs of the proceedings would have to be provided for.

207 For the two alternatives mentioned above—if one decides in favour of these options despite the concerns expressed—the MIC Statute would have to state at the very least that the jurisdiction of the MIC can be established based on an *ad hoc* compromis.

4.2.1.2 (Written) Consent to the Jurisdiction of the MIC

208 However, joining the MIC Statute should not automatically mean that all matters of investment law concerning the respective MIC Member can and must automatically fall within the framework of the MIC rules. In addition to joining the MIC in general, there should be an explicit submission of Members under the jurisdiction of the MIC in relation to specific disputes.[165] This could limit the MIC's jurisdiction to only cover disputes falling within the scope of specific agreements.

[164] Cf. Howse (2017a), p. 54 et seqq.

[165] See also Article 36 para. 1 ICJ Statute: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in

Similar to the ICJ, a special statement of consent to dispute settlement should therefore be added in addition to the requirement of joining the MIC. For the purpose of legal certainty, it should in principle be required that consent shall be given only in writing.[166] This can be done through further agreements, namely: **209**

- multilateral conventions—the MIC Statute,
- bilateral agreements, in particular IIAs,
- if applicable investor-state contracts, or
- an *ad hoc* compromis of the disputing parties.

A written consent to jurisdiction can be given simultaneously with the ratification of the MIC Statute. This Statute could stipulate that the MIC constitutes the dispute settlement body for certain (already existing) IIAs of the MIC Members if these specific IIAs do not (yet) refer to the MIC. The MIC Statute would therefore change bilateral IIAs of MIC Members that are already in force (see Article 41 VCLT). Members of the MIC would thereby recognise the MIC's jurisdiction to settle disputes on the basis of certain existing agreements by consenting to the agreement that establishes the MIC, namely the MIC Statute. The MIC Statute could also state that future international treaties, in particular IIAs of MIC Members, automatically accept the MIC's jurisdiction in investment disputes. In this respect, the MIC's competence would no longer have to be stipulated explicitly in each of these international treaties, i.e. new investment treaties and investment chapters in general FTAs. The MIC Statute should thus include a 'submission clause' for all old and new IIAs of the MIC Members. **210**

When establishing jurisdiction via the MIC Statute, a distinction should be made as to whether only the respondent has to be a member of the MIC, or whether both the respondent and the home state of the claimant must be members of the MIC. **211**

Consent to the MIC's jurisdiction could furthermore be established through new IIAs (see para. 569 et seqq.). In such agreements, the members had already consented to investment arbitration in the past. However, there is no consent to the jurisdiction of the MIC as long as it is not explicitly accepted by (new) IIAs. The MIC's jurisdiction should therefore cover all such disputes under other international agreements, especially IIAs, that confer jurisdiction to the MIC. **212**

Jurisdiction could also be extended to existing investment protection treaties, which refer to the MIC in a supplementary agreement (see para. 573) either exclusively or in addition to other dispute settlement fora. **213**

Furthermore, consent to the MIC's jurisdiction could result from other agreements, such as investor-state contracts in which members of the MIC confer **214**

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treaties and conventions in force." See also the requirements for ICSID under Article 25 para. 1 ICSID Convention; cf. Griebel (2008), p. 124 et seqq.

[166]For example, Article 36 para. 4 ICJ Statute: "Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

jurisdiction for future commercial law disputes with individual investors to the MIC.[167] However, this acceptance of jurisdiction would result in the need for a decision on the applicable substantive law. It is assumed below that investor-state contracts would not automatically constitute applicable law. Rather, this would require corresponding rules in the MIC Statute regarding the MIC's jurisdiction and the applicable law. This would remove the public-law nature of investor-state dispute settlement and the MIC would also have to decide on contractual or private/commercial law issues.

215 Additionally, the domestic law of the host state of the investment could include the option of giving written consent to the MIC's jurisdiction for particular cases, for example if the host state is an MIC Member that has not concluded IIAs, but only investor-state contracts. Consent to jurisdiction in national laws alone appears problematic considering sunset clauses and transparency principles. In the case of an international court, establishing jurisdiction through national law appears to come with considerable legal uncertainty.

216 Once a specific statement of consent to jurisdiction has been issued by a state for dispute settlement before the MIC, it should only be possible to withdraw from it under limited conditions for the sake of legal certainty and the protection of investors' interests—with long periods of notice, comparable to sunset clauses in IIAs.[168] Corresponding periods of notice and survival clauses should therefore be included in the MIC Statute.

4.2.1.3 Jurisdiction *Ratione Personae*

217 The personal jurisdiction of the MIC should be based on characteristics of the investor. Either the MIC Statute could entail a comprehensive definition of "investor" that would have to be met by the potential claimants in order to sue a state before the MIC. Or alternatively, the MIC Statute may stipulate that the applicable IIA should be the basis for the determination of investors with standing before the MIC, i.e. that its definition of investor must be fulfilled, and that the MIC Statute does not contain its own definition of investor. In the MIC Statute, however, 'negative' requirements for jurisdiction could be envisioned in this regard in order to rule out abuse of process.

218 Since it might be difficult to reach an agreement on the definition of investor in multilateral negotiations, especially because this definition would have to be in line with the applicable IIA's definition, it would be advisable to solely refer to the applicable IIA's definition. Additional requirements for classification as an investor could be provided for directly in the MIC through negative jurisdiction requirements.

[167] Cf. Johnson and Volkov (2013), p. 361 et seqq.

[168] See for example Braun (2012), p. 168.

4.2.1.4 Jurisdiction *Ratione Materiae*

International courts commonly require the existence of a dispute.[169] In this context, for the fulfillment of jurisdiction *ratione materiae* of the MIC there must be an investment law dispute. It is therefore necessary that the dispute concerns rights arising from IIAs or in connection with investments, which rules out disputes of a purely political or economic nature.[170] **219**

First, it should be determined whether a foreign investor has made an investment, as stipulated for example in Article 25 ICSID Convention. In that regard, it would be necessary to decide how the provisions of the MIC Statute on substantive jurisdiction could be coordinated with the *ratione materiae* and denial of benefits provisions within the existing IIAs of prospective MIC Member States. Various alternatives exist: **220**

The question of the definition of investment could be left to existing IIAs. In line with that, for example, the arbitration rules of private arbitration institutions such as the Stockholm Chamber of Commerce (SCC) do not state any additional prerequisites. The MIC Statute would have to specify that all disputes under the IIAs in question will be settled by the MIC in the future. This would result in an incorporation of the various rules on material jurisdiction in the IIAs.[171] Furthermore, MIC Members could be given the option of withdrawing their consent to all investor-state arbitration proceedings under their IIAs in the Opt-In Convention, i.e. the MIC Statute (see para. 577 et seqq.). **221**

Alternatively, to avoid 'imperfect rights' (substantive rights which are no longer enforceable), an optional clause could be added to the MIC Statute, according to which MIC Members adapt the investment definition in their BITs and bring them in line with the MIC Statute. However, this would require a definition of investment within the MIC Statute. This investment definition would replace those used in IIAs between MIC Members. In the event that separate specific criteria are stated in the MIC Statute, they could be based on the criteria for an investment as developed under ICSID case law,[172] which is also the model used for CETA.[173] In that case, the following criteria would have to be met: **222**

[169] Article 21 ITLOS Statute: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

[170] Griebel (2008), p. 127; *Consortium Groupement L.E.S.I.-Dipenta v. Algeria*, ICSID Case No. ARB/03/08, Award, 10.1.2005, 2.1, para. 8.

[171] Franke (2013), p. 185.

[172] Cf. Timmer (2012), p. 363 et seqq.

[173] Article 8.1 CETA: "investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

(1) use of a significant amount of capital for a certain period of time;
(2) expectation of profits; and
(3) the taking of a risk.

223 As a third alternative, an investment definition in the MIC Statute could supplement the definition set forth in the IIA, i.e. establish additional requirements. In this case, as is currently practised in ICSID cases, a twofold examination whether the definition of investment is fulfilled would be required: first as to whether the criteria of the respective IIAs are met and second whether the requirements of the MIC Statute are satisfied.

224 Replacing the definition of investment of the existing IIAs with a new definition in the MIC Statute would pose the problem that the presumably large number of states negotiating the MIC Statute would have to agree on a uniform definition of investment; this would prove difficult due to the various approaches to this term.[174] Therefore, a determination of the MIC's subject-matter jurisdiction in light of existing IIAs would be preferable to a modification of the Bilateral Investment Treaties (BITs) via the MIC Statute.

225 In addition, replacing the IIA requirements with an MIC investment definition would result in some investors who would have had standing under the IIAs retrospectively losing their rights. However, a consensual amendment of the IIAs by their member states should in principle be possible, even without transitional provisions.

4.2.1.5 Jurisdiction *Ratione Temporis*

226 Proceedings before the MIC should generally be open to investment disputes arising after the entry into force of the MIC Statute and after the establishment of the MIC, unless the respondent Members also agree to the MIC's jurisdiction for 'old cases' and the MIC Statute states this option expressly. Otherwise, retroactivity and legitimate expectations issues could possibly arise.

227 Furthermore, it would also be necessary to decide whether disputes, which have arisen after the establishment of the MIC but before the accession of the home country of the investor or before the respondent's accession, may be filed. For reasons of legal certainty, this should be regulated in the MIC Statute.

4.2.1.6 Avoidance of Abuse of Process and Negative Admissibility Requirements

228 It is important to vest the MIC with the requisite powers to prevent abuse of process, not only for the protection of states, but also for reasons of cost efficiency and to prevent overburdening of the MIC. In order to rule out an abuse of process,

[174] Cf. Bischoff and Happ (2015), p. 495 et seqq.

(in particular treaty shopping), and to remove existing legal uncertainties, criteria and requirements beyond the definition of 'investors with standing' should be laid down in the MIC Statute. These criteria would in fact supplement or substantiate the IIAs' jurisdiction *ratione personae*. These additional prerequisites to the requirements laid down in the respective IIA would, to that extent, constitute negative admissibility requirements.

If the requirements of an MIC Statute, in the sense of negative admissibility requirements, go significantly beyond those specified in the respective IIA, *i.e.* if they state more stringent requirements than those in the IIA, and if there remained an option to sue before an *ad hoc* tribunal under the IIA, there would be a risk that these requirements could be avoided by investors by filing disputes within the framework of conventional *ad hoc* arbitration. **229**

Dismissal of Inadmissible Claims and Claims Without Merit

Control mechanisms within the framework of ICSID arbitration could serve as role models to evaluate the grounds for dismissal of inadmissible claims. To begin with, one could consider implementing the Secretary-General's 'jurisdictional screening power' as set out in Article 36(3) of the ICSID Convention, which makes it impossible to register disputes that are "manifestly outside the jurisdiction" of the ICSID Convention.[175] Furthermore, the preliminary examination by the arbitral tribunal, which has been enshrined in Article 41(5) ICSID Arbitration Rules[176] since 2006 allows the tribunal to reject claims that are "manifestly without legal merit".[177] In practice, Article 41(5) has so far—probably because of its strict wording—has led to only a few dismissals of cases.[178] **230**

[175] Article 36 para. 3 ICSID Convention: "The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register."

[176] Article 41 para. 5 ICSID Arbitration Rules, 2006: "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit."

[177] Article 41 para. 6 ICSID Arbitration Rules, 2006: "If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect."

[178] *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12.5.2008; *Brandes Investment Partners, LP v. Venezuela*, ICSID Case No ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 2.2.2009 (Appeal under Art. 41(5), but no

231 Therefore, in the event of the ICSID Convention serving as a model, it might be advisable to broaden the restrictive wording of Article 41(5) of the ICSID Arbitration Rules. Nevertheless, whether it would be advisable to no longer require claims to be 'manifestly' without legal merits to dismiss them is questionable,[179] since this would necessitate an immediate examination of the merits of the case in the jurisdictional phase of the proceeding. In the alternative, an elaboration of the *prima facie* examination rules stipulated in CETA and in US BITs seems more suitable.

232 In addition to a provision on claims that are 'manifestly' without legal merit in Article 8.32(1) CETA[180] (based on Article 41(5) of the ICSID Arbitration Rules), CETA also provides for a possibility of a simplified dismissal in Article 8.33 (1) CETA[181] if the claim, while assuming that the alleged facts were true, could not constitute a claim under the IIA. The same option of a simplified dismissal is provided for in Article 28(4) of the 2012 US Model BIT, which allows a petition for a dismissal.[182]

233 Another means of avoiding abuse of process and claims in vain are separate court orders on the costs during the procedure. However, the risk of having to bear the costs for a futile claim at the end of the procedure does not always fulfil the purpose of increasing efficiency and shortening the procedure.[183] By contrast, preliminary or separate court orders regarding costs can continuously influence the process in terms of procedural economy.

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dismissal); *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1.12.2010; *RSM Production Corp. and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10.12.2010. Cf. Diop (2010), p. 312 et seq.; Raviv (2015), p. 673.

[179] Raviv (2015), p. 675.

[180] Article 8.32 para. 1 CETA: "The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit."

[181] Article 8.33 para. 1 CETA: "Without prejudice to a Tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at an appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article 8.23 is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true."

[182] Article 28 para. 4 US Model BIT 2012: "Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34."

[183] Sullivan and Ingle (2015), p. 736.

No Jurisdiction over Political State-Owned Enterprises and Sovereign Wealth Funds

Sovereign Wealth Funds (SWFs) and State-Owned Enterprises (SOEs)[184] usually fall within the scope of IIAs, but generally there are no specific provisions for them in the treaty texts—in areas such as transparency. Hence, SWFs and SOEs can be considered as investors with standing under IIAs. This raises the problem that states, acting via companies attributable to them, may file lawsuits against other states through ISDS mechanisms. **234**

In this regard, it should be explicitly stipulated that SOEs and SWFs are only included as investors under certain conditions, *i.e.* may they only trigger the MIC's jurisdiction *ratione personae* in certain cases.[185] The generally accepted principle that economic activities of state enterprises or SOEs should be protected, as long as the investment itself is not of a political nature, should also be codified in terms of jurisdiction *ratione personae*.[186] **235**

However, it must be determined which rules should prevail if corresponding rules already exist with respect to SWFs and SOEs in the IIAs. It is true that the MIC Statute could be considered as an amendment *inter partes* to existing IIAs if the home state of the claimant and the respondent are Members of the MIC. However, a simultaneous, fundamental amendment of all IIAs is likely to make the negotiations for the MIC even more difficult (see para. 247 et seqq.). Therefore, the respective provisions of the MIC Statute should apply only subsidiarily, *i.e.* they should not contradict existing IIA regulations, but merely supplement or substantiate them. **236**

Avoiding Treaty Shopping

The elimination of possibilities of treaty shopping has been widely discussed. Treaty shopping could occur with regard to the applicable IIAs or the MIC Statute and could thus artificially influence the jurisdiction of the MIC. **237**

Regarding claims of legal persons, the MIC Statute could stipulate that besides the seat or incorporation of a legal person being in the state to which the corporation is attributed, and on whose IIA it is basing its claim on, a substantial economic activity must also be performed within that State (as foreseen in recent IIAs) in order to avoid abuse through treaty shopping.[187] Despite critique that "substantial **238**

[184]Cf. Tietje (2015), p. 1802 et seqq.; Konrad (2015), p. 545 et seqq.

[185]Bungenberg (2014), p. 410 et seqq.

[186]See Bungenberg (2014), p. 410 et seqq.; Tietje (2015), p. 1812 et seqq; Konrad (2015), p. 552 et seqq.

[187]See here Baumgartner (2016), p. 114 et seqq. Cf. Article 8.1 CETA: "For the purposes of this definition, an enterprise of a Party is: (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party." Article 1.2 lit. c) EU-Vietnam IPA: "juridical person of a Party" means a juridical person of the EU Party ora juridical person of Viet Nam, set up in accordance with the domestic laws and regulations of a Member State

economic activity" is an indefinite legal term requiring interpretation,[188] the MIC could establish a consistent precedent to apply homogeneously in this regard.

239 Additionally, it could be stipulated that the investor should have the nationality of the IIA party on whose IIA the claim is based, at the time the dispute arises and also at the time of the filing of the claim.[189]

240 The MIC Statute could also eliminate the possibility of treaty shopping[190] in cases of dual nationality of natural persons by focusing on the more genuine link.[191] It would also be necessary to decide whether jurisdiction should be ruled out in principle if the claimant investor also has the nationality of the respondent host state.[192]

241 As already explained in the previous section, provisions of the MIC Statute should only be applied on a subsidiary basis in the context of treaty shopping, namely if they do not conflict with the provisions of the applicable IIA but merely supplement or substantiate it.

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of the Union, or of Viet Nam, respectively, and engaged in substantive business operations in the territory of the Union or of Viet Nam, respectively".

[188]For this see Statements to be entered in the Council minutes, Commission Declaration on the meaning of the term "substantial business activities" in Art. 8.1 of the Agreement (Definitions of investment), OJ L 11, 14.1.2017, p. 9, No. 31: "The term 'substantial business activities' in CETA is to be understood in the same sense as the term 'substantive business operations' used in Article V (6) and XXVIII(m) of the WTO General Agreement on Trade in Services. The EU has formally submitted a notification to the WTO (1) stating that it interprets this term as equivalent to the term 'effective and continuous link with the economy' utilised in the General Programme for the abolition of restrictions on freedom of establishment adopted by the Council on 15 January 1962 pursuant to Article 54 of the Treaty Establishing the European Economic Community (2). It results that the Commission considers that a Canadian corporation not owned by Canadian nationals could only bring a dispute pursuant to Chapter 8, Section F of the Agreement where it can establish that it has substantive business activities in Canada having an effective and continuous link with the Canadian economy, in the sense of establishment as applied under the EU Treaty. This will be the basis of the Commission's attitude in the implementation of CETA."

[189]See here, Baumgartner (2016), p. 166 et seqq.; cf. also *Philipp Morris v. Australia*, Award on Jurisdiction, 17.12.2015, in particular para. 508.

[190]See also here Baumgartner (2016), p. 114 et seqq.

[191]Article 8.1 CETA: "A natural person who is a citizen of Canada and has the nationality of one of the Member States of the European Union is deemed to be exclusively a natural person of the Party of his or her dominant and effective nationality. A natural person who has the nationality of one of the Member States of the European Union or is a citizen of Canada, and is also a permanent resident of the other Party, is deemed to be exclusively a natural person of the Party of his or her nationality or citizenship, as applicable."

[192]See Article 25 para. 2 lit. a) ICSID Convention according to which the Convention is not applicable for an investor who is a plaintiff in case he also has a nationality of the host state.

Denial of Benefits and Dismissal of Claims in Case of Corruption

A general denial of benefits clause could be another jurisdictional requirement of the MIC,[193] which allows the court to dismiss claims for overriding reasons, such as the abuse of rights or for the enforcement of international sanctions. Most arbitral tribunals treat denial of benefits as a matter of jurisdiction.[194] **242**

In addition to this, an anti-circumvention clause[195] can be added to prevent so-called time-sensitive restructuring, as was the case with the *Philip Morris* dispute.[196] However, such a clause is susceptible to factual limitations—questions as to when the dispute arose and whether the 'principal purpose' of the restructuring was to obtain the standing to sue are subject to case-by-case interpretation.[197] **243**

Finally, an investor should not be allowed to file a claim if the investment is connected to a fraudulent misrepresentation, concealment of facts, corruption or conduct that constitutes an abuse of process. This limitation can be found in more and more IIAs.[198] However, in its scope, this rule is controversial. Nevertheless, a corresponding limitation is already stated in CETA and should also be included in the MIC Statute.[199] **244**

4.2.2 Relationship of the MIC to Other Courts and Arbitral Tribunals

The relationship of the MIC to other courts and arbitral tribunals should be regulated in the MIC Statute. Under WTO Law, the Dispute Settlement Body (DSB) procedure is mandatory and exclusive mode of dispute resolution for all WTO Agreements (Article 2 para. 1 sentence 1 DSU). Such exclusive jurisdiction of the MIC for **245**

[193] Cf. Lange (2016); Hoffmann (2015), p. 598 et seqq.

[194] Baumgartner (2016), p. 116 et seqq.; alternatively *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8.2.2005, para. 158 et seqq.

[195] See here, Article 3.43 EU-Vietnam IPA: "For greater certainty, the Tribunal shall decline jurisdiction where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the Tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim under this Section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the Tribunal."; a similar provision can be found in Article 3.7 para. 5 EU-Singapore IPA.

[196] *Philip Morris Asia Limited v. The Commonwealth of Australia,* UNCITRAL, PLA Case No. 2012-12.

[197] Baumgartner (2016), p. 274 et seqq.

[198] See also Lorz and Busch (2015), p. 577 et seqq.

[199] Article 8.18 para. 3 CETA: "For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process."

investment disputes can only be imposed if the underlying MIC Statute, the IIAs and the investor-state contract or the *ad hoc* agreement provide for it.

246 The IIAs concluded so far generally establish different dispute resolution fora.[200] The extent to which these can be merged by a subsequent agreement between the parties to the agreement—to the detriment of the investors since their choice regarding the dispute settlement forum is limited—has not yet been settled conclusively. It may be for the courts or arbitral tribunals called upon to decide the disputes to determine that they have no jurisdiction if their past jurisdiction has subsequently been changed by a party to the IIA.[201]

247 It should be possible to consider the MIC Statute as an agreement amending the underlying IIAs if all parties to the IIA are Members of the MIC. However, legal uncertainty remains, as ultimately an *ad hoc* arbitral tribunal, to which the parties have recourse based on the dispute settlement mechanism of the respective IIA, will decide whether or not it is still competent, despite the MIC's parallel competence. If the tribunal were to decide against its own competence, the dispute would no longer fall within the jurisdiction of this arbitral tribunal but within the jurisdiction of the MIC. In order to reduce the risk that arbitral tribunals continue declaring themselves competent despite the amendment in the MIC Statute, the Statute may state that arbitration awards made regardless of the MIC's sole competence in the specific case may not be enforced, at least not in MIC Member States. In that regard, the MIC Statute could explicitly refer to Article V(1)(d) NYC[202] and it could also be explicitly stipulated that this provision would constitute a legal basis for the annulment of the arbitral award within the meaning of Article 52 ICSID Convention.[203]

248 If a party to an IIA is not a Member of the MIC, no amendment of the IIA with respect to the IIA's dispute settlement provision may be made and the investor will still be able to make use of the IIA's ISDS mechanism.

249 If only the respondent is a member of the MIC, an IIA which may have been infringed cannot be amended by the MIC Statute. The dispute settlement mechanism provided for in the IIA would remain unchanged. However, the MIC Member may—if stated in the MIC Statute—unilaterally offer investors from the non-MIC states as an opportunity for dispute settlement before the MIC.

250 For example, as long as not all Energy Charter Treaty (ECT) Member States are also members to the MIC Statute, the MIC may just have jurisdiction in addition to the options set out in the ECT. Nevertheless, if the home state of the investor and the

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[200] Generally on the issue of "Concurrent proceedings in international arbitration": UNCITRAL (2016).

[201] The underlying IIA between the parties may be amended in case both/all the parties to the IIA are also parties to the MIC.

[202] Article V para. 1 lit. d) NYC: "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties [. . .]."

[203] Article 52 ICSID Convention: "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers [. . .]."

respondent state are both MIC Members, then the MIC could have exclusive jurisdiction in relation to the dispute between two ECT Member States.

Moreover, provisions could be drafted, such as those in CETA, which would require the MIC to take other courts, which may be involved in the case simultaneously, into account during its own decision-making.[204] **251**

4.2.3 The Relationship with Domestic Courts

The relationship with domestic courts must also be regulated. For example, a so-called fork-in-the-road clause could also be included in the MIC Statute. Such clauses stipulate that an investor can initiate dispute settlement at the international level only if he has not previously pursued domestic legal remedies, to the extent that there would be an obligation to choose between the national and international legal remedy. **252**

Alternatively, a mutual exclusiveness clause could be laid down between the MIC and domestic courts, as currently stated in the TTIP proposal of the EU or in the CETA.[205] A claim at the national level or before the MIC would have to be withdrawn in order to be able to take the other option of national or international dispute settlement. **253**

However, a strict fork-in-the-road clause as well as mutual exclusiveness of claims can cause disadvantages. For example, an early decision by the investor to pursue the claims at the international sphere could deprive him or her of urgently needed legal protection at the national level, since, in general, international legal protection is solely aimed at compensation and damages and does not seek to actively control state behavior. Such a decision would therefore preclude the possibility of seeking legal remedies aside from compensation/damages as relief (see para. 470 et seqq.).[206] If, on the other hand, the domestic jurisdiction turns out to be biased against foreign claimants but the investor has opted for this path, then, according to the regulations currently being implemented by the EU Commission, **254**

[204] Article 8.24 CETA: "Where a claim is brought pursuant to this Section and another international agreement and: (a) there is a potential for overlapping compensation; or (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section, the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award."

[205] Article 8.22 para. 1 CETA: "(f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim."

[206] Cf. Schill (2016a).

the claim at the national level must be withdrawn.[207] However, this will only be possible before a decision has been rendered by the domestic court.

255 As a result, there is a need for a new approach, such as a combination of national and international legal remedies. However, it should also be ensured that overly lengthy procedures and other specific deficiencies of the domestic remedy do not obstruct the effectiveness of the MIC's legal protection. The literature also suggests a preliminary ruling procedure comparable to EU Law.[208]

4.2.4 The Relationship with Inter-State (Arbitration) Dispute Settlement

256 The MIC Statute should also clarify the relationship between ISDS and inter-state dispute settlement. In this regard, various constellations must be differentiated.

257 First, the context and significance of inter-state arbitration between Members of the MIC should be determined, and if that inter-state arbitration is based on IIAs between these two MIC Members. Inter-state arbitration based on existing IIAs could remain possible parallel to an MIC.[209] Awards of inter-state arbitration tribunals based on IIAs between MIC Members may be possible, if provided for in the respective IIAs.[210] These awards have a binding effect on the interpretation of specific provisions of these IIAs.[211] The MIC would probably also have to respect this interpretation. However, it should be possible to eliminate such a binding effect if explicitly stipulated in the MIC Statute. Such a rule would constitute a modification of an earlier bilateral international agreement by a subsequent multilateral agreement between the parties to the earlier bilateral agreement.

258 In case, as seen in most IIAs,[212] such a binding effect is not stated, the MIC Statute could order that such a binding effect must be assumed. Nevertheless, the assumption of a binding effect of state-state decisions based on IIAs suggests that it

[207] Cf. Art. 8.22 para. 1 clause f) and g) CETA.

[208] Schill (2016a).

[209] For example, Chapter 29 of CETA provides for State-State dispute settlement. However, it refers to all disputes regarding interpretation and application of the Treaty and not to investment disputes alone. See also, Article 9 para. 1 and 2 of the German Model BIT 2009: "(1) Disputes between the Contracting States concerning the interpretation or application of this Treaty should as far as possible be settled by the Governments of the two Contracting States. (2) If a dispute cannot thus be settled, it shall upon the request of either Contracting State be submitted to an arbitral tribunal [. . .]."

[210] The interpretation may be binding only on the contracting parties, cf. Article 15 para. 8 sentence 1 Canada-China Foreign Investment Protection Agreement (FIPA): "The decision of the arbitral tribunal shall be final and binding on both Contracting Parties."

[211] Cf. discussion Roberts (2014), p. 55 et seqq.; Potestà (2013), p. 761 et seqq.; Trevino (2014), p. 220 et. seqq.

[212] See also Potestà (2013), p. 762.

would then be possible for individual MIC Members and arbitrators outside the MIC System to influence subsequent decisions of the MIC. In addition, the IIA parties chose to refrain from ordering a binding effect, which would have been possible at any time. However, it should also be borne in mind that the MIC's jurisprudence will regularly refer to bilateral IIAs. The design of such IIAs nevertheless will remain the responsibility of the respective IIA parties. If these IIAs have transferred the power of interpretation to a state-state arbitration tribunal, those interpretations by state-state tribunals should be taken into account.[213] In any case, due to considerations of the rule of law, only those decisions which were taken before an investor-state proceeding concerning the same set of facts has been initiated should be taken into consideration.

259 In order to establish a coherent decision-making process, it would be advisable that the MIC will also decide on state-state proceedings between MIC Members. Therefore, the MIC Statute should rule out separate state-state arbitration possibilities based on existing IIAs between MIC Members.

260 Another question is the relevance of state-state proceedings if they were included in the MIC Statute. There is no reason not to extend the MIC's jurisdiction to state-state disputes. In this case, it would again be necessary to clarify the relationship between state-state decisions and investor-state decisions. In the event that the same IIA is used, there is no reason to oppose a binding effect.

261 With regard to a MIAM, the following should be considered: as long as a binding effect of decisions in state-state proceedings is not expressly provided for in an IIA, such a state-state arbitration decision should not have a binding effect on the MIAM either. However, if a binding effect is stipulated by the IIA, the MIAM should also be able to review in appeal decisions whether the arbitral tribunal of the first instance applied the respective IIA "correctly"—i.e. in accordance with the previous state-state decision.

4.2.5 General Procedure Before the MIC

262 The procedural process before the MIC can be divided into several phases:

- consultations,
- first instance proceedings,
- second instance proceedings, and
- (recognition and) enforcement proceedings.

263 The specific procedural arrangements for dealing with disputes submitted to the MIC may be defined either in the MIC Statute itself or in a separate set of MIC procedural rules. As stated above, rules of procedure would especially aim at further substantiation of general rules, but key points or basic procedural principles should

[213] To that extent, see also Kulick (2016), p. 146 et seqq.

be included in the MIC Statute. Rules of procedure specifying these principles could be drafted by the Secretariat and adopted by the Plenary Body, which would also offer the option of easier modification or amendment (see para. 107).

264 In the following passages there is no direct consideration of the mediation process. However, a large number of IIAs nowadays provide rules to that end,[214] such as the ICSID Convention[215] or FTAs concluded by the EU.[216] Mediation has also been suggested in negotiations with, *inter alia*, Mexico and in the context of TTIP.[217] The mediation process is an alternative to dispute settlement through court rulings as discussed herein. However, the MIC could offer the possibility of setting up a mediation center in the realm of its organisation in order to better implement this procedural aspect.

4.2.5.1 Compulsory Consultations?

265 With the objective of leaving the existing investment protection agreements intact as widely as possible and complementing them "only" with an MIC that replaces the current provisions on investor-state arbitration, procedural steps specific to certain IIAs should continue to apply. Consultation obligations and time limits can be found in almost all IIAs.[218] Before initiating an arbitration procedure, the parties to the

[214] See. Article 9.18 para. 1 Trans-Pacific Partnership (TPP), which is now part of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) by reference in Article 1 (1) CPTPP, or Article 10 para. 1 Germany-Oman BIT: "Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute."

[215] Article 33 ICSID Convention: "Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question."

[216] Cf. Article 8.20 CETA: "1. The disputing parties may at any time agree to have recourse to mediation. 2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c). 3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary General of ICSID appoint the mediator.4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator. 5. If the disputing parties agree to have recourse to mediation, Articles 8.19.6 and 8.19.8 shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party."

[217] Section -Resolution of Investment Disputes- Article 4 EU-Mexico Agreement (under negotiation); Article 3 TTIP.

[218] Markert (2009), p. 158 et seqq.; Schreuer (2004), p. 232 et seqq.; Douglas (2009), para. 322 with further references.

dispute (*i.e.* the investor and the relevant MIC Member) should first seek to reach an amicable settlement within a specific negotiation period.

266 Compulsory consultations beyond the scope of the IIAs do not appear to be necessary, as at that stage parties are usually already past negotiations. In particular, it is unlikely that investors will bring an action against an MIC Member without due cause. Furthermore, it is certainly not necessary to insist on a consultation in cases where it is clear from the outset that no agreement will be reached; for example, if this has already been made clear by statements made by public authorities of the state concerned. On the other hand, refraining from consultations should not undermine certain explicitly determined cooling-off periods.[219]

267 Consultations before the MIC may be initiated either by notification of a special agreement or by filing the statement of the claim. In the broadest sense, TTIP,[220] CETA,[221] the EU-Vietnam IPA[222] and the EU-Singapore IPA[223] provide for time limits for consultations and the submission of claims. These time limits aim at ensuring legal certainty.[224] Hence, maximum consultation periods could be established, followed by the submission of a claim or termination of proceedings. However, if such periods deviated from those of the applicable IIAs, the IIA Member States would in turn have to declare their consent by ratifying the MIC Statute.

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[219] See also Markert (2009), p. 158 et seqq.

[220] Article 4 para. 5 TTIP: "The request for consultations must be submitted: (a) within three years of the date on which the claimant or, as applicable, the locally established company first acquired, or should have first acquired, knowledge of the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby; or (b) within two years of the date on which the claimant or, as applicable, the locally established company ceases to pursue claims or proceedings before a tribunal or court under the domestic law of a Party; and, in any event, no later than 10 years after the date on which the claimant or, as applicable, its locally established company, first acquired, or should have first acquired knowledge, of the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby."

[221] Article 8.19 para. 6 CETA: "A request for consultations must be submitted within: (a) three years after the date on which the investor or, as applicable, the locally established enterprise, first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the investor or, as applicable, the locally established enterprise, has incurred loss or damage thereby; or (b) two years after an investor or, as applicable, the locally established enterprise, ceases to pursue claims or proceedings before a tribunal or court under the law of a Party, or when such proceedings have otherwise ended and, in any event, no later than 10 years after the date on which the investor or, as applicable, the locally established enterprise, first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby."

[222] Article 3.3 EU-Vietnam IPA.

[223] Article 3.26 EU-Singapore IPA.

[224] For example, see Article 8.19 para. 8 CETA: "In the event that the investor has not submitted a claim pursuant to Article 8.23 within 18 months of submitting the request for consultations, the investor is deemed to have withdrawn its request for consultations and, if applicable, its notice requesting a determination of the respondent, and shall not submit a claim under this Section with respect to the same measures. This period may be extended by agreement of the disputing parties."

268 Although CETA requires the initiation of consultations, it does not provide the extent to which serious attempts of amicable settlement actually need to be undertaken by the parties. At any rate, 180 days after a request for consultations, a claim may be submitted. In fact, this requirement resembles a cooling-off period. It may be useful to provide that, upon request, this 180 day period can be waived and thus be shortened if, for example, it cannot be expected that an agreement will be reached and a further waiting period is unreasonable for the investor.

269 Parties should have the obligation to communicate about the conduct of consultations to the Secretariat of the MIC to facilitate due administration of time limits. In addition, a maximum time limit should be stipulated for the conduct of consultations that should be prolongable pursuant to an agreement of the applicant and the defending party.

270 Where IIAs do not stipulate any consultation obligations or any corresponding time limits, the MIC Statute should establish an obligation to consult as well as a time limit if both IIA parties are also MIC Members. If only the respondent is an MIC Member, the MIC should, as stated above, be offered as an additional forum, but with its own consultation obligations and time limits which can be specified in the MIC Statute.

4.2.5.2 First Instance Procedure

The General Procedure

271 The institution of proceedings should in principle be effected by submission of a claim, which is based on the claimant's contention that an MIC Member has violated the rights of the investor either by action or omission. This contention should be contained in a written statement of claim to be submitted in compliance with the set time limits. It could be provided that court fees be due upon submitting the claim (see para. 306 et seqq.). In the initial statement of claim, the claimant should have to demonstrate their right to bring a claim and the subject matter of the claim brought (see para. 277 et seqq.). Immediately after the submission of the claim,[225] the President of the Court should assign the claim to a chamber, which should then decide on the jurisdiction of the MIC as well as the admissibility and the merits of the claim. It should be ensured that the workload of the chambers is equally distributed (for the allocation of cases, see para. 169 et seqq.).[226]

272 Immediately upon submission of a claim, the chamber should review *ex officio* whether the claim is inadmissible, manifestly ill-founded or if there is a manifest lack of jurisdiction. This should also be done in order to save costs for all parties

[225] Cf. Rules of Court of the ECtHR, Article 51 para. 1 and Article 52 para. 1.

[226] See also Article 52 para. 1, Rules of Court of the ECtHR: "Any application made under Article 34 of the Convention shall be assigned to a Section by the President of the Court, who in so doing shall endeavour to ensure a fair distribution of cases between the Sections."

concerned. In addition, it could be stipulated, if necessary, that the determination of the correct respondent shall be made within a certain time limit (see para. 293 et seqq.).[227] Moreover, it should be reviewed whether there are any procedural objections impeding further proceedings. After this preliminary examination, the statement of claim should be delivered to the respondent; a time limit could be set, within which the defendant shall submit a rejoinder.

273 Proceedings could—in a way similar to the ICJ—be separated into two phases; after a first phase in which parties exchange written submissions, a second phase could include an oral hearing, where witnesses, experts, representatives as well as interested third parties are heard. It should be provided that, in certain individual cases and after the consent of all parties to the dispute, the court may make its decision without oral hearing.

274 The respondent should have a certain period of time to submit their rejoinder (cf. the principle of accelerated proceedings, para. 287 et seqq.). The possibilities of surrejoinders should also be taken into account for the specific procedural design of the first phase of the proceedings. Meanwhile, the chamber could at the same time familiarise itself in depth with the claim. It could examine the Court's jurisdiction and the admissibility of the claim; in order to reduce costs, a preliminary ruling on the jurisdiction of the MIC and the admissibility of the claim could be rendered. The competent chamber should, within the limits of its jurisdiction, deal with all the requirements necessary for a decision on the merits. Due to the comparability of the situation—a private claimant being affected by state conduct—certain elements might be designed in the style of both administrative proceedings at the national level and the action for annulment by individuals under Article 263(4) TFEU at the

[227] Cf. Article 8.21 CETA: "1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of this Agreement by the European Union or a Member State of the European Union and the investor intends to submit a claim pursuant to Article 8.23, the investor shall deliver to the European Union a notice requesting a determination of the respondent. 2. The notice under paragraph 1 shall identify the measures in respect of which the investor intends to submit a claim. 3. The European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent. 4. In the event that the investor has not been informed of the determination within 50 days of delivering its notice requesting such determination: (a) if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent; (b) if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent. 5. The investor may submit a claim pursuant to Article 8.23 on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated to the investor, on the basis of the application of paragraph 4. 6. If the European Union or a Member State of the European Union is the respondent, pursuant to paragraph 3 or 4, neither the European Union, nor the Member State of the European Union may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to paragraph 3 or identified on the basis of the application of paragraph 4. 7. The Tribunal shall be bound by the determination made pursuant to paragraph 3 and, if no such determination has been communicated to the investor, the application of paragraph 4."

EU level. Subsequently, the chamber should deal with the substance of the claim and, if necessary, investigate *ex officio* the relevant facts (see the principle of *ex officio* investigation, para. 452 et seqq.). In the course of this, the chamber as such should engage in taking evidence (as to the taking and consideration of evidence, see para. 305).

275 In particular cases, additional interim measures of protection could be imposed to safeguard specific rights; such a possibility is provided for in almost all national legal systems[228] as well as in international court systems[229] and is generally seen as an inherent part of comprehensive and effective legal protection.

276 In the following parts, the question as to which procedural principles should apply before the MIC will be addressed. Nevertheless, this aspect cannot be evaluated conclusively in this legal study. Generally accepted procedural principles of international judiciary do not exist. Arbitral tribunals occasionally resort to procedural rules of the national *lex arbitri* applicable at the seat of the tribunal. However, this cannot be an option for an international court. Instead, statutes and rules of international courts provide for independent procedural requirements—even if sometimes only in a fragmentary way. The application of certain procedural principles can however be justified for the purposes of an MIC, as set out below, such as the principle of fair trial, the principle of independence and impartiality of judges, or generally accepted principles as to the burden of proof etc.

Proceedings Upon Application, Submission of a Claim and the Statement of Claim

277 In principle, the initiation of proceedings should only be possible upon application. The MIC should not be able to initiate proceedings *ex officio*. Otherwise, the MIC would enjoy the capacity to continuously exert a control function *vis-à-vis* its members, which would not be compatible with the aim of the claims, namely to receive compensation.[230]

278 The claimant should be required to clearly identify the alleged violations of substantive standards and establish the reasons for the violation. The statement of claim should therefore identify the specific measures at issue and give a summary of the basic legal arguments brought forward by the claimant in his submission. The statement of claim should at least demonstrate the alleged violation of rights and contain a description of all the relevant facts. The latter should enable the chamber to

[228] In this context, see § 123 VwGO (Code of Administrative Court Procedure, Germany); Article 32 BVerfGG (Act on the Federal Constitutional Court, Germany).

[229] Article 41 ICJ Statute: "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." See also Article 25 Statute of the ITLOS.

[230] See for example, Article 8.39 para. 1 CETA.

infer the claimant's right to bring a claim from the description. In this way, the statement of claim should define the subject matter of the claim brought. In WTO Law, the Panel is bound to adjudicate on grounds stated in the claimant's request.[231] However, in the MIC's procedural rules, later submission of additional reasons should be admissible at least until the oral hearing for reasons of effectiveness and efficiency of the remedy, since new claims would be submitted otherwise. In addition, the general principle of *ex officio* investigation needs to be taken into account (see para. 452 et seqq.), which is opposed to an exceedingly narrow confinement to the initially brought subject matter of the claim.

279 For reasons of transparency (see para. 432 et seqq.) and legal certainty, the claim should be submitted in writing. It should be possible to submit the claim through the Secretariat. Further clarification will be necessary as to whether submissions in electronic form by e-mail could meet the requirements of the written form and, if so, which specific requirements the submission shall meet (such as electronic signature, required file formats etc.).

280 For reasons of transparency, basic information regarding claims submitted before the MIC should be published on a website—in a way similar to the WTO Dispute Settlement Procedure and ICSID Arbitration, where this has been practised since about 2006.[232] In particular, the subject matter of the claim should be provided.

Allocation of a Claim to a Chamber

281 After submission of the claim (see, for example, the time limits for bringing proceedings, para. 287 et seqq.), the President of the Court should assign the claim to a chamber (see para. 169) for a decision, in case chambers have been set up. Otherwise, the President of the Court shall make an allocation to the judges designated in accordance with a predetermined allocation procedure/scheme or by drawing lots (see para. 170).[233]

282 The decision as to which judge or chamber should decide a specific case should not fall within the competence of the Plenary Organ, as this would undermine the right of access to court, which is part of the internationally recognised principle of the rule of law. At the same time, this ensures that the respondent MIC Member cannot prevent or delay the allocation of a case to a certain judge or chamber by exerting its influence in the Plenary Body and cannot in any other way interfere with the constitution of a chamber.

283 Insofar as the court is equipped with the necessary capacity, claims should not be allocated to single judges, since full-time judges should be remunerated from the budget of the MIC. This could be seen differently if varying court fees were charged

[231] Cf. Article 7 DSU; Hilf and Salomon (2010), p. 176, para. 29.

[232] The ICSID Secretariat publishes basic information about a dispute after registration of the dispute.

[233] See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 238.

depending on whether a single judge, a chamber or even a grand chamber deals with a claim.

Examination of Jurisdiction, Inadmissibility or Manifest Ill-Foundedness

284 The MIC should be able to decide on its own jurisdiction.[234] The chamber to which a claim has been allocated should examine as promptly as possible—for this purpose, a time limit may be set—whether:

(1) The MIC has jurisdiction;
(2) the claim submitted is inadmissible; or
(3) the claim submitted is manifestly ill-founded.

285 The judges competent in a specific case should be obliged to review the claim immediately upon receipt of the statement of claim for possible abuse. In the event of inadmissibility or manifest substantive ill-foundedness, the claim should be immediately dismissed (*a limine* dismissal). Inadmissibility should generally be presumed if the application is evidently inadmissible, *i.e.* if the inadmissibility is evident from the documents underlying the proceedings to an unbiased observer who is aware of the relevant circumstances without a detailed evaluation of the essential merits of the case. A manifest ill-foundedness should only be presumed in cases where the claimant's submission does not show any connection with acts committed by the respondent or is limited to frivolous contentions.

286 However, the dismissal of a claim as inadmissible or manifestly ill-founded should, from the point of view of providing an effective remedy, be subject to a possibility of appeal.

Time Limits for the Submission of a Claim

287 Provided that compulsory consultations are required under the applicable IIA, maximum time limits should be set for submitting the claim after the consultations have been terminated. Insofar as regulations in this regard are provided for in the IIA on which the dispute is based, these provisions should be taken into account.

288 Such time limits may also be established in the MIC Statute if both states are party to an IIA and are Members of the MIC. These time limits would amend the respective IIA. If only the respondent state is an MIC Member, the MIC then only constitutes an additional dispute resolution forum, whose use may be made subject to separate conditions.

289 In order to ensure legal certainty, submitting a claim should only be possible within 1 year from termination of a national procedure against state acts violating the

[234] As per the powers provided to the ICSID Tribunal in Article 41 of the ICSID Convention; in International Courts, cf. Article 36 para 6 ICJ Statute.

claimant's rights. If no national proceedings have been carried out, submitting a claim should only be possible within 1 year from the time when a claimant first had knowledge of the state acts violating their rights. Generally, all claims should be barred after 10 years from the time the respective act of the state was carried out, regardless of the claimant's knowledge of the state's acts.

Respondent

Generally, the claim should be directed against a Member of the MIC. Only parties to the MIC Statute would have recognised the MIC's jurisdiction by ratifying the Statute or by having declared submission to the jurisdiction of the MIC. The claim should in principle be directed against the MIC Members as such and not against federal subunits. Here, a comparison to infringement proceedings in the realm of EU Law can be helpful. These claims are also directed against the nation states as such and not against single federal states, regions or municipalities which are more closely related to the individual cases in question. **290**

However, this can be different for international organisations with autonomous legislative powers, *i.e.* in the case of the EU and its Member States. **291**

Generally, investors should not appear as respondents before the MIC (with a possible exception in the context of counterclaims against investors). First, they have not given their consent to a decision by the MIC. Second, there is no such need because host states, by virtue of their territorial sovereignty, can use executive and legislative powers to put pressure on investors or can bring action against them in domestic courts. **292**

Determination of the Appropriate Respondent When International Organisations Enjoying Autonomous Legislative Powers and Their Member States Are Concerned

Specific provisions should be foreseen regarding the determination of the appropriate respondent, in particular in the case of parallel MIC membership of members of an organisation and an international organisation itself. For instance, the EU as well as all its 28 Member States are members of the WTO.[235] Yet there are neither any concrete rules in primary WTO law nor in secondary procedural law addressing the question as to whether dispute settlement proceedings are to be initiated against the EU, its Member States or both. Hence, third countries have a free choice in such cases.[236] **293**

[235]For more details about the parallel membership of the EU and its member states in the WTO, see Tietje (2006), p. 161 et seqq.

[236]Herrmann and Streinz (2014), § 11, para. 154 et seqq.

294 Within the framework of the MIC, there are various alternatives for dealing with such "parallel memberships" in disputes before the MIC:

- first, as in the case of the WTO, the question of the appropriate respondent might not at all be addressed, leaving the applicant with a free choice;
- second, at the primary level, *i.e.* in the MIC Statute itself, a specific provision could be made;
- third, a provision could be included in the procedural rules which substantiate the MIC Statute.

295 A specific provision governing this issue is recommended for ensuring legal clarity. Investors should be able to foresee against whom they are supposed to submit their claims, whether it is an "economic superpower" or a single state. It is unacceptable for a claimant from a third state to be forced to examine and decide whether a national measure has its origin in the law of the supranational organisation or it is autonomous and strictly limited to the realm of national law. At the international level, the "bilateral" CETA[237] provides a specific rule governing this question, as do the EU-Vietnam IPA[238] and the EU-Singapore IPA.[239]

296 However, one could argue against stipulating such a rule at the international level because clauses in multilateral treaties can only be changed with great difficulty or at least after lengthy negotiations, in case they turn out to be impracticable at the end of the day. Providing for such a rule in a quasi-bilateral treaty between the EU (as well as its Member States—which in this respect could be obliged to "speak with one

[237] Article 8.21 CETA: Determination of the respondent for disputes with the European Union or its Member States: "1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of this Agreement by the European Union or a Member State of the European Union and the investor intends to submit a claim pursuant to Article 8.23, the investor shall deliver to the European Union a notice requesting a determination of the respondent. 2. The notice under paragraph 1 shall identify the measures in respect of which the investor intends to submit a claim. 3. The European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent. 4. In the event that the investor has not been informed of the determination within 50 days of delivering its notice requesting such determination: (a) if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent; (b) if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent. 5. The investor may submit a claim pursuant to Article 8.23 on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated to the investor, on the basis of the application of paragraph 4. 6. If the European Union or a Member State of the European Union is the respondent, pursuant to paragraph 3 or 4, neither the European Union, nor the Member State of the European Union may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to paragraph 3 or identified on the basis of the application of paragraph 4. 7. The Tribunal shall be bound by the determination made pursuant to paragraph 3 and, if no such determination has been communicated to the investor, the application of paragraph 4."

[238] Article 3.32 paras. 2, 3, 4 EU-Vietnam IPA.

[239] Article 3.5 paras. 2, 3, 4 EU-Singapore IPA.

voice") and a third state, such as Canada or Vietnam, seems less problematic than providing for such a regulation in a multilateral treaty with considerably more members. In order to address problems resulting from the distribution of competences, the (at the time) EC had issued a supplementary declaration[240] with respect to the determination of the appropriate respondent in the context of dispute settlement under Article 26 of the ECT.[241] Thus, secondary legislation substantiating the MIC's Statute in terms of procedural law (see para. 75) or the submission of a supplementary declaration in this regard, as in the case of the ECT, appears preferable.

Secondary legislation determining the appropriate respondent should specifically **297**
make provision for the question as to whether it is up to the international organisation (as stipulated under the EU-Vietnam IPA, the EU-Singapore IPA and CETA) or up to the affected state (as stipulated under the EU Financial Responsibility Regulation)[242] to identify the appropriate respondent or whether a corresponding

[240]Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69, 9.3.1998, p. 115.

[241]As stated, inter alia, in the Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty: "The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days."

[242]Article 9 Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014, p. 121, Respondent status: "1. The Member State concerned shall act as the respondent except where either of the following situations arise: (a) the Commission, following consultations pursuant to Article 6, has taken a decision pursuant to paragraph 2 or 3 of this Article within 45 days of receiving the notice or notification referred to in Article 8; or (b) the Member State, following consultations pursuant to Article 6, has confirmed to the Commission in writing that it does not intend to act as the respondent within 45 days of receiving the notice or notification referred to in Article 8. If either of the situations referred to in point (a) or (b) arise, the Union shall act as the respondent. 2. The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States, in accordance with the advisory procedure referred to in Article 22(2), that the Union is to act as the respondent where one or more of the following circumstances arise: (a) the Union would bear all or at least part of the potential financial responsibility arising from the dispute in accordance with the criteria laid down in Article 3; or (b) the dispute also concerns treatment afforded by the institutions, bodies, offices or agencies of the Union. 3. The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States in accordance with the examination procedure referred to in Article 22(3), that the Union is to act as the respondent where similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case. 4. In acting pursuant to this Article, the Commission shall ensure that the Union's defence protects the financial interests of the Member State concerned. 5. The Commission and the Member State concerned shall immediately after receiving the notice or notification referred to in Article 8 enter into consultations pursuant to Article 6 on the management of the case pursuant to this Article. The Commission and

declaration should be issued by the EU within a short period of time. Both sets of rules have in common that it is an internal decision-making process. Otherwise, the EU should in principle be the appropriate respondent.

298 Due to its financial strength and technical expertise—as compared to small member states—there is reason to support the idea that in general an international organisation that is an MIC Member, for example the EU, should be considered the appropriate respondent. Moreover, if necessary, an additional short time limit should be provided in which the international organisation and the Member State concerned can jointly formulate a declaration that a Member State is to be considered as respondent. A provision could be included in primary law that supranational organisations may determine such a rule and notify it to the MIC. If the MIC Statute presumes a supranational organisation to be the respondent, unless otherwise notified, it would also be possible to provide for recourse against a Member State in cases where the international or supranational organisation is ordered to pay damages, even though the measure at issue is in fact attributable to one of the Member States of the organisation.[243]

Right to Bring a Claim and Subject Matter of a Claim

299 The claimant investor should have to demonstrate that their rights have been violated by state acts or at least by acts attributable to the state.[244] In this respect, it will be necessary to clarify which rights the investor can invoke before the MIC, in

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the Member State concerned shall ensure that any deadlines set down in the agreement are respected. 6. When the Union acts as the respondent in accordance with paragraphs 2 and 5, the Commission shall consult the Member State concerned on any pleading or observation prior to the finalisation and submission thereof. Representatives of the Member State concerned shall, at the Member State's request and at its expense, form part of the Union's delegation to any hearing and the Commission shall take due account of the Member State's interest. 7. The Commission shall immediately inform the European Parliament and the Council of any dispute in which this Article is applied and the manner in which it has been applied."

[243]In this regard, the Financial Responsibility Regulation provides an opportunity for the EU and Member States to agree on the legal costs as well the liability for damages in cases where the EU acts as a respondent, but the responsibility lies with the Member States. Article 12 Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014, p. 121, Acceptance by the Member State concerned of potential financial responsibility where the Union is the respondent: "Where the Union acts as the respondent in any disputes in which a Member State would be liable to bear all or part of the potential financial responsibility, the Member State concerned may, at any time, accept any potential financial responsibility arising from the arbitration. To this end, the Member State concerned and the Commission may enter into arrangements dealing with, *inter alia*: (a) mechanisms for the periodic payment of costs arising from the arbitration; (b) mechanisms for the payment of any awards made against the Union. This Regulation applies to arbitration cases but not to a future MIC."

[244]Cf. Article 8.18 para. 1 and 2 CETA: "claims to have suffered loss or damage."

particular whether these rights, such as protection standards defined in the IIAs, should exclusively concern rights resulting from IIAs.

The respective IIA and not the MIC Statute should state if, in addition to the protection standards, the violation of market access commitments by the state can be invoked before the MIC. This depends on the scope of protection of the specific IIAs, which in principle should remain in force. **300**

The question as to whether agreements signed but not ratified can give rise to actionable investor rights before the MIC and if the infringement of such rights will then be individually actionable by an investor should be answered by recourse to the IIA underlying the dispute (cf. the issue of provisional application in, for example, Article 45 ECT). **301**

It also needs to be decided whether only possible violations of protection standards stipulated in IIAs, which the home state of the investor has concluded with the respondent MIC Member, can constitute the substance of a claim, or whether the investor should be entitled to rights granted by investor-state contracts as well. Investors should only be able to invoke contractual rights that result from investor-state contracts if this has been explicitly agreed on between the respondent and the investor (see the question of applicable law, para. 366 et seqq.). **302**

The possibility of invoking a breach of national law could lead to great legal uncertainty, in particular with regard to the extent of the claims to be expected. In addition, these are subject matters and infringements that typically have to be brought before national courts. From a EU Law point of view, this would also interfere with the powers of the CJEU and would therefore be difficult to reconcile with EU Law. Therefore, as in CETA, this possibility should be explicitly ruled out.[245] **303**

Right To Be Heard Before the Court

The right to be heard should be guaranteed.[246] The statement of claim should be delivered to parties through the MIC to ensure that due notice of it is taken, as well as the exchange of all other documents. In any case, it should be ensured that parties have the possibility of submitting a rejoinder, a legal opinion etc. The judgment should be based only on facts and evidence the parties are able to comment on. It follows that, for example, the hearing should be reopened *ex officio* if a breach of the **304**

[245] Article 8.31 para. 2 CETA: "The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."; See on this CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 121 et seqq.

[246] Cf. della Cananea (2010), p. 56 et. seqq.

right to be heard is apparent. Although time limits may be short, they should be chosen carefully to prevent any undue limitation to the right to be heard.

Oral Proceedings and "Free" Consideration of Evidence

305 Unless otherwise requested by the parties—due to business secrets of the investor or security interests of the respondent—the MIC should render its decision only after holding an oral hearing. The oral hearing should be public, as provided for in CETA,[247] the EU-Vietnam IPA,[248] the EU-Singapore IPA[249] or the UNCITRAL Transparency Rules.[250] The principle of holding oral hearings corresponds with the demand for more transparency[251] and is reflected in the more recent transparency requirements of international treaties (see para. 432 et seqq.). The details of the course of oral proceedings should be specified in procedural rules. At the same time, the protection of business secrets of the claimant should be ensured.

Court Fees

306 It needs to be determined whether the claimant should pay MIC fees. For example, proceedings before the German Federal Constitutional Court are generally free of court fees.[252] However, an abuse fee may be imposed. Also, for individual complaints before the ECtHR, no procedural fees are charged. The same applies to proceedings before the Courts of the EU.[253] At a national level, however, parties are

[247] Article 8.36 para. 5 CETA: "Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection."

[248] Cf. Article 3.59 para. 9 EU-Vietnam IPA: "At the request of one of the claimants, the consolidating division of the Tribunal may take appropriate measures as it sees fit in order to preserve the confidentiality of protected information of that claimant vis-à-vis other claimants. Such measures may include the submission of redacted versions of documents containing protected information to the other claimants or arrangements to hold parts of the hearing in private."

[249] Article 3.24 para. 12 EU-Singapore IPA.

[250] Article 6 para. 1 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration: "[. . .] hearings for the presentation of evidence or for oral argument ("hearings") shall be public."

[251] Also calling for pertinent transparency rules for an investment court: Katz (2016), p. 188.

[252] The proceedings before the Federal Constitutional Court of Germany are free of charge according to Article 34 para. 1 BVerfGG (Act on the Federal Constitutional Court, Germany). No one should be prevented from invoking their fundamental rights owing to cost reasons. According to Article 34 para. 2 BVerfGG (Act on the Federal Constitutional Court, Germany), misuse of this provision can be punished with a fine of up to EUR 2600.

[253] Article 139 Rules of Procedure of the General Court, OJ L 105, 23.4.2015, p. 1: "Proceedings before the General Court shall be free of charge, except that: (a) where a party has caused the

usually liable to pay the costs of proceedings, as for instance in Germany (with the exception of the Federal Constitutional Court) and Austria.

307 However, the prescription of court fees would prevent a scenario in which the MIC Members would have to bear all the general costs, especially if some states will probably never appear as respondents before the Court due to a high level of compliance with international investment law. Nevertheless, the court also provides legal remedy to all investors who can be attributed to an MIC Member. In addition, for reasons of higher political acceptance, it should be considered that those investors who use the system should participate in its basic costs by paying court fees. If investors succeed in proceedings before the MIC, they should be reimbursed their expenses (see para. 319 et seqq.).

308 For reasons of legal certainty and predictability of the proceedings, costs and fees should be set out in the MIC Statute itself or in the procedural rules substantiating the Statute. However, court fees should not reach a level that would make access to the Court more difficult.[254] For reasons of equity, costs should be reduced on request in particular for SMEs.

309 The court fees for MIC claims should first be due when the court receives the statement of claim. However, the question which party ultimately has to bear the costs should depend mostly on the outcome of the proceedings (see para. 319 et seqq.).

310 If fees were to be charged upon receipt of the claim, the Secretariat could, without consulting the parties, provisionally determine the amount in dispute and, based on this provisional determination, calculate the corresponding fees. The final determination could be made in conjunction with the final decision on the distribution of costs as soon as a decision is rendered on the merits or when the procedure ends for another reason.

311 A framework for the court fees should be established. The amount of fees could be determined according to the economic importance of the case as well as the personnel and material expenditures. A chart of fees could be set up, which could provide that, starting at a certain minimum, the fees could be increased up to a certain maximum. The maximum would have to rank at a level that would ensure that all the costs caused by the procedure before the MIC are covered.

General Court to incur avoidable costs, in particular where the action is manifestly an abuse of process, the General Court may order that party to refund them; (b) where copying or translation work is carried out at the request of a party, the cost shall, in so far as the Registrar considers it excessive, be paid for by that party on the Registry's scale of charges referred to in Article 37; (c) in the event of any repeated failure to comply with the requirements of these Rules or of the practice rules referred to in Article 224, requiring regularisation to be sought, the costs involved in the requisite processing thereof by the General Court shall, at the request of the Registrar, be paid for by the party concerned on the Registry's scale of charges referred to in Article 37." Correspondingly, see Article 143 Rules of Procedure of the Court of Justice, OJ L 265, 29.9.2012, p. 1: "Proceedings before the Court shall be free of charge, except that [. . .]."

[254] See also European Commission (2017), p. 57; European Union (2019), para. 33.

312 The ICSID administrative costs are charged as an annual lump sum. However, in ICSID proceedings, the administrative costs are charged in addition to the arbitrator costs. Since the MIC incurs fees for judges in addition to the administrative costs of the Secretariat, the system of annual lump sums would be of only limited benefit. Some inspiration could be drawn from the SCC Rules where arbitrator costs are calculated based not on daily rates but on the amount in dispute (in the same way as other administrative costs).[255] Based on that amount, the court could then, depending on the actual expenditure, increase or reduce the fees.

313 It would therefore make sense to favour a cost-oriented approach as, for example, in the German court fee system. Fees should not significantly exceed the court's actual expenses. If, for example, in a matter of considerable economic significance, *i.e.* when a particularly large amount in dispute is at stake, a decision may be drafted with comparably little effort, the preliminary determination of the fees by the Secretariat, which is based only on the presumed amount in dispute, should be reduced in the final decision on costs taken by the court.

314 Another decisive factor for a reduction of fees could also be whether the applicant applied for a decision by a single judge.

315 If the MIC is used by claimants from non-MIC Members or if the respondent is a non-Member—assuming this would be permitted under the MIC Statute—then an increased court fee should be provided for, as the funding of the MIC's basic costs would at least not be fully covered by the parties to the proceedings or their home states.

Rules on Cost Allocation Schemes, Legal Funding and Legal Aid

316 Rules on cost allocation are a manifestation of the rule of law principle and are therefore directly linked to the right of access to court. The allocation of the parties' costs incurred in the proceedings as well as in the process of arranging legal funding (or Third-Party Funding) should be laid down in the MIC Statute and further elaborated in the substantiating procedural rules.

317 The cost allocation rules only affect the costs claimed by each party. General costs for financing the MIC cannot be allocated to the parties of the dispute (see para. 604 et seqq.). Insofar as general court costs in the sense of court fees (depending on the amount in dispute) are included in the Statute, these should also be part of the cost allocation and thus the cost decision of the MIC.

318 Due to the general freedom of investment tribunals in deciding on the costs of the procedure, the practice of cost allocation in the past has been inconsistent.

319 Originally, most cost decisions in investment arbitration followed the principle that each party generally had to bear its own costs and the costs of the tribunal were shared[256]; only in some cases, the costs were divided according to the criteria of

[255] Cf. http://www.sccinstitute.com.

[256] Dolzer and Schereuer (2012), p. 299.

good or bad procedural practice by the parties of the dispute. Only recently, there have been numerous cost decisions following the principles of "costs follow the event" or "loser pays", according to which the losing party of the proceedings has to bear all costs.[257] A common practice has emerged according to which procedural "bad faith" of the litigants is sanctioned in the cost decision. In most cases, such procedural actions are either unsubstantiated, malicious, unduly delaying the proceedings or otherwise abusive.[258]

However, too rigid rules with regard to the decision on costs should be avoided. It should rather remain largely at the discretion of the MIC. Nevertheless, the "loser pays" principle should generally be considered relevant[259] in order to reduce abusive submissions. According to this principle, only the necessary or reasonable costs of the other side should be borne by the loser. It would also make sense to establish a catalogue of criteria that sets out exceptions to this principle, addressing for instance the question as to whether SMEs can be ordered to pay the entirety of costs when being subject to cost allocation. **320**

As far as the costs are concerned, it is still to be determined whether legal funding shall be permissible, and if so, to what extent it must be disclosed to the court.[260] Legal funding by third parties could also enable less financially strong investors to enforce their rights by submitting a claim[261] and could support the establishment of a certain "equality of arms" in the proceedings.[262] Additionally, the claim is presumably not 'meaningless' or 'futile' if it is financed by legal funding.[263] As a counterargument, this can however lead to judges being "biased", as they are aware that a positive preliminary examination of the claims has already been carried out.[264] In addition, in the past, the possibility of conflicts of interest regarding arbitrators has been an increasingly discussed topic. Arbitrators may have acted as counsel in other proceedings where they might have been paid by litigation funders.[265] The latter argument, however, does not apply to full-time judges. Since there can be no conflicts of interest regarding judges in this respect, little opposes the permissibility of legal funding. For this very reason, it should also be considered that **321**

[257] Bondar (2016), p. 46.

[258] Dolzer and Schereuer (2012), p. 299.

[259] Forwarding the same idea: Katz (2016), p. 187.

[260] See also Article 8.26 CETA: "1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder. 2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made."

[261] Steinitz (2011), p. 1313; Lamm and Hellbeck (2013), p. 102; UNCITRAL Working Group III (2018b), para. 63.

[262] Cf. von Goeler (2016), p. 87.

[263] Shaw (2017), p. 111 et. seq.

[264] Sharp and Marsh (2017).

[265] Scherer (2013), p. 96.

the parties' corresponding disclosure obligations in the case of the use of legal aid should be waived.

322 With regard to SMEs in particular, who may have difficulties in enforcing their rights due to a lack of financial resources, the idea of setting up a legal aid scheme seems worth considering.[266] The CJEU has in the CETA-Opinion 1/17 dealt with the requirement of accessibility from the point of view of financial risks.[267] International dispute resolution institutions, such as the PCA, the WTO or the ICJ provide for financial support from funds to which both states and natural and legal persons can contribute voluntarily.[268]

323 In the case of the ITLOS, developing countries acting as parties to the dispute before the Tribunal may also apply for financial assistance to cover their legal fees or the travel and accommodation costs of their delegations incurred during oral hearing held in Hamburg. This assistance is available through a voluntary trust fund set up by the UN General Assembly and maintained by the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS).

Non-appearance Before the MIC and Default Judgments

324 If a party does not appear in court, a default judgment should be allowed, as provided for in various procedural rules.[269] This has been widely practiced in arbitration, for example in the Libya cases.[270]

325 In principle, the non-appearance of a party should not result in the termination of the proceedings, but the party appearing—normally the claimant—should be allowed to ask the court to rule in accordance with its claim. In this case, the court should examine whether the claim is admissible, as well as factually and legally well-founded. It should also be taken into account that the principle of *ex officio* investigations should apply.

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[266] Cf. Krajewski (2015), p. 20, Article 23.

[267] CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 208 et seqq.

[268] Permanent Court of Arbitration, Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines (as approved by the Administrative Council on 11 December 1995); Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice, A/59/37221, 21.9.2004; Bekker (1993), pp. 659–668.

[269] Cf. Article 41 Protocol No. 3 CJEU Statute: "Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise." Similar provision in Article 53 ICJ Statute: "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim."

[270] *British Petroleum Co Ltd (Libya) v. Libya* (1982); see also Mangoldt (1983), p. 503 et seqq.

Intervention and Hearings of Interested Third Parties

In other international proceedings, it is sometimes possible that third parties may join a dispute if their legal interests are affected by the proceedings.[271] This possibility was also included in the EU's TTIP[272] proposal for the ICS. The previously, widely recognised principle of an effect of ISDS procedures exclusively *inter partes* is currently undergoing a change. **326**

A provision should also be made in the MIC Statute or in its procedural rules that an MIC Member who demonstrates a legal interest in a pending dispute can be admitted by the MIC as an intervening third party. This would be particularly relevant when it comes to the interpretation of an agreement to which the MIC Member is also a party. If necessary, a third-party intervention could even be permissible in cases where MIC membership is not (yet) available. The provision of the EU proposal for the TTIP Investment Protection Chapter goes even further, as any natural or legal person able to show an interest in the procedure is allowed to intervene.[273] **327**

In the event that a possibility of intervention is provided, it should also be taken into account in connection with the cost allocation rules. An intervening third-party who participates in the proceedings before the MIC should—due to the adversarial character of the procedure—be judged according to the principles governing the proceedings. Generally, interested private third parties wishing to participate in the **328**

[271] Cf. Article 62 para. 1 ICJ Statute: "Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene." Article 10 para. 2 DSU: "Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report." See also Article 36 ECHR and Article 31 ITLOS Statute.

[272] Article 23 TTIP Proposal-Investment Chapter—Intervention by third parties.

[273] Article 23 TTIP Proposal-Investment Chapter: "1. The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties. 2. An application to intervene must be lodged within 90 days of the publication of submission of the claim pursuant to Article 6. The Tribunal shall rule on the application within 90 days, after giving the disputing parties an opportunity to submit their observations. 3. If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the disputing parties, save, where applicable, confidential documents. The intervener may submit a statement in intervention within a time period set by the Tribunal after the communication of the procedural documents. The disputing parties shall have an opportunity to reply to the statement in intervention. The intervener shall be permitted to attend the hearings held under this Chapter and to make an oral statement. 4 In the event of an appeal, a natural or legal person who has intervened before the Tribunal shall be entitled to intervene before the Appeal Tribunal. Paragraph 3 shall apply mutatis mutandis. 5. The right of intervention conferred by this Article is without prejudice to the possibility for the Tribunal to accept amicus curiae briefs from third parties in accordance with Article 18. 6. For greater certainty, the fact that a natural or legal person is a creditor of the claimant shall not be considered as sufficient in itself to establish that it has a direct and present interest in result of the dispute."

procedure should not be reimbursed. This may be different in the case of states intervening as third parties. In such circumstances, it could be provided that in exceptional cases a reimbursement of expenses is left to the discretion of the MIC.

Experts

329 Chambers should be able to consult experts to clarify special questions. Questions in the fields of environmental protection, specific technology, health etc. should be answered in writing or in the course of oral hearings.[274]

Withdrawal of a Claim

330 In addition to the principle of investigation, one will often find the so-called principle of "free disposition" by the parties in international courts. The claimant can therefore withdraw their application/claim in almost all legal proceedings. Given that the initiation of proceedings before the MIC should only be possible upon application (see para. 277 et seqq.), the disputing parties should also be able to dispose of the subject matter of the claim in full. It should therefore also be up to the claimant before the MIC to withdraw their claim, although—if appropriate—the Court should be able to issue a decision on the costs.[275]

Statement of Reasons and Minority Opinions

331 The chamber should in principle decide in the form of a judgment after holding oral hearings. Judgments must be fully reasoned in order to ensure the rule of law and increase confidence in the judgments.[276]

332 It should be determined whether dissenting or separate concurring opinions of certain judges can be attached to the decision (for example, ICJ judgments provide

[274]Cf. Article 24 TTIP Proposal, Investment Chapter: "The Tribunal, at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in a proceeding."

[275]Cf. Article 89 Rules of Court of the ICJ: "1. If in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent."

[276]Cf. della Cananea (2010), p. 56 et. seq.

this possibility).[277] This possibility can serve the judicial independence and transparency of the decision.[278] Therefore, dissenting or separate concurring opinions should also be possible under the procedural rules of the MIC. In particular, dissenting opinions underline that a court has dealt extensively with the case. By virtue of additional reasoning, the quality of the judgments increase. The general confidence in judgments could increase, especially if the disclosure of counterarguments can promote further development of the law. In addition, dissenting or separate concurring opinions can also be seen as evidence of the impartiality and independence of judges. Providing for dissenting or separate concurring opinions would altogether support the possible positive effects of the establishment of an MIC.

Interim Measures and the Protection of the Claimant's Rights

As is usually the case before national and other international courts, as well as before ICSID arbitral tribunals,[279] provision should be made for preliminary protection of the claimant's rights. During ongoing proceedings before the MIC, the parties should comply with any interim measures so that the final decision on the merits is not deprived of its purpose and effect—for example if serious irreparable damage has already occurred and the payment of compensation would not make sense. It is questionable whether interim measures can also lead to a duty of omission of a state. The final decision should always only require states to pay compensation and not to refrain from specific measures.[280] Thus, interim measures of omission cannot aim at

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[277] Article 57 ICJ Statute: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." See also Article 45 para. 2 ECHR.

[278] Lamprecht (1992), p. 376.

[279] Cf. Article 47 ICSID Convention: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

[280] Article 8.34 CETA: "The Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. The Tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 8.23. For the purposes of this Article, an order includes a recommendation."

general political regulations,[281] but they can oblige a state to provisional omission of coercive measures and criminal prosecution.[282]

334 Interim measures should contribute to the taking of evidence for the proceedings.

Counterclaims

335 Counterclaims are currently being discussed extensively in investment protection law. It has to be decided whether the possibility of counterclaims should be provided for at the MIC or whether, on the contrary, that possibility should be explicitly excluded. In practice, the claimant's behaviour is taken into account in the context of counterclaims.[283] However, counterclaims are explicitly excluded under CETA in certain cases.[284] Counterclaims should, if at all, only be allowed to a limited extent. Although they would facilitate a comprehensive consideration of the facts, they would require full consideration of questions of national law, because counterclaims could often be reviewed under national private or administrative law, which should

[281] Cf. *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, 8.5.2009, para. 50: "It is pertinent to recall that in any ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish. Interim measures may thus restrain a State from enforcing a law pending final resolution of the dispute on the merits [. . .]. While the enactment of a law by a sovereign State, upheld as constitutional in that State, is a matter of importance, it cannot be conclusive or preclude the Tribunal from exercise of its power to grant provisional measures. [. . .] At this provisional stage, the Tribunal cannot approach the issue on the assumption that either party's contention is correct. Its role, analogous to that of the City Oriente Tribunal, is to dispose of disputes arising between the parties in connection with the Participation Contracts."

[282] Cf. *Quiborax S.A., Non-Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, 26.2.2010, para. 1 et. seq.: "1. The present decision deals with a Request for Provisional Measures [. . .] by which Claimants request that the Arbitral Tribunal: (1) Order Bolivia and/or Bolivia's agencies or entities to refrain from engaging in any conduct that aggravates the dispute between the parties and/or alters the status quo, including any conduct, resolution or decision related to criminal proceedings in Bolivia against persons directly or indirectly related to the present arbitration; (2) Order Bolivia and/or Bolivia's agencies or entities to discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which jeopardize the procedural integrity of these proceedings; (3) Order Bolivia and/or Bolivia's agencies or entities to discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which threaten the exclusivity of the ICSID arbitration. 2. In their Reply on Provisional Measures ('Claimants' Reply'), Claimants supplemented this request with a fourth request for relief: (4) Order Bolivia and/or Bolivia's agencies or entities to deliver to Claimants the corporate administration of NMM sequestered in the course of the criminal proceedings."

[283] Hoffmann (2013), p. 438 et seqq.; Bjorklund (2013), p. 461 et seqq.

[284] Article 8.40 CETA: "A respondent shall not assert, and the Tribunal shall not accept a defence, counterclaim, right of setoff, or similar assertion, that an investor or, as applicable, a locally established enterprise, has received or will receive indemnification or other compensation pursuant to an insurance or guarantee contract in respect of all or part of the compensation sought in a dispute initiated pursuant to this Section."

not form part of the law to be applied by the MIC. In individual cases, an MIC Member submitting a counterclaim could expressly allow the MIC to treat national issues as well. It would also be possible to add a final, enforceable and undisputed counterclaim to the calculation when it comes to assessing the amount of compensation so that the court only decides on the difference. However, this possibility would have to be examined in more detail, since it must be made sure that abusive judgments are not used to eliminate legitimate claims at MIC level.

Mass Action

336 Another highly discussed topic is the admissibility of mass and class actions, which according to recent practice is partly affirmed, when it is not excluded in IIAs.[285] However, it is argued that the reform of investment arbitration must be designed in such a way that German and continental European legal traditions are taken into account and that class actions should therefore be explicitly ruled out.[286] However, this thinking ignores the fact that mass or class actions could also serve to protect shareholders and smaller companies, who otherwise may not be able to go through independent investment protection proceedings. Therefore, consideration should be given to the possibility of providing for collective proceedings in the MIC Statute at least in clearly defined cases, such as for individual claimants, shareholders and SMEs.

Finality and Legal Effects of Judgments

337 The MIC judgments should—for giving effect to the principle of celerity (see para. 343 et seqq.)—become final if they are not appealed within a short period of time.

[285] Cf. *Abaclat and others v. Argentina*, Decision on Jurisdiction and Admissibility, 4.8.2011, ICSID Case No. ARB/07/5, para. 551(iii): "The procedure necessary to deal with the collective aspect of the present proceedings concern the method of the Tribunal's examination, as well as the manner of representation of Claimants. However, it does not affect the object of such examination. Thus, the Tribunal remains obliged to examine all relevant aspects of the claims relating to Claimants' rights under the BIT as well as to Respondent's obligations thereunder subject to the Parties' submissions." *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (formerly *Giordano Alpi and others v. Argentine Republic*), ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8.2.2013. See also Beess and Chrostin (2012), p. 514 et seqq.; van Houte and McAsey (2012), p. 235 et seqq.; Aggarwal and Maynard (2014), p. 825 et seqq.

[286] Cf. Hindelang (2015), p. 20: "Solche Klagen werfen zahlreiche Probleme auf, die sich bei Investor-Staat-Schiedsverfahren schwer lösen lassen. Auch tragen sie zum Schutz des einzelnen Investors wenig bei. Insbesondere ist die Gefahr des Missbrauchs und des Entstehens einer Klageindustrie nicht ganz von der Hand zu weisen. Besonders gefährlich sind Sammelklagen, wenn sie – vergleichbar den class actions in den USA – mit einem sog. Opt-out-Verfahren ausgestaltet werden. Dieses problematische Rechtsinstitut darf daher keinesfalls in Deutschland und Europa übernommen werden und entsprechend auch nicht Eingang in von der EU abgeschlossenen Investitionsschutzabkommen finden."

338 Decisions of international courts in general have effect only between the parties involved in the proceedings (*inter partes*).[287] Since the MIC should only be able to award individual compensation,[288] the principle of *inter partes* effect should also be expressly provided in the MIC Statute.

Legal Representation Before the Court

339 It is questionable whether a strict statutory requirement of representation by counsel should be provided. MIC Members should rather have the possibility of being represented by government representatives, civil servants or lawyers. Due to the possibly very high costs incurred throughout the proceedings (both because of the risk of a claim of being qualified as abusive and a possible "loser pays" principle) claimants will in general prefer to rely on qualified representation during proceedings. Hence, corresponding regulations do not appear to be necessary.

4.2.5.3 Second Instance Procedure/Appeal

340 So far, appeals mechanisms against decisions of international courts are rare. For instance, appeals are possible against decisions of the General Court of the European Union (GC) before the CJEU.[289]

341 Under investment law, an appeal option has been considered in various treaties since 2002, notably in agreements with the US,[290] and subsequently in agreements

[287] Article 59 ICJ Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Article 296 para. 2 UNCLOS: "Any such decision shall have no binding force except between the parties and in respect of that particular dispute."

[288] in this sense too: Katz (2016), p. 185.

[289] Article 256 para. 1 and 2 TFEU: "Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute."

[290] Bipartisan Trade Promotion Authority Act, Trade Act of 2002, Public Law No. 107-210 dated 6.8.2002, 116 Stat. 933, 19 USC 3801, Section 2102(3) G.iv): negotiating objective of "providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements." See also US-Chile FTA 2003, Article 10.19 para. 10: "If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.25 in arbitrations commenced after the appellate body's establishment."

with Canada,[291] Australia,[292] South Korea and China,[293] as well as in the CPTPP.[294] Thus, a larger number of states have already indicated that they consider the introduction of an appeal mechanism to be favourable or at least conceivable. Also, within the framework of ICSID, such an amendment has already been discussed extensively,[295] however without any precise results.[296] There have also been discussions within the framework of the OECD Investment Committee regarding this issue.[297] Most recently, the option of a second instance had been introduced into treaty practice by the EU with CETA,[298] the EU-Vietnam IPA[299] and the EU-Singapore IPA.[300] Due to a proposal by the Commission as to the TTIP Investment Protection Chapter[301] as well as the Investment Protection Chapter in

[291] Canada-Korea FTA 2014, Annex 8-E: "Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered pursuant to Article 8.42 in arbitrations commenced after they establish the appellate body or similar mechanism."

[292] China-Australia FTA 2014, Article 9.23: "Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law."; Korea-Australian FTA 2014, Annex 11-E: "Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 11.26 in arbitrations commenced after they establish the appellate body or similar mechanism."

[293] China-Japan-Korea Agreement for the Promotion, Facilitation and Protection of Investment (Trilateral Investment Agreement) (2012).

[294] Article 9.23 para. 11 TPP, which is now part of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) by reference in Article 1(1) CPTPP,: "In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings)."

[295] ICSID Secretariat (2004), p. 14 et seqq.

[296] ICSID Secretariat (2005), p. 4: "it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised."

[297] Yannaca-Small (2008), p. 223 et seq.

[298] Article 8.28 para. 1 CETA: "An Appellate Tribunal is hereby established to review awards rendered under this Section."

[299] Article 3.39 EU-Vietnam IPA: "A permanent Appeal Tribunal is hereby established to hear appeals from awards issued by the Tribunal."

[300] Article 3.10 para. 1 EU-Singapore IPA: "A permanent Appeal Tribunal is hereby established to hear appeals from provisional awards issued by the Tribunal."

[301] Article 10 para. 1 Section 3 Investment-Chapter TTIP- Draft: "A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal."

the EU-Mexico Agreement (under negotiation),[302] the issue of a second instance is now being discussed in connection with further agreements.[303] The Commission's Impact Assessment regarding a multilateral reform of investment dispute resolution also mentions that there should be a possibility of appeal in the context of a multilateral investment court.[304]

342 The following parts demonstrate how a second instance could be designed as part of a possible MIC. It seems reasonable to gear the design of the MIC particularly towards that of the CETA Investment Protection Chapter.

The General Procedure of Appeals

343 The second instance procedure begins at the time of the filing of the appeal by the parties involved in the first instance procedure, i.e. the claimant investor or the respondent state. The possibility of lodging an appeal would therefore be open only to the parties of the first instance.

344 If an appeal is filed against a judgment, the legal effect of the latter should be suspended. Securities could be required from the appellant.[305] In the event that a fund system was provided for (see para. 538 et seqq.), it would not be necessary to furnish security to the extent that it could be covered by the fund. If the claimant investor files an appeal, it should provide a security up to the amount of costs allocated to it in the first instance judgment.

345 It needs to be clarified whether intervening third parties should also be entitled to lodge an appeal. The DSU expressly excludes this possibility for the WTO Dispute Settlement Procedure.[306] However, similar to the WTO Appellate Body procedures, at least the right to make a statement should be granted to intervening third parties.[307]

346 As is the case with CETA, the competence to review a decision in a second instance should, in principle, only exist in respect of first instance judgments, which should already have been ruled on. An exception to this rule could only consist in

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[302] Section -Resolution of Investment Disputes- Article 12 EU-Mexico Agreement (under negotiation): "A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal."

[303] The possible establishment of an appellate body as a second instance for an MIC is also mentioned in: UNCITRAL Working Group III (2018b), para. 42.

[304] European Commission (2017), p. 48; the demand for a two-tiered structure is also mentioned in: European Union (2019), para. 13 et seq.

[305] Article 29 para. 4 Section 3 Investment-Chapter TTIP-Draft: "A disputing party lodging an appeal shall provide security for the costs of appeal and for the amount provided for in the provisional award."

[306] Cf. Article 17 para. 4 sentence 1 DSU: "Only parties to the dispute, not third parties, may appeal a panel report."

[307] Article 17 para. 4 sentence 2 DSU: "Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." See also Working procedures for appellate review, WTO, Rule 24.

cases where the impartiality of individual first instance judges is questioned (see para. 159).

Furthermore, appeals against first instance decisions should only be possible within narrow time limits. If appeals are not filed within this period, the judgments of first instance become final. For example, the TTIP stipulates a time limit of 90 days.[308] The WTO DSU sets a time limit of 60 days for lodging appeals.[309] A shorter time limit of only 1 month (30 days) would be another viable option. Should the claimant decide to appeal, it should be afforded an additional period of 1 month within which it should submit the grounds for their appeal.[310] Of course, this could lead to the lodging of appeals as a mere precautionary measure. Such appeals might later be withdrawn when the reasons of the appeal are drafted and a detailed analysis of the first instance judgment takes place. Therefore, a court fee—as long as fees are generally provided for—should be stipulated for the mere filing of the appeal. A time limit of 60–90 days seems reasonable for filing an appeal. **347**

The grounds of the appeal should indicate both the scope of the appeal and the arguments why the appellant claims an infringement of rights and on which grounds they base their legal opinion. **348**

In the second instance, too, decisions should be rendered by judgment. **349**

The appellate instance should be able to confirm, amend or annul the judgments of the first instance.[311] In addition, the second instance could be equipped with the power of "referring issues back to the Tribunal for adjustment of the award,"[312] while the first instance Court would have the obligation to reach a new decision in consideration of the legal opinion of the appellate instance. The introduction of this possibility of referring cases in CETA was presumably motivated by the fact that it allowed decisions to qualify as awards under the ICSID Convention so that it can be enforced pursuant to the ICSID Convention. However, the power to refer cases to lower courts could raise concerns because of the possible consequence of delays to proceedings. As in the WTO DSU procedure, the appellate instance should therefore make the final decision and not refer the case to the court of first instance.[313] **350**

[308] Article 29 para. 1 sentence 1 Section 3 Investment-Chapter, TTIP Draft: "Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance."

[309] Article 16 para. 4 sentence 1 WTO- DSU: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report."

[310] Similar to WTO-DSU. Cf. Working procedures for appellate review, WTO, Rule 20.

[311] Article 8.28 para. 2 CETA "The Appellate Tribunal may uphold, modify or reverse the Tribunal's award [. . .]."

[312] Cf. Article 8.28 para. 7 lit. b), para. 9 lit. c) subclause iii CETA.

[313] Baetens (2016), p. 381. Criticism was however expressed about a possibility of unplanned return of cases in the WTO system. Cf. Pauwelyn (2007).

351 In addition, referring cases back to the first instance would not be necessary if the second instance had its own extensive investigatory powers.[314]

352 The procedural principles of the first instance—the principle of investigation (see above at para. 274), celerity (see above at para. 337) and oral hearing (see above at para. 305), as well as the principle of transparency (see above at para. 279, 280, 305, 332)—should apply analogously to the second instance. The second instance procedure could be similar to the first instance procedure and should be divided into a written and an oral procedure. Facts and evidence already submitted in the first instance should generally be taken into account. Insofar as decisive declarations and evidence have not been put forward in the first instance in spite of demand and time limits, these should generally be precluded during the appeal procedure or be admitted only under strict conditions.

353 It should be possible, as is the case of the claim in the first instance, to withdraw the appeal at any time. However, a decision on costs should be possible in this case, if necessary, at the request of the respondent of the appeal. The withdrawal of the appeal should give legal force to the judgment of the first instance and, at the same time, result in the loss of the possibility of a new appeal.

Duration of Proceedings

354 For example, in the EU-Vietnam IPA[315] or in the WTO DSU,[316] maximum duration of proceedings is stated for the second instance according to the first instance rules. Depending on whether at the level of the second instance only a review of the legal assessment or also an assessment of the facts should be carried out, the appropriate length of proceedings needs to be measured. The TTIP proposal, as well as the EU-Vietnam IPA establish a length of proceedings of up to 180 days, but in no case

[314] For more information on powers of the second instance, see American Bar Association Section on International Law (2016), Executive Summary & Conclusions and Recommendations, p. 80.

[315] Article 3.54 para. 5 EU-Vietnam IPA: "As a general rule, the appeal proceedings shall not exceed 180 days calculated from the date on which a party to the dispute formally notifies its decision to appeal to the date on which the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. Unless exceptional circumstances so require, the proceedings shall in no case exceed 270 days."; a similar provision can be found in Article 3.19 para. 4 EU-Singapore IPA.

[316] Article 17 para. 5 DSU: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

proceedings before the appellate instance should take more than 270 days.[317] The WTO Dispute Settlement Procedure generally states a time limit of 60 days for the review of appeals, which in no case should take more than 90 days.[318] As in the first instance procedure, the principle of celerity of proceedings should apply; the consequences arising out of this principle should apply as well. Full-time judges should be able to render a decision within a maximum of 2 months in cases where the facts are mostly clear. In individual cases, however, the respective chamber must be free to extend the duration of the proceedings for an important reason.

If there are repeated procedural extensions due to an overload of the appeal mechanism, this is an indication for the Plenary Body to increase the number of judges in the second instance. **355**

Scope of Review and Investigative Competence

In the WTO Dispute Settlement Procedure, the competence of the Appellate Body is limited to the legal issues dealt with in the panel report and the corresponding interpretation of the law by the Panel.[319] Primarily, the purpose of the appeal procedure is objective legal control. However, particularly serious errors can lead to reversal of a panel report.[320] The ICSID proposals of 2004 provide that an appeal could be brought against decisions based on the grounds listed in Article 52 ICSID Convention, but also because of a "clear error of law" or a "serious error of fact".[321] Similarly, in CETA, in addition to the grounds set out in Article 52 of the ICSID Convention,[322] an appeal is also possible due to "errors in the application or **356**

[317] Article 29 para. 3 TTIP: "As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed 270 days."

[318] Article 17 para. 5 DSU: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

[319] Article 17 para. 6 DSU: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

[320] Ohlhoff (2003), C.I.2, para. 106.

[321] ICSID Secretariat (2004), Annex, p. 4.

[322] Article 52 ICSID Convention: "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been

interpretation of the applicable law", due to "manifest errors in the appreciation of the facts, including the appreciation of the relevant domestic law."[323] It is criticised that two different concepts—annulment and appeal—would be mixed together.[324] However, it is not clear why an appellate instance should not have the jurisdiction to deal with annulment as well as with appeal. In particular, if there is no provision for the remanding of a case back to the first instance, the review and corresponding decision-making jurisdiction of the second instance should be widely used.

357 The applicable law in litigation at first instance must also include procedural law, *i.e.* there must be a possibility of reviewing compliance with the procedural principles. This is already required under rule of law principles.[325] The question as to whether the investigation of the facts/fact-finding was carried out correctly by the first instance can also be regarded as a legal question, namely whether an "objective assessment of the facts" has been carried out.[326] In addition, according to the drafts previously available, a review of "serious errors of fact" should also be expressly made.[327]

358 Generally, it would be necessary to clarify whether a reference to Article 52 ICSID Convention should be made—and thus the interpretation of this provision by ICSID Arbitral Tribunals should be given greater consideration—or whether the grounds for annulment listed in Article 52 ICSID Convention should be included in the MIC Statute, thus allowing for a full independent interpretation by the MIC. In view of the creation of an independent new institution and the avoidance of conflicts of interpretation or problems of delimitation with other institutions, we believe that the latter should be preferred as far as is practicable (see para. 556 et seqq.).

Chamber or Plenary Decisions In This Sense, Alvarado Garzón (2019), p. 491.

359 The ICSID proposal for the establishment of an appellate instance provided for an Appeals Panel of 15 judges of different nationalities.[328] The WTO Appellate Body,

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a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[323]Article 8.28 para. 2 CETA: "[. . .] (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)."

[324]EFILA (2016), p. 29 et seq.; American Bar Association Section on International Law (2016), p. 78.

[325]Cf. Schill (2016b), p. 118.

[326]Cf. Ohlhoff (2003), C.I.2, para. 106.

[327]Making a similar proposal: European Commission (2017), p. 63.

[328]ICSID Secretariat (2004), Annex, p. 3: "Such a set of ICSID Appeals Facility Rules could provide for the establishment of an Appeals Panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre. The terms of the Panel members would be staggered. Eight of the first 15 would serve for three years; all

however, has only seven members three of whom shall serve on any one case.[329] This relatively low number of Appellate Body members has so far had no negative impact on the acceptance of the WTO DSU System. Based on this, it is also determined in CETA that decisions should be made in the second instance in panels of three appellate body members.[330]

360 At the level of the second instance of the MIC, it should be possible to have a decision by chambers or by the plenary of judges. Plenary decisions would have even greater significance and would prevent substantively divergent decisions between different chambers. However, if it is assumed that an MIC is successfully established and accepted, a high utilisation of the MIC with its appellate instance could argue against the possibility of a plenary decision. It should therefore be applied very restrictively. Chambers should thus decide unless a plenary decision is requested by one of the parties in dispute "for important reasons", such as divergences in the decisions.

361 When the MIC is established, there should be enough judges to allow for decisions in larger adjudicating bodies, which might lead to higher acceptance of judgments. If chambers are introduced, a requirement to exchange arguments between all judges of the appellate instance might also be stipulated, as is the case with the WTO Appellate Body.[331]

Second Instance Judgments As Precedent?

362 As is usually the case with international courts, a formal precedent of judgments in the sense of a case law system should not be provided for. From the principles of predictability and legal certainty, a *de facto* precedent should only be adopted for the interpretation of specific provisions of the agreement on which a specific decision has been taken. Irrespective of this, however, through a permanent staffing of the chambers and, if necessary, an obligation to consult fundamental questions between all judges of the second instance, constant lines of authority would still develop.

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others would be elected for six year terms. Each member would be from a different country. They would all have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties."

[329] Article 17 para. 1 sentence 3 DSU: "It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation."

[330] Article 8.28 para. 5 CETA: "The division of the Appellate Tribunal constituted to hear the appeal shall consist of three randomly appointed Members of the Appellate Tribunal."

[331] Working procedures for appellate review, WTO, Rule 4.3: "In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members. [. . .]."

4.2.6 Consolidation of Pending Procedures at the MIC

363 Consolidation of pending procedures with the MIC would promote some of the objectives outlined so far, namely efficiency in proceedings, coherence and cost reduction.[332]

364 In an international context, both courts and arbitral tribunals use the possibility of consolidation of pending procedures. Thus, Article 47 of the ICJ Rules of Procedure provides for the power of the ICJ to combine proceedings in two or more cases.[333] Similarly, Article 47 of the Rules of the International Tribunal for the Law of Sea regulates the competence for combining procedures.[334]

365 In addition, various investment protection agreements provide for the possibility of combining pending procedures.[335] The MIC provisions should also follow these examples and provide for the possibility to consolidate proceedings.

References

Abi-Saab G (1997) Ensuring the best bench: ways of selecting judges. In: Peck C, Lee RS (eds) Increasing the effectiveness of the International Court of Justice. M. Nijhoff, Boston, pp 165–206

Aggarwal M, Maynard S (2014) Investment treaty arbitration post-Abaclat: towards a taxonomy of mass claims. Camb J Int Comp Law 3:825–852

Ahl B (2009) Die Anwendung völkerrechtlicher Verträge in China. Springer, Heidelberg

Akande D (2014) ICJ Elections 2014: UN General Assembly and Security Council Elect four Judges to the ICJ But Fail to Agree on a Fifth, Again!. EJIL: Talk! of 10.11.2014

Alvarado Garzón AE (2019) Designing a multilateral investment court: blueprints for a new route in investor-state dispute settlement. ZEuS 22:475–500

American Bar Association Section on International Law (2016) Investment Treaty Working Group: task force report on the Investment Court System proposal, initial task force discussion paper of 14.10.2016

Bacchus J (2018) Might Unmakes Right: The American Assault on the Rule of Law in World Trade. CIGI Papers- May 2018:173

Baetens F (2016) The European Union's proposed Investment Court System. Legal Issues Econ Integr 43:367–384

[332] Kaufmann-Kohler et al. (2006).

[333] Article 47 ICJ Procedural Rules: "The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects."

[334] Article 47 ITLOS Procedural Rules: "The Tribunal may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Tribunal may, without effecting any formal joinder, direct common action in any of these respects."

[335] Article 1126 para. 3 NAFTA; Article 10.25 para. 2 CAFTA-DR; Article 15.24 para. 2 US-Singapore FTA; Article 33.3 Uruguay-US BIT; Article 10.24 para. 2 US-Morocco FTA; Article G.27.3 Canada-Chile FTA; Article 83.2 Japan-Mexico FTA.

Baumgartner J (2016) Treaty shopping in international investment law. Oxford University Press, Oxford
Beess J, Chrostin C (2012) Sovereign debt restructuring and mass claims arbitration before the ICSID, the Abaclat case. Harv Int Law Rev 53:505–517
Bekker PHF (1993) International legal aid in practice: the ICJ Trust Fund. Am J Int Law 84:660–668
Bernardini P (2017) Reforming investor-state dispute settlement: the need to balance both parties' interests. ICSID Rev 32:38–57
Bischoff JA, Happ R (2015) The notion of investment. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law – a handbook. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, pp 495–544
Bjorklund AK (2013) The role of counterclaims in rebalancing investment law. Lewis Clark Law Rev 17:461–480
Bondar K (2016) Allocation of costs in investor-state and commercial arbitration: towards a harmonized approach. Arbitr Int 32:45–58
Braun TR (2012) Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht, Qualität und Grenzen dieser Wirkungseinheit. Nomos, Baden-Baden
Brower CN, Ahmad J (2018) From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court. Fordham Int Law J 41:791–830
Bungenberg M (2010) Going global? The EU common commercial policy after Lisbon. In: European yearbook of international economic law 2010. Springer, Heidelberg, pp 123–152
Bungenberg M (2014) The scope of application of EU (model) investment agreements. J World Invest Trade 15:402–421
Caron DD (2000) War and international adjudication: reflections on the 1899 peace conference. Am J Int Law 94:4–30
Consultative Council of European Judges (2002) Opinion No 3 of the European Judges (CCJE) to the Council of Europe's Committee of Ministers on the principles and rules governing the professional conduct of judges, in particular professional law, incompatible behavior and impartiality, CCJE(2002)OP3DE of 19.11.2002
Craven M (2014) Statehood, self-determination, and recognition. In: Evans M (ed) International law, 4th edn. Oxford University Press, Oxford, pp 203–251
Damme IV (2017) The application of "The Judicial Trilemma" to the WTO dispute settlement system. AJIL Unbound 111:359–363
De Baere G, Chané AL, Wouters J (2015) The contribution of international and supranational courts to the rule of law: a framework for analysis. In: De Baere G, Wouters J (eds) The contribution of international and supranational courts to the rule of law. Edward Elgar, Cheltenham, pp 19–82
Della Cananea G (2010) Minimum standards of procedural justice in administrative adjudication. In: Schill S (ed) International investment law and comparative public law. Oxford University Press, Oxford, pp 39–74
Dimopoulos A (2011) EU foreign investment law. Oxford University Press, New York
Diop A (2010) Objection under rule 41(5) of the ICSID arbitration rules. ICSID Rev 25:312–336
Dolzer R, Schereuer C (2012) Principles of international investment law, 2nd edn. Oxford University Press, Oxford
Douglas Z (2009) The international law of investment claims. Cambridge University Press, New York
Eberhard P (2014) Investitionsschutz am Scheideweg, TTIP und die Zukunft des globalen Investitionsrechts, Internationale Politikanalyse, May 2014
EFILA (2016) Task force paper regarding the proposed International Court System (ICS) dated 1.2.2016
Engel NP (2012) Mehr Transparenz für die Wahrung professioneller Qualität bei den Richter-Wahlen zum EGMR. Europäische Grundrechte-Zeitschrift 486:492
European Commission (2015) Trade for all – towards a more responsible trade and investment policy, COM (2015) 497

European Commission (2017) Commission Staff Working Document Impact Assessment, Multilateral reform of investment dispute resolution, SWD(2017) 302 final, 13.09.2017
European Union (2019) Submission of the European Union and its Member States to UNCITRAL Working Group III – Establishing a standing mechanism for the settlement of international investment disputes, 18.01.2019
Franck SD (2009) Development and outcomes of investment treaty arbitration. Harv Int Law J 50:435–489
Franke F (2013) Der personelle Anwendungsbereich des internationalen Investitionsschutzrechts. Nomos, Baden-Baden
Gartland F (2016) EU judges total pay package now more than €300,000. The Irish Times of 11.1.2016
Griebel J (2008) Internationales Investitionsrecht. C.H. Beck, München
Hackspiel S (2015) Art. 255 AEUV. In: von der Groeben H, Hatje J, Schwarze A (eds) Europäisches Unionsrecht, 7th edn. Nomos, Baden-Baden
Hamida WB (2006) The First Arab investment Court decision. J World Invest Trade 7:699–721
Herrmann C, Streinz T (2014) Die EU als Mitglied der WTO. In: von Arnauld A (ed) Europäische Außenbeziehungen, EnzEuR, vol 10. Nomos, Baden-Baden, pp 587–680. § 11
Heuser R (2010) Die unruhigen Ränder Chinas: Tibet und Taiwan. In: Giegerich T, Proelß A (eds) Krisenherde im Fokus des Völkerrechts – Trouble spots in the focus of international law. Duncker & Humblot, Berlin, pp 99–122
Hilf M, Salomon T (2010) Das Streitbeilegungssystem der WTO. In: Hilf M, Oeter S (eds) WTO-Recht, 2nd edn. Nomos, Baden-Baden, pp 165–202
Hindelang S (2015) Grundzüge eines modernen Investitionsschutzes – Ziele und Handlungsempfehlungen, Ein realpolitischer Vorschlag zur Reform des Investitionsschutzes zwischen CETA-Text und den Kommissionsvorschlägen zu TTIP, Harnack-Haus Reflections
Hodgson M (2015) Costs in investment treaty arbitration: the case for reform. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 748–759
Hoffmann AK (2013) Counterclaims in investment arbitration. ICSID Rev 28:438–453
Hoffmann AK (2015) Denial of benefits. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law – a handbook. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, pp 598–613
Howard D (2018) Creating consistency through a World Investment Court. Fordham Int Law J 41:1–52
Howse R (2000) Adjudicative legitimacy and treaty interpretation in international trade law: the early years of WTO jurisprudence. In: Weiler JHH (ed) The EU, the WTO and the NAFTA: towards a common law of international trade. Oxford University Press, New York, pp 35–58
Howse R (2017a) International investment law and arbitration: a conceptual framework. IILJ Working Paper 2017/1
Howse R (2017b) Designing a multilateral investment court: issues and options. Yearb Eur Law 36:209–236
ICSID Secretariat (2004) Possible improvements of the framework for ICSID arbitration. Discussion paper of 22.10.2004
ICSID Secretariat (2005) Suggested changes to the ICSID rules and regulations. Working paper of 12.5.2005
Johnson L, Volkov O (2013) Investor-state contracts, host-state "Commitments" and the myth of stability in international law. Am Rev Int Arbitr 24:361–415
Katz RL (2016) Modeling an international investment court after the World Trade Organization Dispute Settlement Body. Harv Negotiation Law Rev 22:163–188
Kaufmann-Kohler G, Potestà M (2016) Can the Mauritius Convention serve as a model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?

Kaufmann-Kohler G, Boisson de Chazournes L, Bonnin V, Mbengue MM (2006) Consolidation of proceedings in investment arbitration: how can multiple proceedings arising from the same or related situations be handled efficiently? Final report on the Geneva Colloquium of 22.4.2006. ICSID Rev Foreign Invest Law J 21:59–125

Koeth W (2016) Can the Investment Court System (ICS) save TTIP and CETA? EIPA working paper 2016/W/01

Konrad S (2015) Protection of investments owned by states. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law – a handbook. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, pp 545–554

Krajewski M (2015) Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA, Bundesministerium für Wirtschaft und Energie

Kulick A (2016) State-state investment arbitration as a means of reassertion of control – from antagonism to dialogue. In: Kulick A (ed) Reassertion of control over the investment treaty regime. Cambridge University Press, Cambridge, pp 128–152

Lamm C, Hellbeck ER (2013) Third-party funding in investor-state arbitration introduction and overview. In: Cremades BM, Dimolitsa A (eds) Third-party funding in international arbitration, vol 10. Dossiers/ICC Institute of World Business Law, Paris, pp 101–121

Lamprecht R (1992) Richter contra Richter, Abweichende Meinungen und ihre Bedeutung für die Rechtskultur. Nomos, Baden-Baden

Lange S (2016) Denial-of-Benefits-Klauseln in internationalen Investitionsschutzverträgen. Nomos, Baden-Baden

Lorz RA, Busch M (2015) Investment in accordance with the law – specifically corruption. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law – a handbook. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, pp 577–589

Mackenzie R (2014) The selection of international judges. In: Romano C, Alter KJ, Shany Y (eds) The Oxford handbook of international adjudication. Oxford University Press, Oxford, pp 737–756

Mackenzie R, Malleson K, Martin P, Sands P (2010) Selecting international judges – principle, process, and politics. Oxford University Press, Oxford

Mangoldt H (1983) Versäumnisverfahren in der internationalen (Schieds-)Gerichtsbarkeit. In: Mosler H, Bernhardt R (eds) Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler. Springer, Berlin, pp 503–528

Markert L (2009) Streitschlichtungsklauseln in Investitionsschutzabkommen: zur Notwendigkeit der Differenzierung von jurisdiction und admissibility in Investitionsschiedsverfahren. Nomos, Baden-Baden

Mowbray A (2008) The consideration of gender in the process of appointing judges to the European Court of Human Rights. Hum Rights Law Rev 8:549–559

Ohlhoff S (2003) Die Streitbeilegung in der WTO. In: Berrisch G, Prieß HJ (eds) WTO-Handbuch. C.H. Beck, München, pp 677–750

Pauwelyn J (2007) Appeal without remand, a design flaw in WTO dispute settlement and how to fix it. ICTSD issue paper no. 1

Pauwelyn J (2015) The rule of law without the rule of lawyers? Why investment arbitrators are from mars, trade adjudicators from venus. Am J Int Law 109:761–805

Payosova T, Hufbauer GC, Schott JJ (2018) The dispute settlement crisis in the World Trade Organization: causes and cures. Policy Brief- Peterson Institute for International Economics 18:5

Potestà M (2013) State-to-state dispute settlement pursuant to bilateral investment treaties: is there potential? In: Boschiero N, Scovazzi T, Pitea C, Ragni C (eds) International courts and the development of international law: essays in honour of Tullio Treves. T.M.C. Asser Press, The Hague, pp 753–770

Raviv A (2015) Achieving a faster ICSID. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 653–717

Reinisch A (2016) The European Union and investor-state dispute settlement: from investor-state arbitration to a permanent investment court. CIGI-paper no. 2
Roberts A (2014) State-to-state investment treaty arbitration: a hybrid theory of interdependent rights and shared interpretive authority. TDM 11(1)
Roberts A (2017) Would a multilateral investment court be biased? Shifting to a treaty party framework of analysis. EJIEL: Talk! of 28.4.2017
Ruffert M, Walter C (2009) Institutionalisiertes Völkerrecht. C.H. Beck, München
Scherer M (2013) Third-party funding in international arbitration: towards mandatory disclosure of funding agreements? In: Cremades BM, Dimolitsa A (eds) Third-party funding in international arbitration, vol 10. Dossiers/ICC Institute of World Business Law, Paris, p 96
Schermers HG, Blokker N (2011) International institutional law, unity within diversity. Martinus Nijhoff, Leiden
Schill S (2015) Reforming investor-state dispute settlement (ISDS): conceptual framework and options for the way forward. E15 Initiative
Schill S (2016a) The European Commission's proposal of an "Investment Court System" for TTIP: stepping stone or stumbling block for multilateralizing international investment law? ASIL Insights 20(9):5
Schill S (2016b) Sind Regelungen zur Investor-Staat-Streitbeilegung in EU-Freihandelsabkommen sinnvoll? Kölner Schrift zum Wirtschaftsrecht 7:115–121
Schreuer C (2004) Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road. J World Invest Trade 5:231–256
Sharp G, Marsh B (2017) A new seat at the mediation table? The impact of third-party funding on the mediation process. Kluwer Mediation Blog of 1.4.2017
Shaw GJ (2017) Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit. Arbitr Int 33:109–120
Steinitz M (2011) Whose claim is this anyway? Third-party litigation funding. Minn Law Rev 95:1268–1338
Sullivan J, Ingle D (2015) Interim costs orders: the tribunal's tool to encourage procedural economy. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 731–747
Tietje C (2003) Die institutionelle Ordnung der WTO. In: Berrisch G, Prieß HJ (eds) WTO-Handbuch. C.H. Beck, München, pp 39–70
Tietje C (2006) Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO? In: Herrmann C, Krenzler HG, Streinz R (eds) Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag. Nomos, Baden-Baden, pp 161–173
Tietje C (2009) Internationaler Investionsrechtsschutz. In: Ehlers D, Schoch F (eds) Rechtsschutz im Öffentlichen Recht. de Gruyter, Berlin, pp 63–100
Tietje C (2015) Investment law and sovereign wealth funds. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law – a handbook. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, pp 1802–1816
Timmer LJE (2012) The meaning of 'Investment' as a requirement for jurisdiction ratione materiae of the ICSID Centre. J Int Arbitr 29:363–374
Trevino CJ (2014) State-to-state investment treaty arbitration and the interplay with investor-state arbitration under the same treaty. J Int Dispute Settlement 5:199–233
Ulfstein G (2009) The international judiciary. In: Klabbers J, Peters A, Ulfstein G (eds) The constitutionalization of international law. Oxford University Press, New York, pp 126–152
UNCITRAL (2016) Concurrent proceedings in international arbitration – Note by the Secretariat, A/CN.9/881, 08.04.2016
UNCITRAL (2017) Possible future work in the field of dispute settlement: reforms of Investor-State Dispute Settlement (ISDS), A/CN.9/917, 20.04.2017
UNCITRAL Working Group III (2018a) Possible reform of investor-State dispute settlement (ISDS) – Arbitrators and decisionmakers: appointment mechanisms and related issues – Note by the Secretariat, A/CN.9/WG.III/WP.152, 30.08.2018

UNCITRAL Working Group III (2018b) Possible reform of investor-State dispute settlement (ISDS) – Note by the Secretariat, A/CN.9/WG.III/WP.149, 05.09.2018
United States (2016) Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva. 23.05.2016. https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf
Van Harten G (2010) Perceived bias in investment treaty arbitration. In: Waibel M, Kaushal A, Chung KH, Balchin C (eds) The backlash against investment arbitration: perceptions and reality. Kluwer Law International, Alphen aan den Rijn, pp 433–453
van Houte H, McAsey B (2012) Case comment: Abaclat and Others v Argentine Republic, ICSID, the BIT and mass claims. ICSID Rev 27:231–236
Voeten E (2009) The politics of international judicial appointments. Chic J Int Law 9:387–405
von Bogdandy A, Krenn C (2014) Zur demokratischen Legitimation von Europas Richtern. JuristenZeitung 69:529–537
von Goeler J (2016) Third-party funding in international arbitration and its impact on procedure. Kluwer Law International, Alphen aan den Rijn
Voon T (2017) Consolidating international investment law: the mega-regionals as a pathway towards multilateral rules. World Trade Rev:1–31
Weber O (2007) WTO-Streitbeilegung und EuGH im Vergleich: Zur gerichtsförmigen Konfliktlösung in Handelspräferenzzonen. Nomos, Baden-Baden
Wieduwilt H (2017) Bundesrichter setzen sich Grenzen. FAZ of 2.4.2017
Wilske S, Sharma G, Rawal R (2017) The Emperor's new clothes: should India Marvel at the EU's new proposed Investment Court System? Indian J Arbitr Law 6:79–97
Woods L (2016) Fit for purpose? The EU's Investment Court System. Kluwer Arbitration Blog of 23.3.2016
WTO (2016) WTO members debate appointment/reappointment of Appellate Body members. 23.5.2016. https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm
Wuschka S (2015) Investitionsschiedsverfahren: Individualrechtsschutz oder "anti-demokratische Kon-zernherrschaft"?. Völkerrechtsblog of 20.4.2015
Yannaca-Small K (2008) Improving the system of investor-state dispute settlement: the OECD governments' perspective. In: Sauvant KP, Chiswick-Patterson M (eds) Appeals mechanism in international investment disputes. Oxford University Press, Oxford, pp 223–228
Yusuf AAHE (2018) Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly. 25.10.2018. https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf

Chapter 5
Applicable Law

One of the central concerns in establishing an MIC is the creation of institutional framework conditions for the avoidance of contradictory decisions and the development of a uniform decision-making process in the settlement of investment disputes. 366

This concern is understandable given the previous and at times remarkably divergent interpretations of similar, if not identical investment protection standards. One must, however, also acknowledge that in the current decentralised system of investment arbitration, a high degree of convergence in the interpretation of investment protection standards has generally been achieved. 367

Nevertheless, the sometimes fundamental differences in interpretation show that there is a need for harmonisation, for instance with regard to the scope of the term 'investment' under Article 25 ICSID Convention,[1] the applicability of Most-Favored-Nation (MFN) clauses to jurisdictional and procedural matters[2] as well as the "importation" of protection standards,[3] the scope of so-called umbrella 368

[1]See Manciaux (2008), p. 443; Schreuer et al. (2009), p. 128 et seq.; Reinisch (2010), p. 749; Dupont (2011), p. 245; Dolzer and Schreuer (2012), p. 44 et seq.

[2]Gaillard (2005), Douglas (2011), p. 97; Maupin (2011), p. 157; Paparinskis (2011), pp. 14–58; Schill (2011), p. 353.

[3]So far, arbitral awards generally accept, that MFN clauses can help to "import" more preferable protection standards of other agreements. Cf. e.g. *Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, 21.4.2006, para. 179: "[. . .] it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties [. . .]." See Dolzer and Schreuer (2012), p. 211: "The weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties." CETA and other EU agreements exclude the application of MFN clauses on procedural aspects and to substantial protection provisions of other agreements. Cf. Art. 8.7 para. 4 CETA: "For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute

M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-662-59732-3_5

clauses,[4] the scope of obligations of Fair and Equitable Treatment (FET),[5] the conditions for the application of a state of emergency[6] etc.

369 In the context of the divergent interpretations of comparable investment protection standards, criticism expressed regarding an allegedly too investor-friendly interpretation of investment protection standards by investment tribunals must be considered.[7] This would follow, inter alia, from an emphasis on a teleological interpretation based on the object and purpose of an investment treaty, which in IIAs are very often explicitly the increase of foreign direct investment and the creation of an investor-friendly climate.[8] Indeed, in light of the rather low success

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"treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."

[4]See Alexandrov (2004), p. 555; Schreuer (2004), p. 231; Sinclair (2004), p. 411; Wälde (2005), p. 183.

[5]Cf. Kläger (2011), Yannaca-Small (2008), p. 112; Jacob and Schill (2015), p. 700; Tudor (2008).

[6]See Burke-White and von Staden (2007), p. 307; Reinisch (2007), p. 191; Schill (2007), p. 265; Waibel (2007) p. 637; Bjorklund (2008), p. 495; Alvarez and Khamsi (2009), p. 379; Binder (2009), p. 608; Bjorklund (2009), p. 479.

[7]Weeramantry (2012), p. 191; Dolzer and Schreuer (2012), p. 30; Yen (2014), p. 91 et seq.: "Interpreting general and vague treaty terms that can convey various meanings, tribunals have sought guidance in the treaty title and preamble. On that basis, they have found the prominent purpose of protecting and promoting investments to justify their pro-investment interpretations. [. . .] A more serious problem arises where reliance on this means of interpretation is accompanied with a disregard of other means under international rules on treaty interpretation." See also the critique of NGOs: Eberhardt and Olivet (2012), p. 16: "This report argues that the alleged fairness and independence of investment arbitration is an illusion. The law and the consequential disputes are largely shaped by law firms, arbitrators [. . .]. This industry is also responsible for growing its own business with pro-investor interpretations of the treaties." Cf. also Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership urging the Rejection of Investor-State Dispute Settlement, 8.5.2012, https://tpplegal.wordpress.com/open-letter/: "Simultaneously, the substantive rights granted by FTA investment chapters and BITs have also expanded significantly and awards issued by international arbitrators against states have often incorporated overly expansive interpretations of the new language in investment treaties. Some of these interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right of states to regulate and the sovereign right of nations to govern their own affairs."

[8]Cf. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29.1.2004, para. 116: "The object and purpose of the BIT supports an effective interpretation of Article X(2).The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12.10.2005, para. 52: "The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified. Considering, as pointed out above, that any other interpretation would deprive Art. II(2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions (see *SGS v. Philippines*, para. 116 and *Salini v. Jordan*, para. 95)."

rates of investor claims, a generally too investor-friendly interpretation does not seem discernible.

Although both problems can be addressed at the level of the applicable substantive law and through institutional and procedural arrangements, a conceptual distinction has to be made between the uniformity of interpretation and the likelihood of too state-friendly or too investor-friendly interpretations of investment protection standards. **370**

These problems could be tackled, at least to a certain extent, by increasing the degree of precision and by clarifying the scope of investment protection. **371**

However, the competence transferred by the Lisbon Treaty to the EU to conclude IIAs regarding foreign direct investment has created a new and more fundamental problem for the applicable substantive law. It follows from the established case law of the CJEU, which emphasises its interpretative monopoly over EU Law, that the EU's participation in international dispute settlement systems is compatible with this interpretative monopoly only insofar as the ultimate jurisdiction on matters of validity and interpretation of EU Law is reserved for the CJEU. In the CETA-Opinion 1/17, the CJEU has held that tribunals outside the EU judicial system cannot have the power to interpret or apply provisions of the EU law other than those of the international agreements or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.[9] Therefore EU agreements cannot confer on the envisaged tribunals any power to interpret or aply EU law other than the power to interpret or apply the provisions of that agreement having regard to the rules and principles of international law applicable between the parties and that these tribunals may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.[10] **372**

Therefore, from an EU legal perspective, the interpretation and application of EU Law as the substantive applicable law in investment disputes by an MIC will cause problems, if the conditions set up by the CJEU are not taken into consideration. This "EU internal" problem, which is not directly related to the other discussed issues with regard to the establishment of an MIC, should therefore be considered initially. **373**

5.1 Applicable Substantive Law

In the field of investment law, there are two models for the determination of the applicable substantive law: it can be determined by the rules of procedure of a dispute settlement body or it can be contained in the applicable bilateral or multilateral IIAs. In addition, it is possible that both regulatory regimes contain provisions on the applicable substantive law. **374**

[9]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 118.

[10]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 119.

375 For example, the ICSID Convention provides that in light of the principle of party autonomy, the parties to the dispute basically have the right to choose the applicable substantive law. Otherwise, i.e. in the absence of a choice of law, the domestic law of the host state and public international law shall apply.[11]

376 In the case of investment contracts between investors and states, the choice of law is contained in a contractual clause. In the case of treaty-based investment dispute settlement, which is much more common in practice, the choice of law is agreed by the state parties to the treaties. Individual investors accept this "offer" of a choice of law in the same manner as they accept the offer to arbitrate, namely by bringing a request for arbitration.[12]

377 The "cumulative" application of the domestic law of the host state and of public international law provided for in Art. 42 ICSID Convention has caused conceptual problems. The original practice was based on a "complementary and corrective function" of public international law, according to which the domestic law had to be applied primarily; public international law was used only to fill gaps and correct results incompatible with international law.[13] However, it is nowadays accepted that both legal systems play an equal role,[14] the latter especially with regard to customary rules on state responsibility, particularly regarding issues of attribution and the circumstances precluding wrongfulness, the protection against denial of justice, expropriation etc.[15]

378 Most bilateral and multilateral IIAs also contain a definition of the applicable substantive law. As a rule, the substantive investment protection standards of the respective IIAs should in many cases be applied in conjunction with general international law. Furthermore, there are a number of treaties which in addition to public international law also provide for the application of the domestic law of the

[11] Article 42 ICSID Convention: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[12] Schreuer et al. (2009), Art. 42, para. 23.

[13] Cf. *Amco v. Indonesia*, Resubmitted Case: Award, 5.6.1990, para. 20, 1 ICSID Reports 580: "This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference." Dolzer and Schreuer (2012), p. 292.

[14] *Wena Hotels v. Egypt*, Decision on Annulment, 5.2.2002, 6 ICSID Reports 129, para. 40: "What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42 (1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit." Gaillard and Banifatemi (2003), p. 377.

[15] Dolzer and Schreuer (2012), p. 288.

host state and specific investment contracts between investors and states.[16] Conversely, some IIAs limit the applicable law to the respective substantive investment protection treaty standards.[17]

From the EU's perspective, a treaty provision in an MIC Statute or in the respective IIAs concluded by the EU which stipulates that the domestic law of the host state shall be the applicable law would mean that EU Law would have to be interpreted and applied by an MIC. **379**

While from a public international law perspective this would seem unproblematic and might even have the advantage that an MIC could take EU Law directly into account, from an EU legal perspective and especially in light of the CJEU's jurisprudence on safeguarding its interpretative monopoly, problems could arise with regard to the conformity of such a choice of law with EU Law. **380**

5.1.1 EU Law as Applicable Substantive Law?

Within the EU, the question arises as to whether the application and interpretation of EU Law by an MIC could jeopardise the ultimate jurisdiction of the CJEU over the interpretation of EU Law. **381**

In principle, the CJEU does not regard the establishment of international courts on the basis of international treaties as incompatible with the EU Treaties.[18] Rather, it has repeatedly held that binding international dispute settlement provisions are compatible with EU Law in so far as they concern the application and interpretation of treaties concluded by the Union.[19] It has also considered international dispute settlement systems as permissible under EU Law, provided that they do not affect the competences of the Union and its institutions or the autonomy of the EU legal order.[20] **382**

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[16]Cf. Article 10 para. 7 Argentina-Netherlands BIT: "The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable."

[17]Cf. Article 26 para. 6 ECT: "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." Article 1130 North American Free Trade Agreement (NAFTA) Governing Law: "A Tribunal established under this Subchapter shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

[18]See CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 105 with further references.

[19]ECJ, Opinion 1/91, *EEA I*, ECLI:EU:C:1991:490, para. 40: "An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."

[20]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 105 et seqq.

383 It follows that such courts are in conformity with EU Law, provided that they confine themselves to the interpretation and application of the international agreements in question and do not extend to the interpretation and application of EU Law, which would have been the case with the draft for a "European and Community Patents Court" which the CJEU has found to be incompatible with the EU Treaties.[21]

384 After the CJEU Opinion 1/17[22] it now seems to having been clarified that also an MIC should be compatible until EU law provided for that the conditions set up by the CJEU in this Opinion 1/17 are fully taken into account when creating a statute for an MIC, especially in regard to the applicable law[23]

385 Several investment tribunals have held that the interpretation of EU Law as applicable law in investment disputes is unproblematic and considered it compatible with the EU legal order in light of the *acte claire* doctrine.[24] Arbitral decisions concerning the ECT also did not find the overlap of interpretations to constitute a curtailment of the CJEU's exclusive jurisdiction, since assessments of measures based on EU Law would never deal with the validity of European Law, a question reserved for the competent EU institutions.[25]

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[21]ECJ, Opinion 1/09, *European Patents Court*, ECLI:EU:C:2011:123, para. 78: "By contrast, the international court envisaged in this draft agreement is to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law, in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the FEU Treaty concerning the internal market and competition law. Likewise, the PC may be called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union." Cf. further para. 89: "Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law."

[22]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341.

[23]CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 130 et seqq.

[24]*Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26.10.2010, para. 282 et seq.: "The argument that the ECJ has an "interpretative monopoly" and that the Tribunal therefore cannot consider and apply EU law, is incorrect. The ECJ has no such monopoly. Courts and arbitration tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law: but that is quite different. Moreover, even final courts are not obliged to refer questions of the interpretation of EU law to the ECJ in all cases. The acte clair doctrine is well-established in EU law."

[25]Cf. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30.11.2012, para. 4.197 et seq.: "The Tribunal recognises the special status of EU law operating as a body of supranational law within the EU. It also recognises

Because of still existing uncertainty, it is understandable that the negotiators of European investment treaties and chapters in comprehensive free trade agreements are very cautious with regard to the application of EU Law. For example, Article 8.31 para. 2 CETA provides that an investment tribunal does not have jurisdiction to determine the legality of a measure under domestic (including EU) law. Domestic law may only be relevant as a question of fact and interpretations of domestic law by investment tribunals have no binding effect on state courts and institutions of the contracting party.[26] **386**

Accordingly, it seems appropriate to also include a provision on the applicable substantive law in an MIC Statute, which essentially limits the standards of protection to those of the applicable treaties. Such a provision could also stipulate whether and, if yes, under which circumstances an MIC can exercise jurisdiction over breaches of investor-state contracts (see para. 214 et seq.). **387**

5.1.2 Uniform Interpretation of Standards of Protection

It is evident that a uniform interpretation of investment protection standards can best be achieved on the basis of uniform treaty texts. Therefore, the optimal condition for a homogeneous interpretation would be the existence of a single multilateral investment treaty. However, it is also clear from today's perspective and after the experience with the failure of a multilateral investment agreement in the 1990s that a multilateral investment treaty is currently politically impossible.[27] Rather, the application of the existing and future IIAs needs to be considered. According to estimates by the United Nations Conference on Trade and Development (UNCTAD), there is a **388**

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the roles undertaken by the ECJ as the arbiter and gate-keeper of EU law comprising, in the words of ECJ Opinion 1/09, "the fundamental elements of the legal order and judicial system of the EU" (paragraph 54). However, these important features do not arise in the present case. [. . .] Although the Tribunal is required in this arbitration to interpret the European Commission's Final Decision of 4 June 2008, and in that sense, to apply EU law to the Parties' dispute, the Tribunal is not required to adjudicate here upon the validity of that decision [. . .]. That adjudication remains a decision for the EU courts alone [. . .]."

[26] Article 8.31 para. 2 CETA: "The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party." On this point CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 131 et seqq.

[27] Zuleta (2015), p. 405; Dolzer and Schreuer (2012), p. 10 et seq.; Salacuse (2013), p. 354.

considerable legal body of approximately 3000 bilateral and multilateral treaties (especially IIAs and trade agreements with investment chapters).[28]

389 Although these treaties contain to a large extent similar provisions on substantive standards of protection,[29] those provisions are often formulated in a significantly more detailed manner in the more recent agreements compared to those in the first generations of IIAs.[30] In this context, we are faced with rather standardised provisions on compensation for direct and indirect expropriations, FET, full protection and security and non-discrimination in the "older" treaties from the 1960s to 1990s and subsequently with a series of agreements that do not always consistently regulate the various standards of protection in much greater detail.

390 This results in treaty-based limitations on a possible uniform interpretation of investment protection standards. As far as the wording of applicable substantive standards of protection clearly diverge, these textual differences must be taken into account in accordance with the generally accepted principles of treaty interpretation codified in the VCLT.[31]

391 Nevertheless, as evidenced by previous practice of investment arbitration, individual arbitral tribunals are able and willing to interpret and harmonise divergent provisions (see para. 394).

392 In addition, there are also procedural steps that contribute to a harmonious interpretation and which could be incorporated in an MIC Statute. This would primarily include the permanence of treaty interpreters (as opposed to *ad-hoc* arbitrators) inherent in a permanent court as well as an explicit, harmonious interpretation mandate.

5.1.2.1 Permanency of the Treaty Interpreters at the MIC

393 As the various interpretations of investment protection standards referred to above are not only owed to the fact of 'objectively' diverse treaty wording, but can sometimes also be attributed to the different treaty interpreters. A 'standardisation' among the treaty interpreters would be another important step towards the desired result.[32]

394 Already in the previous practice of investment arbitration, similar rudimentary steps were made; for example, by the formal consolidation of individual

[28] 2353 BITs in force and 313 agreements in force with investment provisions. Division on Investment and Enterprise, https://investmentpolicy.unctad.org/international-investment-agreements.

[29] They are often based on comparable national standard investment protection contracts, that, in turn, are based on OECD standards. Cf. Vandevelde (2010), p. 57; Brown (2015), p. 182; De Brabandere (2014), p. 25.

[30] Brown (2015), p. 183.

[31] Vienna Convention on the Law of Treaties of 23.5.1969, 1155 UNTS 331.

[32] Marceddu (2016), p. 44.

proceedings[33] or by the appointment of the same arbitrators in different but related proceedings[34] in order to avoid divergences in interpretation as much as possible.

In fact, the repeated reappointment of certain arbitrators in different arbitration proceedings resulted in a certain permanence of adjudicators, which may have contributed to a more uniform interpretation of treaty provisions.[35] 176 out of the total of 361 existing arbitrator posts in proceedings between 1972 and 2006 were occupied by the same 43 arbitrators.[36] This trend has intensified in recent years and led to the development of shared legal views, which has resulted in an increased consistency of decisions.[37] **395**

This standardising function can undoubtedly be strengthened by the establishment of an MIC, which would establish a single institution to decide on the interpretation and application of treaty standards instead of different *ad hoc* arbitral tribunals.[38] **396**

[33]Cf. examples from the past "*de facto* consolidation": Kurtz (2014), pp. 257, 271; Kaufmann-Kohler et al. (2006), p. 74.

[34]Cf. e.g. the composition of the tribunals in *Sempra* and *CMS* (*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12.5.2005): Francisco Orrego Vicuna has served as President and Marc Lalonde as member of both tribunals. In general, the decisions are identical, the tribunal in *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28.9.2007, para. 346 finds that: "While two arbitrators sitting in the present case were also members of the tribunal in the CMS case the matter has been examined anew." Cf. additionally more critical Burke-White (2010), p. 425 et seq.; Dugan et al. (2008), p. 89 et seq.

[35]Commission (2007), p. 136: "The question as to whether or not ad hoc tribunals with ever-changing members can truly create precedent, and a distinct jurisprudence, is not a new one. As to investment treaty decisions and awards emanating from ICSID tribunals, however, the tribunal members are no longer ever-changing. Put simply, their backgrounds, qualifications, experiences in international law and their regular interactions, both professionally and otherwise, have contributed to the development of an esprit de corps amongst ICSID and other investment treaty arbitrators." Cf. regarding the previous common practice of numerous reappointments of certain arbitrators Shihata and Parra (1999), p. 311.

[36]Commission (2007), p. 141; Fontoura Costa (2011), p. 11: "For instance, group of only 12 arbitrators (4.4%) of the ICSID population accounts for about a quarter of nominations [. . .] the 12 people (first quartile) who account for over a quarter of the ICSID nominations are present in 60% of the tribunals, i.e. in 158 out of 263 tribunals. In other words, the group of more frequent arbitrators spreads their influence not only on a quarter of tribunals, but well over half of them."

[37]Commission (2007), p. 141.

[38]Cf. the statements on the influence of the presence of permanent judges (as opposed to *ad-hoc*) on harmonised decisions on the occasion of the establishment of the Statute of the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice. Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, Annex No. 1, 695 (1920): "In the Court of Arbitration, there is no permanent tie between the sitting judges, and consequently, no esprit de corps nor progressive continuity in jurisprudence; on the other hand, the Court of International Justice, being composed of judges, permanently associated with each other in the same work, and, except in rare cases, retaining their seats from one case to another, can develop a continuous tradition, and assure the harmonious and logical development of International Law."

397 It can be expected that the interpretation of identical or similar investment protection standards by the same group or a small group of persons who decide in a similar composition will lead to a greater degree of consistency and coherence, as should be the case with the proposed MIC.

5.1.2.2 Harmonising Interpretation Mandate

398 A further possibility to achieve a higher degree of uniformity in the interpretation of identical or similar investment protection standards would be to emphasize the need for the most uniform possible interpretation of the applicable provisions by the MIC.

399 Other dispute settlement systems also feature comparable "interpretation mandates" for treaty users and treaty interpreters. For example, the WTO DSU stipulates that the WTO Dispute Settlement System is primarily intended to serve legal certainty and predictability, and explicitly states that it should be oriented towards the international customary principles of interpretation of international treaties and must abstain from "legislative" interpretation.[39] The background of the latter skepticism towards overly activist interpretations by WTO Panels and the Appellate Body has been a concern that Member States may have had in the often far-reaching interpretative practice of GATT Panels.[40] However, it seems essential that the WTO Dispute Settlement System comprises a provision which contains a precise interpretative directive.[41]

400 Similarly, it seems practical not only to instruct the MIC to observe international customary principles of interpretation of international treaties, but also the most harmonising possible interpretation of investment protection standards which are not formulated in a completely identical manner. Such an interpretative mandate could, for example, be achieved by an emphasis on the systematic interpretation already mentioned in the VCLT and also known in investment arbitration practice in accordance with Article 31 para. 3 lit. c VCLT.[42] Alternatively, one could also

[39] Article 3.2 DSU: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[40] Jackson (1998), p. 342.

[41] Van Damme (2010), p. 606 et seq.

[42] Article 31 VCLT: "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [. . .] (3) There shall be taken into account, together with the context (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties." *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15.4.2009, para. 78: "It is evident to the Tribunal that the same holds true in

choose a wording according to which the interpretation of the applicable investment standards by the MIC would be oriented towards the principles of consistency and coherence.

5.1.3 Ensuring a Neutral and Objective Interpretation of Standards of Protection

A separate problem of interpretation is the question as to how to prevent investment treaty standards agreed upon by the parties from being interpreted as too investor- or too state-friendly. The previous debate above was about the concern of a too investor-friendly interpretation of the standards of protection contained in IIAs and other treaties by investment arbitral tribunals which has given rise to various considerations for a "change of course". **401**

The proposals ranged from specifying and limiting investment standards to establishing corrective measures by the parties to the treaties e.g. authentic treaty interpretations or even proposals to establish an MIC to eliminate the influence of arbitrators appointed by the investors. **402**

Similar to the issue of uniformity, in the interpretation of investment standards, this is also a question of interpretation, but at the same time involves weighing conflicting interests in interpretation.[43] Therefore, it appears particularly necessary to consider the integrity of the interpretation and decision-making process by an MIC. **403**

5.1.3.1 Clarification and Limitation of Investment Protection Standards in Investment Agreements

An unproblematic response to an interpretation practice of arbitral tribunals which is perceived to be too investor-friendly would be the correction and revision of investment protection standards in the applicable agreements. In fact, not only the **404**

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international investment law and that the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles."; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8.11.2010, para. 233: "The Tribunal will apply the provisions of the UABIT and interpret the UABIT in a manner consistent with customary international law." See for the systemic interpretation also Hofmann and Tams (2011), p. 53; McLachlan (2005), p. 279.

[43] *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27.4.2006, para. 70: "This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow." Weeramantry (2012), p. 193.

CETA and TTIP texts but also a number of other recent investment agreements have clearly included provisions aimed at restricting investor rights.[44]

405 This can be well illustrated by the provisions on indirect expropriation. Whereas in the original "first generation" IIAs, direct and indirect expropriations were generally treated as equal and therefore in principle triggered an obligation to provide compensation,[45] in the practice of investment tribunals[46] and at the same time in the practice of treaty drafting, it has become accepted that non-discriminatory state measures adopted for a public purpose, e.g. health or environmental protection or for general public safety, cannot in principle be considered as measures tantamount to expropriation.[47]

406 Comparable textual limitations[48] of investor rights can also be found in other standards of protection. For example, the CETA text provides for a far-reaching curtailment of the standard of FET by defining only extreme violations of the elements of FET identified in previous practice of investment tribunals as CETA violations.[49] Similarly, the CETA text adopts the standards of full protection and

[44]See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 155 et seqq.

[45]Dolzer and Schreuer (2012), p. 101 et seq.; Vandevelde (2010), p. 285 et seq.: "Like the [first] German BITs, the Abs-Shawcross Convention also explicitly recognized the distinction between a direct and an indirect expropriation. [. . .] The concept of an indirect expropriation in these early instruments quickly gained recognition in general BIT practice." See e.g. Article 7 Switzerland-Guinea BIT 1962: "Falls eine Vertragspartei Vermögenswerte, Rechte oder Interessen von Staatsangehörigen [. . .] enteignet oder verstaatlicht oder gegen diese Staatsangehörigen, Stiftungen, Vereinigungen oder Gesellschaften irgendeine andere Massnahme der direkten oder indirekten Besitzentziehung ergreift." Article 3 Netherlands-Tunisia BIT 1965: "Where one Party expropriates or nationalizes property, rights or interests [. . .] or takes any measure which results directly or indirectly in the dispossession of such nationals or corporations [. . .]." Similarly also Article 3 BLEU (Belgium-Luxembourg Economic Union)-Tunisia BIT 1964.

[46]Cf. *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3.8.2005, Part IV, D., para. 7: "[. . .] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17.3.2006, para. 262: "[. . .] the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today."

[47]See e.g. Annex B(4) 2012 US Model BIT; Annex B.13(1) 2004 Canada Model FIPA; Annex 8-A (3) CETA: "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."

[48]See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 156 et seqq.

[49]See e.g. Article 8.10 para. 2 CETA: "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process,

security by being expressly restricted to protection against physical threats by third parties.[50]

As the wording of a provision is the starting point of treaty interpretation[51] under the VCLT rules,[52] such prospective limitation of investors' rights seems to be the safest and least problematic way of preventing individual standards from being interpreted in a too investor-friendly manner at the expense of host states. At most, however, an excessive limitation[53] could result in investors finding the protection granted inadequate and they may therefore possibly turn to alternative methods of dispute settlement.[54] This could range from a reactivation of diplomatic protection (which could be accompanied by a politicisation of the disputes),[55] the increased conclusion of investment contracts between investors and states including their own separate arbitration clauses, to the strategic planning of investments via states that have a higher level of protection due to existing IIAs. **407**

Such a redirecting effect would certainly be counterproductive with regard to the objective of uniform and consistent interpretation of investment protection standards. However, insofar as the respective agreements find a balance between the **408**

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including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

[50]See e.g. Article 8.10 para. 5 CETA: "For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments."

[51]Cf. the comments of the ILC to Article 31 VCLT, in ILC, Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, vol. II, p. 220: "The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties." See also *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3.8.2005, Part II, B, para. 22: "[. . .] the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties." *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8.12.2008, para. 78: "The carefully-worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the travaux preparatoires, or any predilections based on presumed intention."

[52]Article 31 para. 1 VCLT: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[53]Newcombe (2013), p. 23; Alvarez (2011), p. 235; Tan and Bouchenaki (2015), p. 253 et seq.; Levesque and Newcombe (2013), p. 40.

[54]Ryan (2008), p. 761: "That means that all participants will be required to adjust their expectations if the system is to flourish. The United States is attempting to more clearly define the scope of protections accorded to investors through changes to its Model BIT. In doing so, it has arguably narrowed the scope of protections available to investors. Investors, in turn, may be required to adjust their expectations in such a way that will allow them to operate in the changing legal environment."

[55]Schreuer (2015), p. 881 et seq.

legitimate interests of host states and investors, a clarification of the standards of protection not only seems to be unproblematic, but even practical in order to provide the treaty interpreter, i.e. a future MIC, with a more detailed decision-making basis.

5.1.3.2 Limiting the Mandate for Interpretation

409 It should also be considered whether the MIC should be instructed with specific interpretative maxims. For example, it would be conceivable to clarify in the respective text of the treaty, in the preamble or in the annexes, that the investment protection standards are to be interpreted neutrally and objectively, or that specific interpretative variants could be agreed as binding. The more recent practice of interpreting the scope of the standard of FET and full protection and security or clarification of what should not be regarded as indirect expropriation provides useful examples (see para. 406). Since they are already provided for in the applicable treaties, investors cannot claim being confronted with an unexpected interpretation.

410 As an alternative to incorporating them in the applicable IIAs, one could consider whether comparable interpretation directives could be included in an instrument that governs the functioning of an MIC.

411 In this case, it may be necessary to differentiate whether a particular interpretation is within the scope of what the original text envisages or goes beyond it. This will be the case if, for example, the clarification of the individual elements of the FET standard contained in CETA is based on established principles of the previous interpretation by investment tribunals[56]; however, with regard to the subsidiary protection of legitimate expectations[57] and the total lack of any stability and predictability, this may be considered questionable.[58]

412 More problematic than the clarification of the content of the investment protection standards in the applicable IIAs or the establishment of certain interpretation maxims therein (or in a general instrument for the functioning of the MIC) are two additional methods of interpretation in the context of correcting an investor-friendly ruling:

[56]Cf. Article 8.10 para. 2 CETA: "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

[57]Cf. Article 8.10 para. 4 CETA: "When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

[58]Cf. Kriebaum (2014), p. 482.

so-called authentic interpretation by the parties to the agreement and the appointment of state-friendly judges as treaty-interpreters.

5.1.3.3 Authentic Interpretation by the Parties

A number of IIAs already provide that the Contracting Parties should be able to interpret individual treaty provisions as binding, in addition to the dispute settlement institution designated for "routine" interpretation and application of such treaties.[59] In other words, the MIC (superseding the previous arbitral tribunals) and the parties to the IIA would in principle be entitled to interpret an IIA. The MIC Statute could therefore clarify (within the provision on the applicable law) that the MIC must take into account interpretative statements of the parties to the applicable IIA. However, the Plenary Body of the MIC cannot be given jurisdiction for the interpretation of bilateral IIAs, at best it could have jurisdiction for interpreting the MIC Statute. **413**

As the rare invocation of such interpretative competence has shown, it is especially used as a corrective measure against overly investment-friendly interpretations by arbitral tribunals. A clear example is provided by the interpretation of FET by the North American Free Trade Agreement (NAFTA) Free Trade Commission, which stated that the FET standard provided for in Chapter 11 (the investment chapter of the NAFTA) does not go beyond the minimum standard of treatment under customary international law.[60] **414**

To the extent that such interpretations are within the scope of the respective investment protection standard and do not go beyond that,[61] i.e. modify the treaty, **415**

[59]Cf. Article 30 para. 3 US Model BIT 2012: "A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." Article 31 US Model BIT 2012: "Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. [. . .] 2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue." Article 1131 para. 2 NAFTA: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[60]NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decisions of 31.7.2001, www.worldtradelaw.net/nafta/chap11interp.pdf: "B.1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

[61]Cf. *Pope & Talbot Inc. v. Canada*, Award in Respect of Damages, 31.5.2002, para. 47: "[w]ere the tribunal required to make a determination whether the commission's action is an interpretation or an amendment, it would choose the latter."

and to the extent that it is prospectively applicable, such "authentic" interpretations by the contracting parties appear to be a legitimate instrument to help them assert their will.[62]

416 However, it seems problematic to provide the contracting state parties with such extensive interpretative competence that they could help their legal position to a breakthrough in ongoing proceedings.[63] This would not only be contrary to the principle that no one may be a judge in his own case (*in causa sua nemo iudex sit*), but also contrary to fundamental rule of law requirements for a fair trial.[64] It would therefore be particularly important to note that any "authentic" interpretation by the parties to the agreement, even if made in response to an interpretation by the MIC or another dispute settlement body, must not have an effect on any pending proceedings.[65]

5.1.3.4 Composition of the MIC: Impartial and Independent Judges

417 Another means of ensuring neutral and independent interpretations of the investment protection standards appears to be already implicitly included in the plans to establish an MIC. The appointment of judges to an MIC is intended to prevent arbitrators who are too investor-friendly from interpreting the standards of protection in favour of the investors, not only in individual cases, but on a permanent basis.

418 In traditional arbitration, the influence of party-appointed arbitrators is counterbalanced by the presiding third arbitrator.[66] In addition, rules governing the independence and impartiality of persons appointed as arbitrators should prevent an

[62]Roberts (2010), pp. 179–225; Ewing-Chow and Losari (2015), p. 103; Dolzer and Schreuer (2012), p. 33.

[63]Kaufmann-Kohler (2011), pp. 181–183.

[64]*Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8.2.2005, para. 149; Ishikawa (2015), p. 141; UNCTAD (2011), p. 4.

[65]See in this regard CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 237. A potential risk of breaching certain procedural minimum guarantees in the sense of *due process* could be avoided, if there would be a mechanism of consultations in advance to a procedure. One possibility would be the establishment of a state-to-state mechanism of consultations that would enable an interpretative dialogue between the arise of a dispute and the beginning of the dispute settlement procedure. Cf. Ishikawa (2015), p. 145.

[66]Carbonneau (2003), p. 1211: "The tradition in prior practice had been to require only that the presiding arbitrator (the "neutral" arbitrator) be fully impartial. There was an expectation that party-designated arbitrators would be sympathetic to the position of the appointing party and would favor that position in the deliberations."; Franck (2009), p. 443 et seq.: "All arbitrators are generally required to be impartial and to contribute to the adjudicatory outcome. Nevertheless, the presiding arbitrator performs a different role than the party-appointed arbitrator and his or her appointment is a matter of vital importance. The presiding arbitrator can "influence the style of an international arbitration" and make critical procedural decisions. Some suggest that presiding arbitrators resolve disputes between party-appointed arbitrators and, in some cases, become the ultimate decision makers." Böckstiegel (2003), p. 371.

undue influence of investors or states on the tribunal.[67] As explained above (see para. 133 et seq.), this should be regulated primarily by a corresponding Code of Conduct of an MIC, with the option of incorporating the already very nuanced and widely used IBA Guidelines on Conflicts of Interest in International Arbitration.[68]

419 If the judicial decision-makers are appointed solely by one or more state parties, this could not only call the arbitral nature of this form of dispute settlement (see para. 518) into question, but also raise doubts about the independence and impartiality of the judges appointed exclusively by the potential respondent states. Indeed, this could be rebutted by the fact that states not only protect their own interests as potential respondent host states against foreign investors, but at the same time protect the interests of their investors abroad. Thus, they have an interest in a balanced appointment of the members of the MIC. However, even these considerations cannot change the fact that the selection of the MIC Members would lie exclusively in the hands of the state parties.[69]

420 Therefore, it would be important to minimise other factors beyond the appointment to the judicial office which could affect the impartiality of the individual decision-makers as far as possible (for details on the impartiality and independence of the judges, see para. 130 et seq.).

421 As stated above, terms of office should be as long as possible and either no or only a one-time re-election should be envisaged (see para. 155 et seq.). The exclusion or restriction of re-election is often considered as the main instrument to prevent a potential dependency of judicial decision-makers on the electing states. In addition, the exclusion of persons who could have a close relationship to potential parties to the dispute should also be considered. In specific terms, this could not only mean excluding government officials and party representatives of investors, as stated in CETA,[70] but also persons who have held certain political or administrative offices in states' or EU institutions in the past.

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[67]Cf. Article 6(7) UNCITRAL Arbitration Rules 2010: "independent and impartial arbitrator"; Article 14 para. 1 ICSID Convention: "Persons [. . .] of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." Article 18 para. 1 SCC Arbitration Rules 2017: "Every arbitrator must be impartial and independent. [. . .]." Article 10.1 London Court of International Arbitration (LCIA) Arbitration Rules 2014: "The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: [. . .] (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence." Article 10 para. 1 Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules 2017: "Any arbitrator appointed in an arbitration under these Rules, whether or not nominated by the Parties, shall be and remain at all times independent and impartial. [. . .]." Poudret and Besson (2007), p. 346 et seq.; Lawson (2005), p. 22; Dimitropoulos (2016), p. 415 (proposed standards for the investment arbitration).

[68]IBA Guidelines on Conflicts of Interest in International Arbitration, Resolution of the International Bar Association Council of 23.10.2014. Wuschka (2016), p. 165.

[69]Sandrock (2015), p. 627.

[70]Article 8.30 para. 1 CETA: "The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or

5.2 Applicable Procedural Law and Procedural Principles

422 The current decentralised system of investment dispute settlement by *ad hoc* arbitral tribunals based on IIAs generally provides for various alternatives. Thus, it is usually at the investors' discretion whether to initiate proceedings under the rules of the ICSID Convention, the ICSID Additional Facility Arbitration Rules, the UNCITRAL Arbitration Rules (possibly administered by the PCA), or under the arbitration rules of various institutions (such as International Chamber of Commerce (ICC), SCC, London Court of International Arbitration (LCIA) etc.).

423 These arbitration rules mostly do not differ significantly with regard to the core aspects of the proceeding. However, it should be noted that only the ICSID Arbitration Rules and the ICSID Additional Facility Arbitration Rules apply specifically to investment arbitration proceedings, while the other arbitration rules—except for the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration[71]—are also used in commercial arbitration.

424 Since in all these procedural rules the actual proceeding is regulated very rudimentarily and informally, only small differences arise. The core of all these arbitration rules is party autonomy and respect for the mutual right to be heard.[72]

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government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement." This so called "German professors-clause" shall clarify that university professors, in countries where the universities are state-financed, are not excluded. See on this also CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 240.

[71]UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, in force since 1.4.2014.

[72]Article 17 para. 1 UNCITRAL Arbitration Rules: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." Article 22 ICC Arbitration Rules 2017: "(2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. [. . .] (4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." The right to be heard before the court is also reflected in the following articles of the ICSID Arbitration Rules 2006: Schreuer et al. (2009), p. 987: "The principle that both sides must be heard on all issues affecting their legal 305 position is one of the most basic concepts of fairness in adversarial proceedings. [. . .] It is reflected throughout the ICSID Arbitration Rules (see esp. Rules 20, 21, 27, 31, 32, 37, 39, 40, 41, 42, 44, 49, 50, 54, 55)."; Petrochilos (2004), p. 254: "By ineluctable inference from the reference in Article 52 of the ICSID Convention to 'fundamental' procedural rules, an ICSID tribunal must respect the minimum standards of due process, namely the equality of the parties and the right to be heard." Cf. Blackaby et al. (2009), para. 6.11 et seq.; Wälde (2011).

425 Therefore, in practice, the choice between the various arbitration rules is primarily based on the different enforcement mechanisms between the ICSID arbitral awards that provide for a separate enforcement mechanism under the ICSID Convention and arbitral awards under other procedural rules, which are generally governed by the New York Convention (see para. 483). In addition, the special rules on jurisdiction of the ICSID Convention[73] and its annulment system[74] also influence the choice of procedure.[75] Investors who have doubts as to whether their investments comply with the so-called *Salini* criteria of "investment" developed in ICSID arbitration practice or the nationality criteria set out in Article 25 ICSID Convention, or investors wishing to avoid the potential procedural delay caused by the possibility of annulment under the ICSID Convention may therefore rather opt for UNICTRAL rules based arbitration or other non-ICSID arbitration proceedings.

426 The fundamental question is primarily whether the current system of adopting existing rules of procedure should be maintained or whether separate rules of procedure should be provided for. The MIC Rules of Procedure could already be directly integrated into the MIC Statute or adopted by the Plenary Body as secondary rules specifying the MIC Statute (see para. 107).

427 This fundamental question depends on several factors: enforceability of awards, special procedural requirements such as transparency, efficiency (in particular cost efficiency but also reduction of the length of proceedings etc.), avoidance of abusive procedures etc.

428 The realisation of these objectives should partly be achieved by adopting existing rules of procedure and partly by creating own rules of procedure.

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[73] Article 25 ICSID Convention: "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. (2) "National of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

[74] Article 52 para. 1 ICSID Convention: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[75] Dolzer and Schreuer (2012), p. 241.

429 As will be explained in more detail below (see para. 484 et seq.), ICSID arbitral awards are subject to a particularly efficient enforcement mechanism according to which all (currently 163)[76] parties to the ICSID Convention have in principle the duty to enforce the awards as if it were a final judgment of their own national court, whereby only the principles of state immunity in enforcement proceedings may constitute an admissible objection. Similarly efficient is the enforcement of arbitral awards governed by the New York Convention in all its (currently 160)[77] members. However, there are additional grounds for non-recognition or non-enforcement of awards under the New York Convention. A precondition for the applicability of the enforcement mechanisms of increased effectiveness under the two named conventions is that the resulting decisions can be regarded as ICSID arbitral awards or as arbitral awards within the meaning of the New York Convention (see para. 480).

430 Whether decisions of the MIC can be regarded as ICSID arbitral awards or as arbitral awards within the meaning of the New York Convention is not only fundamentally problematic, but it also depends on the extent to which they are based on a procedure consistent with the ICSID Rules of Procedure or rules of procedure that satisfy the requirements of the New York Convention (see para. 480).

431 A series of measures/rules aimed at more efficient procedures which ultimately move away from the principle of party autonomy prevailing in arbitration towards a stronger concentration of the judicial process could run counter to this objective. Nevertheless, these should be discussed in detail in the context of a comprehensive reform of investment dispute settlement as is planned within the MIC.

5.2.1 Transparency

432 Principles of transparency have recently been the subject of various discussions and reform plans within arbitration. Under the aspect of transparency, the issues of publication of documents, the participation of third parties interested in the proceedings as well as public access to hearings are generally included. Transparency is seen as an expression of fundamental rule of law requirements. In order to ensure the simple application of the UNCITRAL Transparency Rules without having to renegotiate all existing investment agreements, the UN General Assembly adopted the Mauritius Convention[78] at the end of 2014.

[76] As of 01.08.2019.

[77] As of 01.08.2019.

[78] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, A/RES/69/116 of 10.12.2014.

Transparency is dealt with differently in the various investment dispute settlement mechanisms: on the one hand, there are divergences regarding the definition of a general obligation, either of confidentiality or transparency.[79] On the other hand, there are differences in the implementation of presumed transparency.[80] **433**

Using the transparency obligations enshrined in the 2013 UNCITRAL Rules on Transparency[81] as a potential standard for an MIC is largely undisputed. As a result of many years of negotiation, they constitute a stable set of rules and cater to the specific needs of proceedings between states and investors as a tailored set of rules which can significantly promote transparency in investment arbitration.[82] **434**

In the context of the MIC, it would therefore make sense to incorporate the UNCITRAL Rules on Transparency into the constituent instrument following the example of CETA.[83] Above all, this would avoid the problem of application that **435**

[79]Cf. Article 28 para. 3 Norway Model BIT 2007, Draft version 191207: "All awards and substantive decisions of the Tribunal shall be made publicly available."

[80]Cf. the opportunity not to publish decisions under ICSID and the Secretariat's obligation to publish excerpts of the legal reasoning of the tribunal: Article 48 para. 5 ICSID Convention: "The Centre shall not publish the award without the consent of the parties" and Article 48 para. 4 ICSID Arbitration Rules: "The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal" or the rules on transparency in Article 29 para. 1 US Model BIT 2012 concerning the publication of process documents: "the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28 (2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation]; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal", as well as Article 29 para. 2 concerning the publicity of hearings: "The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure." Ortino (2013), p. 121.

[81]United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency), concluded the 10.12.2014 and entered into force the 18.10.2017.

[82]Loken (2013), pp. 1302–1303; Alvarado Garzón (2019), p. 491.

[83]Article 8.36 CETA: "(1) The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section. (2) The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules. (3) Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules. (4) Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the Tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository. (5) Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the

arose with regard to IIAs concluded before 1 April 2014 in relation to the UNCITRAL Rules. This issue had to be solved by a special multilateral instrument (Mauritius Convention).[84]

436 Specifically, it has to be noted that the debate in the area of a transparent investment dispute settlement system focuses on the following issues: access to information concerning the initiation of proceedings, public access to hearings, the possibility for third parties to participate in proceedings as well as the publication of procedural documents, in particular of the final award.[85]

437 As already stated above, the statement of claim should be published on the MIC website after the submission of a claim. The UNCITRAL Transparency Rules also provide that all documents related to the dispute must be published. The entire award and all relevant procedural documents such as the parties' written pleadings, records of hearings and decisions would have to be published according to the Mauritius Convention (Article 3).

438 Under the aspect of transparency the participation of "interested third parties" has often been discussed in the past.[86] The guarantee of procedural participation rights of interested parties also serves as "minority protection" in a broader sense; in any case, those affected by a decision should also have a right to participate in the proceedings leading to the decision in question. For example, according to the CETA guidelines, *amicus curiae* briefs should generally be allowed. Pursuant to the UNCITRAL Transparency Rules, the arbitral tribunal has the discretion to allow *amicus curiae* briefs (Article 4). The participation of third parties has now also been comprehensively regulated in the various transparency chapters.[87]

439 Pursuant to the UNCITRAL Transparency Rules, oral hearings should also in principle be public, unless that proves to be logistically impossible (Article 6).

440 In particular, transparency through the publication of documents and the conduct of oral hearings open to the public should in principle be under the caveat that business and trade secrets are treated in a confidential manner and that no respondent should have to disclose information concerning its confidential interests (Article 7). It should also be ensured that the "integrity" of the procedure is not impaired by transparency, for example by impeding the taking of evidence, intimidating witnesses, party representatives or arbitrators.

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appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection. (6) Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information."

[84]Ortino (2013), p. 126.

[85]Dolzer and Schreuer (2012), p. 286.

[86]Cf. e.g. Böckstiegel et al. (2005), Brekoulakis (2010) and Ruthemeyer (2014).

[87]Cf. e.g. Article 4 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

5.2.2 *Efficiency*

At present, arbitration proceedings last on an average for 3 years and 8 months.[88] For the effectiveness and acceptance of the new system, limitations should be provided for the duration of the proceedings. Thus, in addition to being susceptible to soaring costs, the existing system is often criticised for the excessive duration of the proceedings.[89] A shortening of the length of the proceedings would automatically lead to a reduction of the total costs.[90] **441**

In traditional arbitration, it is partly up to the arbitral tribunals to ensure the efficient conduct of the proceedings; however, the concrete procedural organisation remains mostly at the disposition of the parties. The time-efficient and cost-effective completion of a procedure can thus be rendered more difficult by the obligation of the tribunal to decide on all submissions of the parties as explicitly laid down in the respective dispute settlement instruments.[91] **442**

In practice, it is above all the right to be heard that usually causes the arbitral tribunal to admit submissions by the parties,[92] even if they have a delaying effect on the proceedings, since otherwise they are subject to the risk of annulment.[93] **443**

Here, a stronger conduct of proceedings by the MIC could provide a meaningful remedy. Where appropriate, it should be noted that in terms of cost and time efficiency, procedural decrees taken by the MIC are not, as a rule, to be considered as limitations on the due process of law. **444**

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[88] European Federation for Investment Law and Arbitration (2014), p. 8; Hodgson (2014).

[89] Schill (2015), p. 3.

[90] Schill (2015), p. 9.

[91] Cf. Article 48 para. 3 ICSID Convention: "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." Article 46 ICSID Convention: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

[92] Article 17 UNCITRAL Arbitration Rules: "The Arbitral Tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

[93] According to the grounds of rescission of Article 52 ICSID Convention, that is at most Article 52 para. 1 lit. d) ICSID Convention: "serious departure from a fundamental rule of procedure", the right to be heard before the court can be asserted. Cf. *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment, 3.7.2013, para. 36: "[. . .] the Parties agree on the substance of the principe du contradictoire and on the fact that it is a rule of procedure that ensures equality of the parties in an adversarial proceeding. The Committee further notes that this principle is closely related to the right to be heard. This right of parties to present their case has been recognized as part of that "set of minimal standards" considered fundamental for a fair hearing. The Committee thus concludes that the principe du contradictoire is a fundamental rule of procedure." But an award that does not deal with the pleadings can also be contested under Article 52 para. 1 lit. b) ICSID Convention. See Schreuer et al. (2009), p. 816 et seq.: "An award that is not comprehensive and exhaustive of the parties' questions amounts to an excess of powers just like a decision on questions that have not been submitted to the tribunal."

445 It therefore seems advisable to set time frames for the length of proceedings for the MIC using the example of the reformed WTO DSU or regional instruments such as Association of South-East Asian Nations (ASEAN)[94] or NAFTA.[95] By virtue of complying with the deadlines set by the WTO DSU, the issue of longstanding disputes under the old GATT System has been resolved and it has helped the system to be transformed into an efficient dispute settlement mechanism.[96]

446 For the entire procedure of the first instance, from the lodging of the statement of claim to the decision, a maximum duration could be set from which it should be possible to deviate only after a special statement of reasons by the chamber. The investment dispute settlement mechanism in CETA and in the EU-Vietnam IPA provides for a maximum duration of proceedings based on the WTO DSU, which has so far not been found in investment arbitration. The first instance should last a maximum of 18 months, the second instance a further 6 months (see also para. 354 et seqq.).

447 Despite the generally accepted positive effects of fixed deadlines[97] and defined subject matters of the disputes on procedural and cost efficiency, there was also some doubt in the context of the WTO Dispute Settlement System. In particular, it was criticised that such arrangements may have a cost-saving effect in the short term, but could have the opposite effect in the longer term,[98] since the probability of several "procedural stages" could increase.[99]

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[94] 60 days of mediation and consultation before the proceeding, 45 days for the establishment of the panel, decision (report) within 60–70 days. See ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

[95] Article 1904 para. 14 NAFTA: "Chapter 19-decisions have to be made within 315 days"; see also Rule 2 NAFTA Art. 1904 Panel Rules: "These rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions of panels within 315 days after the commencement of the panel review. The purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904."

[96] Butler (2015), p. 356.

[97] Sevilla (1998).

[98] Moonhawk (2008), pp. 657–686: "For example, stricter time limits can increase time pressure on bureaucracies. The possibility – in fact high likelihood – for review by the Appellate Body on issues of law further increases and countries' need for deeper expertise in the WTO law increases."

[99] Busch and Reinhardt (2003), p. 467 et seq.: "To that end, we note that the legal reforms of the DSU may actually raise the transaction costs inherent in settling disputes by affording opportunities for longer delays, increasing incentives for foot-dragging in litigation, and motivating defendants to delay concessions. Granted, each separate stage of the process now operates according to a tighter timeline, but this fact is overwhelmed by the new possibility, indeed, the inevitability of successive rounds of litigation in the same dispute, [. . .] Further, the added stages of litigation, tight enforcement of terms of reference, the legal disincentives for disclosure, and the rules on standing, all serve to put the onus on disputants and third parties to legally mobilize as soon as possible in order to avoid losses on technicalities (i.e., having the panel or AB deem a certain argument outside its terms of reference) later on."

As a result, the MIC should in future be granted discretion to set the temporal dimension of specific cases based on their complexity. It should therefore be possible to extend the stipulated time frames in particularly complex cases or indeed if the establishment of the facts raises specific challenges. **448**

For the MIC, it should be noted that already in the first instance, the judges should in principle be full-time judges, unlike, for example, under the CETA mechanism or the WTO DSU (which is known to appoint *ad hoc* arbitrators). Therefore, a shorter maximum length of proceedings could be envisaged, which could only be extended based on a statement of reasons, for instance due to the particular complexity of the facts. In the case of full-time judges, a maximum length of proceedings of generally 6 months/180 days for the first instance is generally accepted, which could be extended if, for example, comprehensive and lengthy fact finding is required or if there are particular difficulties in the legal assessment or calculation of damages and expert opinions have to be obtained. The procedural role of the MIC with full-time judges, unlike the *ad hoc* arbitrators of WTO Panels, could prevent the parties from lengthening proceedings and causing additional costs. **449**

In conjunction with the introduction of requirements for the length of proceedings, the principle of celerity should apply. Hence, in all its work, the chamber should be careful not to unreasonably impair the conduct of the proceeding. In that regard, the chamber could be provided with means to expedite the implementation of the procedure, such as having the ability to deny submissions for the admission of evidence after a certain point in time, only providing for oral hearings or enforcing strict duties for pleadings. At the same time, however, it must be borne in mind that a balance should be struck between the interests of complete and comprehensive establishment of the facts on the one hand and the interest of least possible impairment to a potentially accelerated conduct of the proceedings on the other hand. **450**

From the moment a chamber gives reasons for an extension of the length of the proceedings, this chamber should not be assigned new disputes until the decision has been handed down. If all chambers are busy and an extension of the length of the proceedings is requested on a regular basis, the President of the Court should propose to the Plenary Body for the number of MIC judges to be increased (see para. 86). **451**

5.2.3 *Practice of Judicial Investigation and Limitation of the Subject Matter of the Dispute*

452 In German public law,[100] European law[101] and public international law[102] proceedings, the application of the practice of judicial investigation is widely accepted.[103] There are no reasons why this should be deviated from in the case of the MIC, where basically the behaviour of public authorities is examined for compatibility with subjective legal positions. The MIC should therefore be allowed to establish the facts of the dispute *ex officio*.

453 This means that, the court would not be bound by the submissions and motions by the parties to take evidence.[104] At the same time, however, it could be set forth that a substantive examination can only be carried out to the extent that a reference to the claimant's arguments is clear. Furthermore, it should be considered whether a determination/limitation of the subject matter of the dispute—as is the case in the WTO DSU[105] or also in the ICC Arbitration[106]—should take place, inter alia, by

[100] Cf. in Germany e.g. Article 86 VwGO (Code of Administrative Court Procedure); Article 26 BVerfGG (Act on the Federal Constitutional Court).

[101] Article 24 Protocol No. 3 CJEU Statue: "The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal. The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings."

[102] E.g. Articles 49–51 ICJ Statute.

[103] Schill (2016), p. 118.

[104] Under German law, the principle of investigation applies in all proceedings whose subject touches particularly public interests.

[105] Article 7 DSU: "1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." 2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. 3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB."

[106] Article 23 ICC Arbitration Rules: "As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars: (a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration; (b) the addresses to which notifications and communications arising in the course of the arbitration may be made; (c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims; (d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined; (e) the names in full, address and other contact details of each of the arbitrators;

establishing Terms of Reference. This could lead to a focus of the proceeding on the actual points of contention. CETA has similar aims as it states that the claimant may not present any measure in its claim that was not already presented in the request for consultations.[107]

454 The chamber should clarify the facts of the dispute to the extent that it deems necessary for its decision. The principle of *ex officio* investigation or the principle of judicial investigation is thus in proportion to the principle of party disposition on the part of the applicants. Nevertheless, within the context of the scope of examination, it should only be examined whether the claimant's interests were damaged, i.e. whether the rights of the claimant originating in the particular IIA were violated. Therefore, such violations of an MIC Member that do not affect the applicant's own standards of protection should not be dealt with by the MIC.

455 Contrary to the principle of legal representation and the principle of production of evidence in civil procedural law, the chamber would itself under the principle of judicial investigation determine the manner and extent of the investigations. Insofar as the chamber sees further need for investigation, it should, in principle, exhaust all reasonably available and legally admissible possibilities for clarifying the relevant facts. In many cases, however, a chamber will only be able to confine itself to the points raised by the claimant as well as to other manifest and serious infringements. Further elaboration of the formalities regarding the taking of evidence should be provided for in the procedural rules of the MIC, for example, that the court can examine, take oath and, in the case of non-appearance, impose a fine on witnesses and experts, or that the MIC in this respect also has a right to information towards its members.[108]

456 The obligation of the parties to advance the procedure should in principle interact with the obligation of the chamber to find out the relevant facts *ex officio*. If a party to the proceedings fails to perform his obligation to ensure smooth conduct, the MIC chamber would consider it to the detriment of the non-compliant party. The duty to investigate the matter and to establish the facts should rather only come into play in case that the arguments of the parties (or the other facts), if considered reasonably, provide a sufficient reason to do so. From the interaction between the principle of judicial investigation and the principle of efficiency and the principle of celerity, it

(f) the place of the arbitration; and (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono."

[107] Article 8.22 para. 1 lit. e) CETA.

[108] For legally relevant facts that can be proven, the plaintiff must designate the available evidence. Concerning the fact-finding, the participants of the dispute have to be obliged to co-operation. The participants must point out and clarify circumstances that lie in their sphere. This obligation to co-operation serves the fact-finding. Therefore, in the case, that facts could be clarified by one participant especially in his own favour, the chamber must not investigate all conceivable courses of events. The plaintiff has to designate all legally relevant and provable facts as available evidences.

follows that the procedure should be terminated if the claimant fails to perform its obligations in a sufficiently swift manner.[109]

457 Without receiving a detailed statement of fact, the chamber should not be obliged to investigate on its own. Conversely, it follows from this "interaction doctrine" that, in case that the statement of facts by the parties or other facts give the supervisory bodies sufficient grounds for examination, they should be obliged to conduct further *ex officio* investigation and judicial review. The burden of proof for the legal facts should be borne by the one who asserts a right.

458 In the procedure before the MIC, the principle of free evaluation of evidence should apply, which results as a consequence of the principle of judicial investigation. The chamber should be bound to the rules of legal logic as well as to principles derived from recognised empirical principles and methods of interpretation in assessing the facts. In its assessment, the chamber can include in addition to the results following the taking of evidence the statement of facts by the parties, the knowledge of the administration, and as a whole, the overall impression of all circumstances etc.

References

Alexandrov SA (2004) Breaches of contract and breaches of treaty – the jurisdiction of treaty-based arbitration tribunals to decide breach of contract claims in SGS v Pakistan and SGS v Philippines. J World Invest Trade 5:555–577

Alvarado Garzón AE (2019) Designing a multilateral investment court: blueprints for a new route in investor-state dispute settlement. ZEuS 22:475–500

Alvarez JE (2011) The return of the state. Minn J Int Law 20:223–264

Alvarez JE, Khamsi K (2009) The Argentine crisis and foreign investors: a glimpse into the heart of the investment regime. Yearb Int Law Policy 2008–2009:379–478

Binder C (2009) Changed circumstances in international investment law: interfaces between the law of treaties and the law of state responsibility with a special focus on the Argentine crisis. In: Binder C, Kriebaum U, Reinisch A, Wittich S (eds) International investment law in the 21st century, essays in honour of Christoph Schreuer. Oxford University Press, Oxford, pp 608–630

Bjorklund AK (2008) Emergency exceptions: state of necessity and force majeure. In: Muchlinski P, Ortino F, Schreuer C (eds) Oxford handbook of international investment law. Oxford University Press, Oxford, pp 459–523

Bjorklund AK (2009) Economic security defenses in international investment law. Yearb Int Invest Law Policy 2008–2009:479–503

Blackaby N, Partasides C, Redfern A, Hunter M (2009) Redfern and Hunter on international arbitration, 5th edn. Oxford University Press, Oxford

[109] Article 8.35 CETA: "If, following the submission of a claim under this Section, the investor fails to take any steps in the proceeding during 180 consecutive days or such period as the disputing parties may agree, the investor is deemed to have withdrawn its claim and to have discontinued the proceeding. The Tribunal shall, at the request of the respondent, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered the authority of the Tribunal shall lapse."

Böckstiegel KH (2003) The role of the arbitrators in investment treaty arbitration. In: van den Berg AJ (ed) International commercial arbitration: important contemporary questions. Kluwer Law International, The Hague, pp 366–375

Böckstiegel KH, Berger KP, Bredow J (2005) Die Beteiligung Dritter an Schiedsverfahren. Heymann, Köln

Brekoulakis SL (2010) Third parties in international commercial arbitration. Oxford University Press, Oxford

Brown C (2015) International investment agreements – history, approaches, schools. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law, a handbook. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, pp 153–360

Burke-White WW (2010) The Argentine financial crisis: state liability under BITs and the legitimacy of the ICSID system. In: Waibel W, Kaushal A, Chung KH, Balchin C (eds) The Backlash against investment arbitration. Kluwer Law International, Alphen aan den Rijn, pp 407–432

Burke-White WW, von Staden A (2007) Investment protection in extraordinary times: interpreting non-precluded measures provisions. Va J Int Law 48:307–410

Busch ML, Reinhardt E (2003) Transatlantic trade conflicts and GATT/WTO dispute settlement. In: Petersmann EU, Pollack MA (eds) Transatlantic economic disputes: the EU, the US, and the WTO. Oxford University Press, Oxford, pp 465–485

Butler N (2015) In search of a model for the reform of international investment dispute resolution: an analysis of existing international and regional dispute settlement mechanisms. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 353–380

Carbonneau TE (2003) The exercise of contract freedom in the making of arbitration agreements. Vanderbilt J Transnatl Law 36:1189–1232

Commission JP (2007) Precedent in investment treaty arbitration: a citation analysis of a developing jurisprudence. J Int Arbitr 24:129–158

De Brabandere E (2014) Investment treaty arbitration as public international law. Cambridge University Press, Cambridge

Dimitropoulos G (2016) Constructing the independence of international investment arbitrators: past, present and future. Northwest J Int Law Bus 36:371–434

Dolzer R, Schreuer C (2012) Principles of international investment law, 2nd edn. Oxford University Press, Oxford

Douglas Z (2011) The MFN clause in investment arbitration: treaty interpretation off the rails. J Int Dispute Settlement 2:97–113

Dugan C, Wallace D, Rubins ND, Sabahi B (2008) Investor-state arbitration. Oxford University Press, Oxford

Dupont PE (2011) The notion of ICSID investment: ongoing 'confusion' or 'emerging synthesis. J World Invest Trade 12:245–272

Eberhardt P, Olivet E (2012) Profiting from injustice: how law firms, arbitrators and financiers are fuelling an investment arbitration boom. Corporate Europe Observatory and the Transnational Institute, Brussels/Amsterdam

European Federation for Investment Law and Arbitration (2014) TTIP Consultation Submission

Ewing-Chow M, Losari JJ (2015) Which is to be the master? Extra-arbitral interpretative procedures for IIAs. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 91–114

Fontoura Costa JA (2011) Comparing WTO panelists and ICSID arbitrators: the creation of international legal fields, 1/4 Oñati Socio-Legal Series 1

Franck SD (2009) Development and outcomes of investment treaty arbitration. Harv Int Law J 50:435–489

Gaillard E (2005) Establishing jurisdiction through a most-favoured-nation clause. N Y Law J 233, No. 105 of 2.6.2005

Gaillard E, Banifatemi Y (2003) The meaning of "and" in Article 42(1), second sentence, of the Washington Convention: the role of international law in the ICSID choice of law process. ICSID Rev Foreign Invest Law J 18:375–411

Hodgson M (2014) Investment treaty arbitration: how much does it cost? How long does it take? Allen Overy Publications of 18.2.2014

Hofmann R, Tams CJ (2011) International investment law and general international law – from clinical isolation to systemic integration? Nomos, Baden-Baden

Ishikawa T (2015) Keeping interpretation in investment treaty arbitration on track: the role of state parties. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 115–149

Jackson JH (1998) Dispute settlement and the WTO. J Int Econ Law 1:329–351

Jacob M, Schill S (2015) Fair and equitable treatment: content, practice, method. In: Bungenberg M, Griebel J, Hobe S, Reinisch A (eds) International investment law. A handbook. Hart, Oxford, pp 700–763

Kaufmann-Kohler G (2011) Interpretive powers of the free trade commission and the rule of law. In: Bachand F (ed) Fifteen years of NAFTA Chapter 11 arbitration. Juris, Huntington, pp 175–194

Kaufmann-Kohler G, Boisson de Chazournes L, Bonnin V, Mbengue MM (2006) Consolidation of proceedings in investment arbitration: how can multiple proceedings arising from the same or related situations be handled efficiently? Final Report on the Geneva Colloquium of 22.4.2006. ICSID Rev Foreign Invest Law J 21:59–125

Kläger R (2011) "Fair and equitable treatment" in international investment law. Cambridge University Press, Cambridge

Kriebaum U (2014) FET and expropriation in the (invisible) EU model BIT. J World Invest Trade 15:454–483

Kurtz J (2014) Building legitimacy through interpretation in investor-state arbitration: on consistency, coherence and the identification of applicable law. In: Douglas Z, Pauwelyn J, Vinuales JE (eds) The foundations of international investment law, bringing theory into practice. Oxford University Press, Oxford, pp 257–296

Lawson DA (2005) Impartiality and independence of international arbitrators. Swiss Arbitr Assoc Bull 23:22–44

Levesque C, Newcombe A (2013) The evolution of IIA practice in Canada and the United States. In: De Mestral A, Levesque C (eds) Improving international investment agreements. Routledge, London, pp 25–41

Loken K (2013) Introductory note to UNCITRAL rules on transparency in treaty-based investor-state arbitration. Int Leg Mater 52:1300–1308

Manciaux S (2008) The notion of investment: new controversies. J World Invest Trade 9:443–466

Marceddu ML (2016) The EU dispute settlement: towards legal certainty in an uneven international investment system? Eur Invest Law Arbitr Rev 1:33–75

Maupin JA (2011) MFN-based jurisdiction in investor-state arbitration: is there any hope for a consistent approach? J Int Econ Law 14:157–190

McLachlan C (2005) The principle of systemic integration and Article 31(3)(c) of the Vienna Convention. Int Comp Law Q 54:279–319

Moonhawk K (2008) Costly procedures: divergent effects of legalization in the GATT/WTO dispute settlement procedures. Int Stud Q 52:657–686

Newcombe A (2013) Developments in IIA treaty-making. In: De Mestral A, Levesque C (eds) Improving international investment agreements. Routledge, London, pp 15–24

Ortino F (2013) Transparency of investment awards: external and internal dimensions. In: Nakagawa J (ed) Transparency in international trade and investment dispute settlement. Routledge, London, pp 119–158

Paparinskis M (2011) MFN clauses and international dispute settlement: moving beyond Maffezini and Plama. ICSID Rev Foreign Invest Law J 26:14–58

Petrochilos G (2004) Procedural law in international arbitration. Oxford University Press, Oxford

Poudret JF, Besson S (2007) Comparative law of international arbitration, 2nd edn. Sweet & Maxwell, London
Reinisch A (2007) Necessity in international investment arbitration – an unnecessary split of opinions in recent ICSID cases? J World Invest Trade 8:191–214
Reinisch A (2010) From the perennial issue of the notion of investment pursuant to Article 25 ICSID Convention and narrow dispute settlement provisions to further clarifications of substantive standards of protection – ICSID arbitration in 2009. Global Community – Yearbook of International Law and Jurisprudence, 749
Roberts A (2010) Power and persuasion in investment treaty interpretation: the dual role of states. Am J Int Law 104:179–225
Ruthemeyer T (2014) Der amicus curiae brief im Internationalen Investitionsrecht. Nomos, Baden-Baden
Ryan CM (2008) Meeting expectations: assessing the long-term legitimacy and stability of international investment law. Univ Pa J Int Law 29:725–762
Salacuse J (2013) The three laws of international investment. national, contractual, and international frameworks for foreign capital. Oxford University Press, Oxford
Sandrock O (2015) Das Internationale Handelsgericht im TTIP: The Permanent International Investment Tribunal. Recht der internationalen Wirtschaft 61:625–640
Schill S (2007) International investment law and the host state's power to handle economic crises. J Int Arbitr 24:256–286
Schill S (2011) Allocating adjudicatory authority: most-favoured-nation clauses as a basis of jurisdiction – a reply to Zachary Douglas. J Int Dispute Settlement 2:353–371
Schill S (2015) Reforming investor-state dispute settlement (ISDS): conceptual framework and options for the way forward. E15 initiative
Schill S (2016) Sind Regelungen zur Investor-Staat-Streitbeilegung in EU-Freihandelsabkommen sinnvoll? Kölner Schrift zum Wirtschaftsrecht 7:115–121
Schreuer CH (2004) Travelling the BIT route: of waiting periods, umbrella. Clauses and forks in the road. J World Invest Trade 5:231–256
Schreuer CH (2015) Do we need investment arbitration? In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 879–889
Schreuer CH, Malintoppi L, Reinisch A, Sinclair A (2009) The ICSID Convention. A commentary, 2nd edn. Cambridge University Press, Cambridge
Sevilla CR (1998) Explaining patterns of GATT/WTO trade complaints. Working Paper 98-1
Shihata IF, Parra AR (1999) The experience of the international centre for settlement of investment disputes. ICSID Rev 14:299–361
Sinclair AC (2004) The origins of the umbrella clause in the international law of investment protection. Arbitr Int 20:411–434
Tan LY, Bouchenaki A (2015) Limiting investor access to investment arbitration. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 250–309
Tudor I (2008) The fair and equitable treatment standard in the international law of foreign investment. Oxford University Press, Oxford
UNCTAD (2011) Interpretation of IIAs: what states can do, IIA Issues Note December No. 3
Van Damme I (2010) Treaty interpretation by the WTO appellate body. Eur J Int Law 21:605–648
Vandevelde KJ (2010) Bilateral investment treaties. Oxford University Press, New York
Waibel M (2007) Two worlds of necessity in ICSID arbitration: CMS and LG&E. Leiden J Int Law 20:637–648
Wälde TW (2005) The "Umbrella" clause on investment arbitration – a comment on original intentions and recent cases. J World Invest Trade 6:183–236
Wälde TW (2011) "Equality of arms" in investment arbitration: procedural challenges. Transnatl Dispute Manage, 1
Weeramantry JR (2012) Treaty interpretation in investment arbitration. Oxford University Press, Oxford

Wuschka S (2016) Ein Investitionsgerichtshof – Der große Wurf der EU-Kommission? Zeitschrift für Europarechtliche Studien 19:153–176
Yannaca-Small K (2008) Fair and equitable treatment: recent developments. In: Reinisch A (ed) Standards of investment protection. Oxford University Press, Oxford, pp 111–130
Yen TH (2014) The interpretation of investment treaties. Brill Nijhoff, Leiden
Zuleta E (2015) The challenges of creating a standing international investment court. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the investor-state dispute settlement system. Brill Nijhoff, Leiden, pp 403–423

Chapter 6
The Pronouncement of Decisions and Its Consequences

It seems appropriate to start by considering the options of the effects and consequences of the decisions of international dispute settlement bodies, in general, and of investment arbitral tribunals, in particular, in order to make specific recommendations for the structuring of the decisions of an MIC. 459

6.1 Legal Effects of Decisions of International Dispute Settlement Bodies

In theory, a wide range of legal effects of decisions of international dispute settlement bodies exists, from pure declaratory decisions without a strict obligation to comply, to annulments with direct effect on the contested legal act, in the sense of decisions modifying a legal right. 460

In practice, however, there are usually hybrid forms, such as declaratory decisions, advisory opinions or decisions that oblige a party to perform a certain act which must be complied with in substance, or annulments that relate only to internal acts of the organisation, the acting body of which is a dispute settlement body. A genuine annulment of national rules by decisions of international courts and thereby modifying a legal right is practically non-existent and would probably also be contrary to the system. 461

Typically, proceedings before international courts lead to a decision which has declaratory effect but whose binding force for the parties to the dispute results in a clear obligation to comply with the decision.[1] That is, even if an international court 462

[1] Article 59 ICJ Statute in conjunction with Article 94 para. 1 UN Charter; Article 49 para. 1 ECHR; Article 296 para. 1 UNCLOS concerning the binding nature of decisions for the parties; Harris et al. (2009), p. 162 et seq.; Shaw (2014), p. 798.

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finds that a national legal act (law, administrative act, national judgment or other acts) is unlawful under public international law, the former remains unaffected but the responsible state has to ensure that the unlawfulness is abolished. For example, in the case of decisions of the ICJ or the ECtHR, this may lead to an international obligation to repeal the national legal act.[2]

463 The solution that states pay damages as an alternative to remove the international injustice is not found in decisions of the ICJ, but in some cases before human rights courts.[3] This was also discussed in the early investment arbitration practice when, in the course of the Libyan oil concession cases in the 1970s,[4] some arbitral tribunals permitted the expropriating state to elect for the option of compensation, even for expropriations in violation of international law, which in principle require restitution.[5]

464 If it is desirable from a policy perspective that the decisions of an MIC should also not be subject to secondary obligations to repeal national legal acts, this should be explicitly set down.[6]

465 For other international dispute settlement bodies, the legal effects of declaratory decisions may be even weaker. For example, WTO Panels and the WTO Appellate Body only have the power to find infringements, but not to order the removal of the illegal acts or alternatively, the payment of damages.[7] Rather, the power of the WTO

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[2]See e.g. ICJ, *Democratic Republic Congo v. Belgium*, ICJ Reports, 2002, p. 31 et seq. The ICJ finds the duty of Belgium to cancel a Belgian warrant of arrest instead of reversing the warrant as direct consequence of the decision; ECtHR (GC), No. 32772/02, *Verein gegen Tierfabriken (VgT) v. Switzerland (No 2)*, para. 85 et seq.; IACHR, *Aloeboetoe et al. v. Suriname*, Judgment, 10.9.1993, IACHR (Ser. C) No. 15 (1993).

[3]See e.g. ECtHR, No. 27527/03, *L. v. Lithuania*, Judgment, 11.9.2007, para. 74, where the ECtHR adjudicates the opportunity of compensation, if the required change in the law is not made within 3 months.

[4]*Libyan American Oil Company (Liamco) v. Libya*, Award, 12.4.1977, 62 ILR (1981) 140; *British Petroleum v. Libya*, Award, 10.10.1973 and 1.8.1974, 53 ILR (1973) 297.

[5]See *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libya,* (1979) 53 ILR 389, para. 111, and *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10.2.1999, para. 136 et seq., where the tribunals awarded such an option to be provided with mere financial compensation to the states.

[6]See e.g. Article 34 US Model BIT 2012: "1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution."; Art. 1135 NAFTA: "1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution."

[7]The WTO cannot adjudicate compensation, if the defendant party accepts this obligation voluntarily, cf. Article 22.2 DSU: "If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute

Dispute Settlement Body is limited to "recommending" the WTO Members a WTO compliant behaviour going forward. Should the latter fail to comply with these recommendations, only countermeasures ("trade retaliation") of the affected WTO Members can be approved, which allow them to compensate for the expected economic damage resulting from non-compliance with WTO rules and recommendations.

Of course, the above-mentioned collateral legal consequences of purely declaratory decisions have a steering effect, urging the disputing parties to implement the content of declaratory decisions to the extent that the unlawfulness is removed. **466**

Particularities of the effects of decisions arise in individual courts of regional economic organisations. Of particular note in this context is the CJEU. Its decisions in proceedings between Member States and in infringement proceedings brought by the Commission against Member States for breaches of EU Law are declaratory; however, the TFEU implies a clear obligation of states to remove the illegality found therein.[8] Far-reaching effects of judgments are found in the so-called actions for annulment, which are, however, only directed against acts of Union institutions. They lead to the repeal of secondary legislation of the Union.[9] However, this is a quasi-constitutional judicial control of the legal acts of the Union institutions. It is significant that even the CJEU has no comparable jurisdiction with regard to unlawful acts of the Member States. **467**

In summary, it can be said that general public international law does not foresee decisions of international judicial institutions that have a direct effect over national law. As a rule, there is only an obligation to remove any illegality of national legal acts under public international law and to comply with international obligations. This can also be mitigated by a mere liability for compensation. **468**

6.2 Effects of Decisions of Investment Arbitral Tribunals

The legal effects of the decisions of investment arbitral tribunals are generally not expressly included in the respective investment protection treaties. Rather, they result from the applicable rules of procedure or from the general public international law principles of state responsibility.[10] **469**

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settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements." See Bronckers and van den Broak (2005), p. 101.

[8] Article 260 TFEU.

[9] Article 264 TFEU.

[10] The International Law Commission lists the possibilities of "restitution, compensation and satisfaction" in Article 34 ILC Draft Articles on State Responsibility. The consequences of a

470 According to Article 53 ICSID Convention, ICSID arbitral awards are binding on the parties to the dispute and are not subject to appeal (except for the possibilities of annulment, interpretation and revision of errors in calculations provided for in the Convention).[11]

471 According to Article 34 para. 2 of the UNCITRAL Rules,[12] UNCITRAL awards are also final and binding, and are therefore not subject to appeal or other legal remedies in arbitration,[13] and must be implemented by the parties immediately.[14]

472 In addition, the rules of the ICC,[15] the LCIA,[16] and the SCC[17] contain provisions that declare the arbitral awards rendered under the respective arbitration rules as final and binding.

473 The same applies to some sectoral and regional treaties with investment protection chapters such as NAFTA[18] and the ECT, which, while referring in principle to various procedural rules, still specifically lay down the finality and binding force.[19]

474 This means, in practice, that arbitral tribunals can find violations of standards contained in investment protection treaties and determine compensation for lawful expropriations. For unlawful expropriations or other violations of investment protection standards, it can award damages or grant a decision (or award) for specific performance.

475 Ordering the restoration of the situation before the treaty infringement by arbitral tribunals would constitute an interference with the sovereignty of states. Therefore, arbitral tribunals have so far refused to order changes in national legal orders.[20] Even

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"specific performance" are not explicitly stated by the ILC Articles. Gray (1999), p. 419 et seq., assumes that the ILC "specific performances" can be subsumed as "restitution".

[11] Article 53 para. 1 ICSID Convention: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

[12] UNCITRAL Arbitration Rules 1976, 15 ILM 701 (1976), www.uncitral.org/uncitral/en/uncitraltexts/arbitration/1976Arbitration_rules.html; UNCITRAL Arbitration Rules (as adopted in 2013), www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[13] The UNCITRAL Rules accept an interpretation and correction of misspellings or miscalculations. The majority of all legal systems accept the opportunity of setting aside of an arbitral award for special reasons, following the UNICTRAL Model Law. Therefore, the finality of awards in national law of the *forum arbitri* is not absolute. See Caron and Caplan (2013), p. 740.

[14] Article 34 para. 2 UNCITRAL Arbitration Rules: "All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay."

[15] Article 35 para. 6 ICC Arbitration Rules 2017.

[16] Article 26 para. 8 LCIA Arbitration Rules 2014.

[17] Article 46 SCC Rules 2017.

[18] Article 1136 NAFTA.

[19] Article 26 para. 8 ECT.

[20] Cf. de Brabandere (2014), p. 184 et seq.; *LG&E v. Argentinia*, ICSID Case No. ARB/02/1, Award, 25.6.2007, para. 87: "[. . .] the judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty."

if under general public international law, according to Article 34 of the ILC Articles on State Responsibility,[21] compensation is a secondary form of redress which should only be effective in case of impossibility or inappropriateness of restoring the situation before the treaty infringement,[22] arbitral awards usually oblige states exclusively to pay damages.[23]

However, it is generally accepted that arbitral tribunals can also award non-monetary remedies in arbitral awards.[24] Opposite opinions in the literature justify the refusal of non-monetary remedies in investment disputes primarily with practical problems of the enforcement of such arbitral awards.[25] Although the ICSID Convention in Article 54 only regulates the enforceability of pecuniary obligations resulting from arbitral awards, it cannot be concluded that non-monetary remedies, such as a right to the fulfilment of treaty obligations, should not be granted by an ICSID tribunal.[26] Some ICSID tribunals[27] and non-ICSID tribunals[28] have seized the opportunity to award non-monetary remedies.[29] Since only financial compensation can be enforced through ICSID, an investor may need to have recourse to the New York Convention for the enforcement of non-monetary claims.[30] **476**

Limiting the available remedies under international treaty law is legally possible. A number of investment protection agreements have introduced such limitations on damages in order to exclude non-monetary remedies.[31] **477**

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[21] Article 34 ILC Articles on State Responsibility: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

[22] Permanent Court of International Justice, Factory at Chorzow, Judgment No. 13, 1927, p. 47; de Brabandere (2014), p. 179 et seq.

[23] McLachlan et al. (2008), p. 341; Gray (1987), p. 11; Brower and Brueschke (1998), pp. 473, 477; Toope (1990), pp. 165–167.

[24] McLachlan et al. (2008), p. 341; Schreuer (2004), p. 325; de Brabandere (2014), p. 187.

[25] See a summary of these critical opinions in Dermikol (2015), pp. 403, 408.

[26] Schreuer (2004), p. 325, bases his opinion on the *travaux préparatoires* and the international practice of arbitral tribunals.

[27] *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/02, Decision on Jurisdiction and Admissibility, 24.9.2008, para. 166-168; *ATA Construction v. Jordan*, ICSID Case No. ARB/08/2, Award, 18.5.2010; *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8.4.2013.

[28] *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/02, Decision on Jurisdiction and Admissibility, 24.9.2008, para. 166-168; *ATA Construction v. Jordan*, ICSID Case No. ARB/08/2, Award, 18.5.2010; *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8.4.2013.

[29] *Goetz and others v. Republic of Burundi*, ISCID Case No. ARB/95/3, Award, 10.2.1999, para. 136 et seq. is an interesting case concerning the possibility of awarding non-monetary legal remedies. As requested, the ICSID Tribunal awarded a two-tiered legal remedy: only if Burundi will not have fulfilled his contractual obligation to perform within a fixed period of time, Burundi would have to pay damages. Although there was an obligation for an act with legal consequences directly to national law, it could only be enforced voluntarily. This solution enables the state to decide autonomously, if a change in the law respectively performance of the contract or performance of damages could better be implemented.

[30] Schreuer et al. (2009), p. 1138 et seq.

[31] See e.g. Article 34 US Model BIT 2012; Article 1135 NAFTA; Article 26 para. 8 ECT.

478 Decisions of the MIC should essentially be limited to finding violations of investment protection standards and should have the power to award damages to the prevailing party. In addition, the power to determine the existence of a generally (not unlawful) indirect expropriation and to determine the amount of compensation due, which is usually enshrined in the individual investment protection treaties, should also be provided for.

References

Bronckers M, van den Broak N (2005) Financial compensation in the WTO. Improving the remedies of WTO dispute settlement. J Int Econ Law 8:101–126

Brower CN, Brueschke JD (1998) The Iran-United States claims tribunal. Martinus Nijhoff Publishers, Leiden

Caron DC, Caplan LM (2013) The UNCITRAL arbitration rules: a commentary, 2nd edn. Oxford University Press, Oxford

De Brabandere E (2014) Investment treaty arbitration as public international law: procedural aspects and implications. Cambridge University Press, Cambridge

Dermikol B (2015) Remedies in investment treaty arbitration. J Int Dispute Settlement 6:403–426

Gray CD (1987) Judicial remedies in international law. Clarendon Press Publication, Oxford

Gray C (1999) The choice between restitution and compensation. Eur J Int Law 10:413–423

Harris DJ, O'Boyle M, Bates E, Buckley C (2009) Harris, O'Boyle, Warbrick: Law of the European Convention on Human Rights. Oxford University Press, Oxford

McLachlan C et al (2008) International investment arbitration – substantive principles. Oxford University Press, Oxford

Schreuer C (2004) Non-pecuniary remedies in ICSID arbitration. Arbitr Int 20:325–332

Schreuer CH, Malintoppi L, Reinisch A, Sinclair A (2009) The ICSID Convention. A commentary, 2nd edn. Cambridge University Press, Cambridge

Shaw MN (2014) International law, 7th edn. Cambridge University Press, Cambridge

Toope SJ (1990) Mixed international arbitration. Grotius Publications Ltd., Cambridge

Chapter 7
Recognition and Enforcement of Decisions

A key issue for any dispute resolution mechanism is the question of effectiveness of decisions. This is ensured by the fact that these are not only final and binding (see paras. 469 et seqq.), but also legally enforceable if necessary. **479**

The distinction between recognition and enforcement of decisions has little practical relevance,[1] especially because due to international enforcement mechanisms such as the ICSID Convention[2] or the New York Convention,[3] no separate recognition procedure (in the sense of a double *exequatur*) is required for enforcement. **480**

This enforceability could theoretically be ensured by international institutions (for example, measures of the UN Security Council for enforcing judgments of the ICJ),[4] but is usually guaranteed through the support of state courts. **481**

The prevailing model in investment arbitration is the recognition and enforcement of awards through state courts in third countries according to the provisions of the ICSID Convention or the New York Convention. Both conventions state that arbitral awards are final and binding on the specific parties to the dispute and that they can be recognised and enforced also in other states which are a party to the treaty, but were not involved in the investment dispute. **482**

In practice, it often occurs that losing state parties do not comply with their obligations resulting from awards; in such cases, the prevailing party often has the only a chance to successfully enforce the award if the assets of the losing party are **483**

[1] Toope (1990), pp. 102 et seq.; however, an important distinction is, that a decision, indeed, can be accepted as *res judicata*, but, at the same time can be unenforceable e.g. due to state sovereignty.

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18.3.1965, 575 UNTS 159; 4 ILM 532 (1965).

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38; 7 ILM 1046 (1968).

[4] Article 94 para. 2 UN Charter provides powers for the UN Security Council to enforce ICJ decisions.

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located in a third state and can be accessed there via an enforcement procedure. Therefore, it would be useful for the MIC to have its own procedure permitting enforcement in third countries as well as in other MIC states at least. In addition, it must be examined whether the MIC can be designed in such a way that its decisions are considered as arbitral awards within the meaning of the ICSID Convention or the New York Convention. This would have the advantage that MIC decisions would be directly enforceable in the already numerous state parties to the two conventions and no separate or new enforcement mechanism would have to be created.

484 ICSID awards enjoy a particularly high level of enforceability. According to the ICSID Convention, ICSID awards have to be recognised as binding and their monetary content (namely compensation and damages) has to be enforced in a manner equivalent to a last-instance decision of its own state courts by all (currently 163[5]) parties to the ICSID Convention.[6] This means that a review as to whether the content of the specific ICSID award is in accordance with the *ordre public* or similar concepts has to be omitted. The only permissible restriction of enforceability is the law of state immunity in enforcement proceedings.[7]

485 In contrast, non-ICSID awards are governed by the provisions of the New York Convention (when enforcing it in one of the current 160[8] parties to the Convention). Non-ICSID awards include arbitral awards under the ICSID Additional Facility Rules,[9] via the UNCITRAL Rules, according to the Rules of the ICC,[10] the SCC[11] or the LCIA.[12]

486 Although investment arbitration awards are sometimes assumed to be "anational" or "internationalised" awards which have not been necessarily made in the territory of a party to the treaty, as non-domestic arbitral awards they are—according to

[5] As of 2.8.2019.

[6] Article 54 ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [. . .]."

[7] Article 55 ICSID Convention: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

[8] As of 2.8.2019.

[9] Schreuer et al. (2009), pp. 1120 et seq.; see also Article 3 Additional Facility Rules: "Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."

[10] ICC Rules of Arbitration 2012, www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/.

[11] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2010, www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf.

[12] LCIA, Arbitration Rules 1998, 37 ILM 669 (1998), www.lcia-arbitration.com; LCIA, Arbitration Rules 2014 www.lcia.org/dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

predominant opinion—[13] at least subject to the New York Convention (see paras. 526 et seqq.).[14]

Meanwhile, it is also largely agreed that investment arbitral awards, despite their special character (which often includes a review of sovereign state activities), have to be considered as "commercial" disputes for those states who have declared a corresponding reservation (see paras. 530 et seqq.)[15] to the New York Convention.[16] In particular, some investment protection agreements explicitly state this interpretation.[17] **487**

Furthermore, investment arbitration based on treaties, according to which there is no written *ex ante* arbitration agreement between the parties to the dispute, but rather arbitration based on a claim according to the provisions of the investment protection treaty,[18] is in practice not an obstacle to the requirement of a written agreement under the New York Convention.[19,20] **488**

[13] Article I para. 1 NYC: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

[14] See Delaume (1993), pp. 48 et seq.; Delaume (1995), p. 170; Choi (1995–1996), pp. 190 et seq.

[15] Article I para. 3 NYC.

[16] See *United Mexican States v. Metalclad*, Canada, Supreme Court of British Columbia, 2.5.2001, [2001] BCSC 664, 5 ICSID Reports 236; *United Mexican States v. Feldman Karpa*, Canada, Ontario Court of Appeal, 11.1.2005, 9 ICSID Reports 508, 516, para. 41; *Czech Republic v. CME Czech Republic BV*, Sweden, Svea Court of Appeal, 15.5.2003, 9 ICSID Reports 439, 493.

[17] E.g. Article 1136 para. 7 NAFTA: "A claim that is submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention." Article 26 para. 5 lit. b) ECT: "Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of that Convention."

[18] Cf. Paulsson (1995), p. 232.

[19] Article II para. 1 NYC: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

[20] See *Republic of Ecuador v. Occidental Exploration and Production Company*, England, Court of Appeal, 9.9.2005, [2005] EWCA 1116, 12 ICSID Reports 129. Cf. Article 26 para. 5 lit. a) ECT: "The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: [. . .] (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 [hereinafter referred to as the New York Convention]." Cf. also Article 25 para. 2 lit. b) US Model BIT 2004; Article 28 para. 2 lit. b) Canadian Model BIT 2004.

489 Similarly like the ICSID Convention, the New York Convention obliges all parties to the agreement to recognise and enforce arbitral awards.[21] Enforcement may be rejected by the restrictions of sovereign immunity. In addition, Article V NYC states more far-reaching exceptions, according to which a conflict with the *ordre public*, the invalidity of the arbitration agreement (for instance due to legal incapacity of the parties or another lack of will), a violation of the right to be heard, lack of jurisdiction of the tribunal, a flawed constitution of the arbitral tribunal or a lack of binding legal force and/or the annulment of the arbitral award according to the *lex arbitri* or the law of the state of residence can lead to the refusal of enforcement.[22]

490 Although enforcement under the ICSID Convention has the advantage that the awards do not have to withstand a review by the executing State, the New York Convention is considered as an effective and established enforcement mechanism as well.

491 A substantive revision of the award is only permitted to a very limited extent in both conventions and the successful claimant only has to have the award being declared enforceable in the state of enforcement. Another advantage of the conventions is that there is already plenty of court practice. The respective enforcement courts could thus be guided by their experience and parties could to a certain extent rely on past cases.

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[21] Article III NYC: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

[22] Article V NYC: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Accordingly, qualifying decisions of the MIC as arbitral awards within the meaning of the ICSID Convention or the New York Convention would be useful in terms of effective enforceability. That could have prompted the EU Commission to describe the decisions of the permanent investment courts in CETA, the EU-Vietnam IPA and the TTIP draft as arbitral awards within the meaning of the ICSID Convention. 492

In the following paragraphs, it will therefore be examined to what extent the decisions of a permanent MIC can be qualified as arbitral awards in the sense of the ICSID Convention or the New York Convention. 493

However, it has to be pointed out at the outset, that in both the enforcement regime of the ICSID Convention as well as the New York Convention, the national courts having jurisdiction over enforcement are responsible for the interpretation and application of the conventions. Most of the terms of the conventions are defined by national law. Hence, there is no consistent interpretation and enforcement practice worldwide. The national conflict-of-law rules and the *lex arbitri* may also have an impact on the outcome of the application of the convention through the national courts. For this reason, the following statements always have to be understood with the proviso that an attempted enforcement of an MIC decision could be very different, depending on the state in which it is handed down. 494

7.1 Decisions of the MIC as Arbitral Awards Within the Meaning of the ICSID Convention

The provisions of the ICSID Convention outlined above clearly refer to "arbitral awards under this Convention",[23] i.e. in order to benefit from the particularly effective enforcement regime of the ICSID Convention, it has to be an ICSID arbitral award. 495

It seems impossible that decisions of a permanent MIC could be considered as ICSID arbitral awards. The ICSID Convention provides a specific method for constituting the panels, certain rules of procedure, the exclusion of legal remedies such as appeals and similarly only very limited review mechanisms in the form of annulment procedures and interpretation and revision of arbitral awards.[24] The approaches discussed above of designing an MIC and its decisions contradict all these conditions, which have to be fulfilled to qualify a decision as an ICSID award. 496

However, it would be conceivable to consider the decisions of the MIC as an ICSID award after *inter se* modification of the ICSID Convention, thus as a modification only between those involved and not between all parties to the 497

[23] Article 54 ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [...]."

[24] Reinisch (2016), pp. 765 et seq.

agreement. According to the principles codified in the VCLT, an *inter se* modification of a multilateral treaty between various states which agree to do so, requires that the other parties to the agreement are impaired neither in their rights nor in their obligations and that the modification is not incompatible with the object and purpose of the treaty as a whole.[25]

498 Regarding the ICSID Convention, a modification would probably not affect the rights and obligations of other ICSID States, such that the assessment of the permissibility of the modification depends on what the exact object and purpose of the ICSID Convention is. If the object and purpose of the ICSID Convention is to provide a dispute settlement mechanism between investors and states, which can be inferred from Article 1 para. 2 ICSID Convention and not the specific form of dispute resolution in force, a modification for MIC decisions is likely to be allowed.[26] However, this is not undisputed[27]; but even if an *inter se* modification of the ICSID Convention would be considered admissible, the resulting decisions could not be qualified as ICSID awards, rather at best as arbitral awards for the modifying parties; only they would be obliged to enforce it.

499 Therefore, it would be better to consider a general revision of the ICSID Convention in order to achieve a far-reaching enforceability of MIC decisions as ICSID arbitral awards. The ICSID Convention requires the consent of all parties for a revision of the Convention. For practical reasons, this consensus is very difficult to achieve.[28] Hence, it makes sense to examine the alternative of whether decisions of an MIC can be considered as arbitral awards within the meaning of the New York Convention and thus are subject to its recognition and enforcement regime.

[25]Cf. Article 41 VCLT.

[26]A modification of the ICSID Convention between states consenting hereto, requires that the remaining Member States neither are affected in their rights nor in their obligations, and that the modification is not contradictory with the object and the purpose of the treaty as a whole (as stated in Article 41 VCLT and, even though not undisputed, provided in customary law). Since a modification most probably would not affect the rights and obligations of other ICSID Member States, the admissibility of the modification depends on the object and purpose of the ICSID Convention. If the object and purpose of the ICSID Convention would be a dispute settlement mechanism between investors and states, in reference to Article 1 para. 2 ICSID Convention, and the concrete design of this dispute settlement would not belong to the object and purpose, a modification for MIC decisions would presumably be admissible. For a closer analysis of this topic, see Reinisch (2016), p. 761.

[27]Calamita (2017).

[28]Schreuer et al. (2009), p. 1265.

7.2 Decisions of the MIC as Arbitral Awards Within the Meaning of the New York Convention

The decisions of the MIC would have to be arbitral awards under Article I NYC[29] in order to fall within the material scope of application of the New York Convention.[30] There is no single definition of the term "arbitral award". Neither the New York Convention, nor the UNCITRAL Model Law[31] contain a legal definition. The characterisation of a decision as an arbitral award thus falls within the competence of the courts having jurisdiction over enforcement or the respective national legal systems.[32] **500**

However, some similarities can be inferred from literature and court decisions on the definition of arbitral awards. In any case, the principle of "substance over form" prevails: the mere designation of a decision as such does not automatically make it an arbitral award.[33] **501**

The four constituent elements of an arbitral award are: (1) a voluntary submission of the parties (2) to a legally binding final dispute settlement (3) by a non-state decision-maker (4) which is constituted by arbitrators selected by the parties. The importance of this last element is considered diversely.[34] As the question whether a **502**

[29]Article I NYC: "(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. (2) The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

[30]See on the contrary Petrochilos (2004), p. 378, para. 8.100, who considers that the classification of a decision as arbitral award by a legal order is no *ratione materiae* requirement for the applicability of the NYC; he disagrees expressly with Sanders by arguing that the NYC uses the term "awards" in a "rudimentary legal manner": "to refer to what is commonly known as 'award' and 'arbitration' [...] it uses autonomous terms, without reference to any law, to refer to the intrinsic characteristics of as type of proceedings." According to Petrochilos, the NYC should clarify explicitly, that "awards" are defined pursuant to a certain legal order like in other provisions of the NYC (e.g. Art. V NYC).

[31]Article 31 UNCITRAL Model Law regulates only "form and content of award". Herefrom it can be concluded that the awards are made by "arbitrators" of an "arbitral tribunal".

[32]Ehle (2012), pp. 32–34, concluding that from national laws and decisions no uniform or only predominant practice can be derived about whether the *lex fori*, the *lex arbitri*, a combination of both or an autonomous interpretation of the NYC is decisive for the characterisation of awards. Bermann (2014), pp. 13 et seq., concludes from a comparative law perspective that a considerable number of legal orders do not state a significant definition of awards, neither by law, nor by case law; in and about the same number of legal orders have a very broad definition of awards and a smaller group requires the finality and the legally binding effect of the decision for the definition of awards by copying Art. 31 UNCITRAL Model Law. Born (2014), pp. 246 et seqq.

[33]Ehle (2012), p. 35.

[34]Kaufmann-Kohler and Potestà (2016), para. 86; see Born (2014), p. 240, remarking on the prerequisites of "due process"; Ehle (2012), pp. 34–36, identifying two characteristics of all awards:

decision is an arbitral award under the New York Convention ultimately remains within the competence of the respective national courts having jurisdiction over enforcement, the possible enforceability of an MIC decision can only be tentatively assessed here.

7.2.1 Voluntary Submission by the Parties

503 Article I para. 2 NYC states that decisions which are enforceable under the New York Convention include those "to which the parties have submitted". This voluntary submission is considered to be a significant difference between arbitration and compulsory court jurisdiction.[35]

504 Party autonomy in arbitration proceedings, which manifests itself in a voluntary declaration of submission, proves to be a particularly important element of an arbitral award. Whether it is sufficient for such a declaration of submission that the parties fall within the scope of application of an international investment agreement, which compulsorily provides an arbitral tribunal for the purposes of dispute settlement, is controversial. An MIC would constitute such a compulsory dispute resolution system; investors, who fall within the scope of application of the respective agreement which provides for the dispute settlement jurisdiction of the MIC, could file claims against states only under the MIC system, without the individual investors having ever agreed to the MIC's authority.[36] Whether an MIC decision derives from

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they are made by a tribunal and are final and legally binding. This opinion focuses on the definition of the term "arbitral tribunal", which corresponds to the above mentioned "awards": "a private panel of one or more arbitrators appointed to resolve a dispute by way of arbitration instead of state court proceedings, deriving its authority and jurisdiction from an agreement between the parties." Ehle considers the compliance with principles of fair trial as a characteristic of arbitral tribunals. Additionally, the attribute, that tribunals are *ad hoc* institutions is repeatedly mentioned. However, in the context of the enforcement of MIC decisions through the New York Convention this characteristic does not have to be addressed, since Article I para. 2 NYC explicitly declares awards of permanent arbitral institutions as enforceable.

[35]See e.g. *Altain Khuder LLC v. IMC Mining Inc*, Victoria State Court, 2011, para. 295: "unlike court proceedings, arbitration proceedings are consensual"; Born (2014), pp. 249–251.

[36]A similar constellation is explicitly provided in Article 26 para. 5 ECT. This provision states that the consent of all parties to the ECT regarding the submission to arbitral tribunals is to be considered compliant with the ICSID Convention and New York Convention enforcement requirements. Article 26 para. 5 ECT: "(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and (iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules. (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York

the voluntary submission of the parties would thus be one of the key points for the issue of enforceability under the New York Convention.

505 It is indisputable that the conclusion of an IIA which includes a general, compulsory dispute settlement system fulfils the requirement of voluntary submission in regard to the state party.[37] If an investor would like to file a claim against the state on the basis of an IIA and not under national law, the investor submits itself to one of the proposed dispute resolution mechanisms by bringing the dispute to arbitration. If this dispute settlement mechanism is the ICSID Convention, the resulting award can, according to prevailing opinion, also be enforced through the New York Convention and not just through the ICSID Convention.[38]

506 However, it is considered controversial in the context of the IUSCT whether an investor voluntarily submits itself as soon as it assigns the case to an arbitration tribunal and thus whether the submission element of an arbitration award according to the New York Convention is fulfilled. Since US or Iranian investors in investment disputes against Iran or the US may bring a case only before the IUSCT and not before domestic courts of the two states respectively, both literature[39] and courts[40] have considered that the lack of alternative dispute resolution options could undermine the voluntary nature of the submission.

507 However, in the few cases in which the New York Convention was used for the enforcement of awards of the IUSCT and the characterisation of the decision as an arbitral award was discussed,[41] the courts in general came to the conclusion that the submission of individual investors can be replaced through the consent of the

Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention." See also *Republic of Ecuador v. Occidental Exploration and Production Company*, England, Court of Appeal, 9.9.2005, [2005] EWCA 1116, 12 ICSID Reports 129; cf. also Article 25 para. 2 lit. b) US Model BIT 2004; Article 28 para. 2 lit. b) Canadian Model BIT 2004; Article 1136 para. 6 NAFTA.

[37] Paulsson (1995), p. 233; van Harten and Loughlin (2006), pp. 128 et seq.

[38] Van den Berg (1981), p. 99; Cane (2004), pp. 444 et seq.; Schreuer et al. (2009), p. 1119; Tawil (2009), p. 335, fn. 42; Lew et al. (2003), p. 801; Verhoosel (2009), pp. 310 et seq.

[39] Ehle (2012), pp. 54 et seq. takes the view that IUSCT cannot make awards in the sense of the New York Convention, since the Algiers Accords was made admissible based on public international law treaties and not based on private law declarations; hence, the element of voluntary submission, according to Ehle, is missing. Ehle concludes that arbitral tribunals established by law can never make arbitral awards in the sense of the NYC, based partly on the text of the convention, partly on the *travaux préparatoires*. Kaufmann-Kohler and Potestà (2016), pp. 38 et seq., identify this point as the main problem of possible enforceability of arbitral awards of a permanent international arbitral tribunal under the NYC.

[40] See *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, US Court of Appeals for the Ninth Circuit, Nos. 88-5879 and 88-5881, 1989, France No. 33; *Abrahim Rahman Golshani v. The Government of the Islamic Republic of Iran*, Bureau for International Legal Services, Cour d'Appel (Court of Appeal), 28.6.2001.

[41] In other cases, the characterisation of IUSCT decisions as awards in the sense of the New York Convention was not mentioned.

respective government to settle disputes through the IUSCT[42] or that bringing the case before the IUSCT by the investor is a voluntary submission.[43]

508 One opinion in the literature suggests that the voluntary nature of submission should be sufficient for enforcement under the New York Convention as long as investors still have the choice between settling disputes through an international arbitral tribunal or national courts.[44] This opinion can be justified by the fact that the submission of investors under ICSID proceedings is considered to be sufficiently voluntary for the characterisation as an arbitral award under the New York Convention.

509 Therefore, it would be more likely that national courts consider the element of voluntary submission to be fulfilled if the MIC should leave domestic jurisdiction accessible to investors.

7.2.2 Final and Binding Dispute Resolution

510 The fact that an arbitral award under the New York Convention must result in a final and binding resolution of the dispute does not present any problems in the case of MIC decisions.[45] Arbitration is a genuine alternative to national jurisdiction. In arbitration, the parties expect a binding decision by a third, neutral party in a court-like procedure.[46] In contrast to this are, for example, mediation procedures or simple arbitration reports, which do not lead to arbitral awards and therefore would not be enforceable under the New York Convention.

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[42]In *Ministry of Defense of the Islamic Republic of Iran v. Gould*, the court held that the President can replace a voluntary submission for arbitral awards under the New York Convention (according to Article I para. 2 as permanent arbitral award) with an Executive Order submitting US citizens to the jurisdiction of the IUSCT. Alternatively, the circumstance, that *Gould* had brought the case before the IUSCT voluntarily, would constitute a ratification of the submission by the President. In the cases, *Iran Aircraft Industries v. AVCO* and *Flatow v. Iran*, the courts had decided correspondingly. In France, the court had equally decided in *Golshani v. Iran*, that *Golshani* could not argue, that no declaration of submission existed, since he had voluntarily brought the case before the IUSCT.

[43]In 1985, the English High Court had made an *obiter dictum* in *Dallal v. Bank Mellat*, that the NYC would not be applicable for the enforcement of the IUSCT in England. The High Court had not held the decision as an award under the NYC, since according to the *lex arbitri* (according to the High Court Dutch law), an award would require a declaration of submission in writing and signed by both parties. However, the High Court in *Dallal* had solely to decide on the admissibility of the IUSCT and not on the question whether the NYC would be applicable to IUSCT decisions. The High Court had decided that *Dallal* had submitted himself voluntarily to the IUSCT by bringing the case before the tribunal and, therefore, at least had established the jurisdiction of the tribunal. In any case, according to the High Court, the prerequisites of a voluntary submission were fulfilled.

[44]Kaufmann-Kohler and Potestà (2016), para. 88.

[45]Ehle (2012), p. 37, para. 32.

[46]Ehle (2012), p. 37.

In any case, an MIC, which should undoubtedly have court-like features, would fulfil the requirement that a third, neutral party renders a final resolution of a given dispute in a court-like procedure. **511**

7.2.3 Non-State Decision-Makers

Both national court decisions and prevailing opinion in the literature agree that an essential characteristic of arbitral tribunals is their private, non-governmental nature, which distinguishes them from courts or governmental institutions.[47] **512**

This raises the question of whether the MIC should be considered as a public or private entity. Some authors draw parallels to the ICJ and ECtHR to show that while a permanent investment tribunal would not be an institution of state justice, it would certainly not be a "private" entity.[48] Others refer to the IUSCT as an institution *sui generis*.[49] **513**

A solution would be to give the MIC sufficient "private" elements to classify it as an arbitral tribunal under the New York Convention. For example, a permanent judiciary might conflict with the characterisation as a private entity. However, a list of specific candidates used in the election procedure of the judicial bench could solve this problem.[50] Here, this element of arbitration overlaps with the fourth element—the arbitrators selected by the parties—which will be discussed below (see paras. 517 et seqq.). **514**

The MIC is not likely to be a less private entity than the IUSCT, whose nature as a state or private institution has not been addressed during enforcement procedures under the New York Convention.[51] In states which enforce decisions of the IUSCT as arbitral awards according to the New York Convention, this element should therefore not be a problem. In general, this third element cannot be evaluated independently, but rather can only be clarified from the overlap and elaboration of the other elements. **515**

[47] Born (2014), pp. 255–258 accepts the difference between arbitration and choice of jurisdiction clauses in court proceedings: in the case of arbitral proceedings, a dispute is transferred to another, non-state level and will not be decided by state officials, whereas, in the case of choice of jurisdiction clauses, only a specific national court was chosen by the parties. Additionally, in the case of choice of jurisdiction clauses, the parties do not choose the individuals who take the decision, but the judges out of an existing judiciary, that are chosen by the court, independent from the parties' wishes.

[48] Kaufmann-Kohler and Potestà (2016), pp. 36 et seq.

[49] Toope (1990), p. 284.

[50] Kaufmann-Kohler and Potestà (2016), pp. 36 et seq.

[51] Neither *Ministry of Defense of the Islamic Republic of Iran v. Gould*, *Flatow v. Iran* nor *Dallal v. Bank Mellat* discuss this aspect.

7.2.4 Arbitrator Selection by the Parties

516 The last element of arbitral awards is not consistently given the same degree of attention within the literature.[52]

517 If the MIC were to be permanently established and regulated by the member states only and if these states elected the judges exclusively, while investors had no impact on that process, one could doubt the private nature of such an institution. This is also a significant difference to ICSID procedures, whose decision-makers are at least private: both parties to the dispute, the respondent state and the investor, have the same influence on the constitution of the arbitrator's bench.

518 Again, an examination of the IUSCT can be useful here. Iran, the US and the state-appointed arbitrators each select one third of the nine arbitrators.[53] Consequently, only the states, but not the investors, have an influence on the decision-makers in the IUSCT. In the rulings on the enforcement of IUSCT awards through the New York Convention, this arrangement of the arbitrator's bench was not problematic.[54]

519 It is also frequently argued that a modern definition of arbitration does not require the arbitrators being elected by the parties, since the focus would lie on the voluntary submission of the parties, as has already been confirmed by some arbitral tribunals.[55]

520 One possibility of making the MIC more tribunal-like would be to use *ad hoc* judges appointed by the investors in each case in addition to the permanent judges appointed by the states (see para. 174). This arrangement would create space for party autonomy and might bring the character of the MIC closer to that of arbitral tribunals.

7.2.5 Foreign, Non-Domestic and Anational Awards

521 The definition of another element of Article I para. 1 NYC is relevant to the question of whether decisions by the MIC would be enforceable under the New York Convention: only awards "rendered in the territory of another State" ("foreign") and those "not considered as domestic" ("non-domestic") fall within the scope of application of the New York Convention.

522 Foreign arbitral awards follow the principle of territoriality: an arbitral award is foreign, as long as it has not been rendered in the territory of the state of enforcement; if the state of enforcement has not declared the reservation of reciprocity in accordance with Article I para. 3 NYC, the New York Convention is applicable universally,

[52]Ehle (2012), for example, does not mention this element at all; however, Kaufmann-Kohler and Potestà (2016), p. 37, discuss the choice of arbitrators by the parties as a controversial potential feature of arbitral awards.

[53]Brower and Brueschke (1998), p. 10.

[54]Neither *Ministry of Defense of the Islamic Republic of Iran v. Gould*, *Flatow v. Iran* nor *Dallal v. Bank Mellat* discuss this aspect.

[55]Kaufmann-Kohler and Potestà (2016), see the sources in para. 96.

irrespective of the state of origin of the arbitral award or of the parties.[56] According to the prevailing view, an arbitral award is "made" in the state of the seat of the tribunal.[57]

Thus, the question arises as to whether a decision by the MIC would be foreign in the case where the host state of the MIC is not the state of enforcement at the same time. In the context of the principle of territoriality, which only deals with the statutory geographical position of the tribunal,[58] such an interpretation may well be conceivable.[59] **523**

Arbitral awards are non-domestic if they were rendered according to the principle of territoriality in the state of enforcement, but national law was not applied. However, the definition of that term, which falls in the competence of the national courts, does not seem to be of much importance for the enforcement of MIC decisions in light of the existing jurisprudence—relevant cases that may be non-domestic are usually referred to as "anational" or "delocalised". The examination of jurisprudence and literature reveals that the question of whether or not the decision was rendered under domestic or foreign law would not be problematic for the enforcement of MIC decisions, but rather whether the decision was based on any national law and whether basing the decision on national law would be necessary.[60] **524**

Some authors,[61] and judges especially in France[62] and the US,[63] claim that IUSCT-awards are enforceable as anational awards under the New York **525**

[56]Ehle (2012), pp. 56 and 59. Petrochilos (2004), p. 352, para. 8.35 concludes that it is both sufficient and necessary, if the award was made in another state than the enforcement forum, for applying the NYC.

[57]Ehle (2012), p. 57, para. 99.

[58]Ehle (2012), p. 56, para. 95. Ehle (2012), p. 60, considers an absolute geographical interpretation as inappropriate, since the focus should be on the word "made"—an award would not be made where it is signed, but at the legal formal seat of the tribunal.

[59]Additionally, Petrochilos (2004), p. 357 concludes that it is sufficient and necessary, if an arbitral award was made in another state than the enforcement forum, for applying the NYC.

[60]Kaufmann-Kohler and Potestà (2016), p. 57 define anational/delocalized awards as "awards not made under domestic law" and point out how much attention the possible enforcement of such awards under the NYC has gained recently.

[61]According to Ehle (2012), pp. 60 et seq., the majority opinion favours the idea that arbitration should or must be established, especially by the agreed seat-state and/or the *lex arbitri*. Ehle argues this with the following reasoning: a subsumption is neither under the term foreign, nor under the term non-domestic possible; a historical interpretation of anational awards under the NYC is also not possible, since a national awards were not a topic discussed within the NYC negotiations. Petrochilos (2004), p. 371 instead concludes that there is no proof that the NYC could not be applied to awards, which have been rendered under merely international law. Toope (1990), pp. 127–129 does as well conclude that a-national awards do exist and can be enforced under the NYC. The UNCITRAL Guide on the NYC, para. 63, however, assumes that the text of Article 1 para. 1 NYC permits the enforcement of a national awards, so that the domestic or a national nature of the awards would be without effect on the applicability of the NYC.

[62]Cour de Cassation, Les Cahiers de l'Arbitrage 2007, 44 = 25(4) ASA Bull. 829 (2007) = XXXII Y.B. Com. Arb. 299 (2007).

[63]See *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, Court of Appeals for the Ninth Circuit, 23.10.1989, 887 F.2d 1357, the court denied that there was a condition under the NYC, that the award had to be rendered under domestic law. The reasons for refusal of an enforcement were stated explicitly in the NYC. None of these reasons required the award to be rendered under domestic law (1364–5).

Convention.[64] In any event, as discussed above, ICSID awards (as a sort of a national arbitration awards) may be enforced through the New York Convention.[65] Within the literature, it is therefore argued that there is no reason why the arbitral awards of an international arbitral tribunal should not be enforceable under the New York Convention.[66]

526 Another way of reading the New York Convention would be that the grounds for refusal of enforcement are listed in one article only: Article V NYC. It explicitly states according to which legal system the individual exclusion criteria should be assessed. Article V NYC furthermore recognises the distinction between the law "of the country in which, or under the law of which [the arbitration award was rendered]",[67] which could be taken as an indication that an arbitral award does not necessarily have to be made under the law of a particular country. With that argument, the US court in the *Gould* case came to the conclusion that the New York Convention *ratione materiae* is also applicable to anational arbitration awards, since in Art. V NYC, and also in Article I NYC, it does not presuppose a national nature of the arbitration award.

7.2.6 Litigation Between Natural or Legal Persons

527 There is consensus (also confirmed by the *travaux preparatoires* and court decisions) that the term "legal person" in Article I para. 1 NYC also includes legal persons of public law, for example states and international organisations.[68] The interpretation of this term should therefore not be a problem in the context of the enforcement of MIC decisions.[69]

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[64]Cases regarding the enforcement of awards *SEEE v. Yugoslavia* (26.10.1973, Hoge Raad) and *SEEE v. Yugoslavia* (13.11.1984, Cour d'appel de Rouen); *Götaverken v. France*, *LIAMCO* and *Gould* are commonly been referred to as proofs of judicial practice regarding the enforcement possibility of anational awards under the NYC.

[65]Schreuer et al. (2009), pp. 1122 et seq. explain that an enforcement of ICSID awards under the NYC will probably not come up in the future, but such a case would need to be handled in a manner similar to the enforcement of ICSID additional facility awards. Additional facility awards should be enforced under the NYC, since a majority of legal scholars and some court decisions assumed as well that "international, a-national and denationalized awards" fall within the scope of the NYC. Kaufmann-Kohler and Potestà (2016), p. 58 therefore saw in their legal opinion no reason why an award of another international arbitral tribunal should not be enforced under the NYC.

[66]Kaufmann-Kohler and Potestà (2016), p. 58.

[67]Article V para. 1 lit. e) NYC: "of the country in which, or under the law of which".

[68]Ehle (2012), p. 69.

[69]According to the *travaux préparatoires,* the majority of states did not want to implement such rules into the NYC, since they considered it redundant. The Union of Soviet Socialist Republics (USSR) and Czechoslovakia, who wanted to make the awards rendered by their arbitral institutions enforceable under the NYC, were finally able to gain acceptance for their proposal. It can be extracted from the *travaux* that the supreme topic of negotiations regarding Article I para. 2 was the

7.2.7 MIC as a "Permanent Arbitral Body" Under Article I Para. 2 NYC

Article I para. 2 NYC explicitly states that "not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted" are enforceable under the New York Convention. **528**

Arbitral institutions such as the ICC,[70] the Arbitration Institute of the Finnish Central Chamber of Commerce[71] and the Singapore International Arbitration Centre (SIAC),[72] have already been subsumed under Article I para. 2 NYC as permanent arbitral bodies.[73] In the *Gould* case the IUSCT was regarded as a permanent arbitration tribunal under Article I para. 2 NYC. In any event, Article I para. 2 NYC makes it clear that the permanent existence of the MIC does not pose a problem for the enforceability of a decision according to the New York Convention. **529**

7.2.8 Reservation on "Commercial Matters" Under Article I Para. 3 NYC

Under Article I para 3, the New York Convention explicitly provides two reservations that states may declare.[74] Many Member States have declared, by accession to the New York Convention, through a reservation under Article I para. 3 NYC, that they only enforce arbitral awards arising out of disputes over commercial matters **530**

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voluntary submission to these permanent arbitral bodies. The majority of the states were of the opinion that awards from permanent arbitral tribunals would also fall into the scope of Article I para. 1 NYC, as long their jurisdiction was not compulsory. The free choice of arbitrators was e.g. not discussed in the negotiations. A German court followed this strong focus on voluntary submission and denied the enforcement of a Polish tribunal's decision under the NYC, since the jurisdiction of the tribunal was compulsory. Kammergericht Berlin (Court of Appeal), decision of 7.3.1995—14 U 2979/93; see as well BGH (Federal Supreme Court), decision of 20.1.1994—III ZR 143/92, BGHZ 125, 7.

[70] *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, Supreme Court of New South Wales, 1.11.2010.

[71] Brandenburgisches Oberlandesgericht (Higher Regional Court of Brandenburg), decision rendered on 13.6.2002—8 Sch 02/01.

[72] *Transpac Capital Pte Ltd v. Buntoro*, Supreme Court of New South Wales, 7.7.2008, [2008] NSWSC 671.

[73] *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, Court of Appeals for the Ninth Circuit, 23.10.1989, 887 F.2d 1357.

[74] Article I para 3 NYC: "When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

under the New York Convention.[75] For this reason, it is equally relevant to the practical enforceability of MIC decisions under the New York Convention to identify which cases are considered to concern "commercial matters". *In concreto,* the question arises as to whether "commercial matters" can be construed as including investment disputes between states and investors or only matters of international commercial law between private individuals.

531 According to Article I para. 3 NYC, the definition of "commercial matters" depends on the national law of the reserving state. Thus, until now, reservations on commercial matters have been interpreted widely by national courts; legal disputes between states and investors under an investment agreement have been subject to the same criteria for the classification as commercial matters as those between private individuals.[76] For example, the US has declared a reservation for commercial matters.[77] However, in cases concerning the enforcement of decisions by the IUSCT under the New York Convention in the US, this reservation has not been addressed. Therefore, it can be assumed that investment disputes between states and investors are also covered by the term "commercial matters".[78]

532 In any event, Canadian courts have acknowledged NAFTA investment awards under Chapter 11 NAFTA as awards concerning "commercial matters" as defined by the UNCITRAL Model Law.[79] Furthermore, the Swedish Svea Court of Appeal has

[75]In 2012, out of the 147 state parties of the NYC, 46 had applied reservations for commercial matters.

[76]According to Ehle (2012), pp. 81 et seq. the interpretation of "commercial matters" has not so far created problems in practice, since the states interpret the term widely. Also, he concludes that courts have a tendency to interpret "commercial matters" as broadly as envisaged in the UNCITRAL Model Law (footnote 2 of the UNCITRAL Model Law defines "commercial" as "[. . .] Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."); Born (2014), pp. 302 et seq., defines "commercial matters" as "relationship involving an economic exchange where one (or both) parties contemplate realizing a profit or other benefit." This definition would also be consistent with the tenor of national court decisions regarding the NYC.

[77]See U.S. Federal Arbitration Act (FAA) 9 U.S.C. § 201; according to § 202 the NYC applies "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

[78]However, Born (2014), pp. 300 et seq. shows that in the context of state immunity, space for different interpretation is given. In cases of public law, such as trusts law, concession and other contracts which are based on national sovereignty, doubts concerning the interpretation of the term "commercial matters" seem to be significant. According to Born, the parties of concession contracts, however, intend arbitration clauses in a way that they constitute commercial matters in the sense of the NYC, since effective enforcement would be one of the fundamental goals of international arbitration treaties.

[79]*United Mexican States v. Metalclad*, Canada, Supreme Court of British Columbia, 2.5.2001, [2001] BCSC 664, 5 ICSID Reports 236; *United Mexican States v. Feldman Karpa*, Canada, Ontario Court of Appeal, 11.1.2005, 9 ICSID Reports 508, 516, para. 41.

recognised the award in the case *CME v. Czech Republic*[80] as "international commercial arbitration".[81]

A possible reservation on commercial matters would therefore presumably not **533**
per se preclude enforcement of an MIC decision under the New York Convention.

7.3 Recognition and Enforcement of Decisions of the MIC

It follows from the preceding analysis that the enforcement of MIC decisions in third **534**
countries would not be possible through the ICSID Convention since its decisions do not constitute ICSID arbitration awards, due to the fact that the MIC and its procedures are designed in a manner differing from the ICSID Convention.

An enforcement according to the New York Convention would be legally **535**
conceivable; nevertheless, successful enforcement depends on the perspective of the specific national court having jurisdiction over enforcement. This can lead to divergent results, depending on the legal system. The main difficulties in recognition and enforcement of MIC decisions as arbitral awards could be the issue of "voluntary submission" to the MIC by both parties and the controversial enforceability of "anational decisions".

Due to the legal uncertainty as to whether MIC decisions can be qualified as **536**
arbitral awards—whether according to the ICSID Convention or under the New York Convention—the best solution seems to be the imposition of an obligation to enforce within the MIC Statute, analogous to the provisions of the ICSID Convention. For the moment, this would mean that only the parties to the agreement would be bound by the MIC Statute. However, later on, with a wider acceptance of the MIC, this solution should be legally unequivocal.

Besides, a fund system could be set up in addition to an autonomous enforcement **537**
mechanism provided for in the MIC Statute. The IUSCT followed an interesting approach to ensure the enforcement of decisions of this tribunal. After the conclusion of the Algiers-Agreement, US$1 billion of Iranian assets in US bank accounts at the time of the hostage crisis after the storming of the US Embassy in Tehran in 1979 was paid into a "security account" as a fund for the satisfaction of US claims resulting from IUSCT decisions.[82] In addition, Iran has been obliged to make additional payments to this account, so that the account balance never falls below US$500 million. Iran itself has had no access to this security account and therefore had to go through regular enforcement channels; however, Iran has so rarely been awarded damages that the bias of the IUSCT enforcement mechanism can be

[80] *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, Partial Award, 13.9.2001, 9 ICSID Reports 121.

[81] *Czech Republic v. CME Czech Republic BV*, Sweden, Svea Court of Appeal, 15.5.2003, 9 ICSID Reports 439, 493.

[82] See Brower and Brueschke (1998), p. 8.

neglected.[83] Nevertheless, this enforcement mechanism has proven to be very efficient, which also explains the rarity of execution attempts under the New York Convention.[84] Certainly, it would not be easy to set up a comparable instrument for the MIC. Nevertheless, it would be worth considering the extent to which it would be possible to set up a fund for the settlement of claims for compensation arising from MIC decisions.

538 In this respect, one way of ensuring the prompt and effective enforcement of MIC judgments would be that the MIC members make a deposit into a fund. It should be determined whether the amount of the payment should be based on the member's economic situation or whether all members should make equal payments. One argument against the latter alternative is that countries with higher economic output may benefit more from an MIC, since in absolute terms higher investments are likely to be made by investors in these countries. However, it cannot be assumed that the volume of foreign investments is directly proportional to the number of investment cases. Moreover, since the possible amount of damages for an MIC decision is not based on the economic strength of the respective state, economic performance as a basis for the financing of the fund does not seem to be an appropriate criterion.

539 The compensation of damages up to a certain maximum amount could immediately be paid from this fund to the winning investor. In that regard, a cap on the payout sum could be stipulated. In any case, the fund volume should never fall below a certain minimum sum; with 40 or more members, a sum in the single-digit millions of each member should be sufficient to keep the fund operational. At least, such a fund system could be used by SMEs as a special system of enforcement, so that their claims can be satisfied as soon as possible. The claim from the MIC judgment against the MIC member would then be transferred to the MIC itself.

540 Enforcement in the MIC system and the fund system should not be mutually exclusive. However, it could be considered that recourse to the fund system would only be possible if other forms of enforcement prove to be difficult.

References

Bermann GA (2014) Recognition and enforcement of foreign arbitral awards: the application of the New York Convention by National Courts. Springer, Heidelberg

Born G (2014) International commercial arbitration. Wolters Kluwer, Alphen aan den Rijn

Brower CN, Brueschke JD (1998) The Iran-United States claims tribunal. Martinus Nijhoff, Leiden

Calamita NJ (2017) The (In)compatibility of appellate mechanisms with existing instruments of the investment treaty regime. J World Invest Trade 18:585–627

Cane G (2004) The enforcement of ICSID awards: revolutionary or ineffective? Am Rev Int Arbitr 15:439–465

Choi S (1995–1996) Judicial enforcement of arbitration awards under the ICSID and New York Conventions. N Y Univ J Int Law Polit 28:175

[83] Toope (1990), p. 280.

[84] Toope (1990), p. 281: "the practical importance of the Account cannot be overstated."

Delaume GR (1993) Enforcement of state contract awards: jurisdictional pitfalls and remedies. ICSID Rev Foreign Invest Law J 8:29–52
Delaume GR (1995) Reflections on the effectiveness of international arbitral awards. J Int Arbitr 12:5–19
Ehle B (2012) Article I (scope of application). In: Wolff R (ed) New York Convention. Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958. Commentary. Verlag C.H. Beck, Hart, Nomos, Oxford, Baden-Baden
Kaufmann-Kohler G, Potestà M (2016) Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? – Analysis and roadmap
Lew JDM, Mistelis LA, Kröll SM (2003) Comparative international commercial arbitration. Kluwer Law International, Alphen aan den Rijn
Paulsson J (1995) Arbitration without privity. ICSID Rev Foreign Invest Law J 10:232–257
Petrochilos G (2004) Procedural law in international arbitration. Oxford University Press, Oxford
Reinisch A (2016) Will the EU's proposal concerning an investment court system for CETA and TTIP lead to enforceable awards? – The limits of modifying the ICSID Convention and the nature of investment arbitration. J Int Econ Law 19:761–786
Schreuer CH, Malintoppi L, Reinisch A, Sinclair A (2009) The ICSID Convention. A commentary, 2nd edn. Cambridge University Press, Cambridge
Tawil GS (2009) Binding force and enforcement of ICSID awards: untying articles 53 and 54 of the ICSID Convention. In: van den Berg AJ (ed) 50 Years of the New York Convention. Kluwer Law International, Alphen aan den Rijn, p 327
Toope SJ (1990) Mixed international arbitration. Cambridge University Press, Cambridge
Van den Berg AJ (1981) The NY arbitration convention of 1958: towards uniform judicial interpretation. Springer, Heidelberg
Van Harten G, Loughlin M (2006) Investment treaty arbitration as a species of global administrative law. Eur J Int Law 17:121–150
Verhoosel G (2009) Annulment and enforcement review of treaty awards: to ICSID or not to ICSID? In: van den Berg AJ (ed) 50 Years of the New York Convention. Kluwer Law International, Alphen aan den Rijn, p 310

Chapter 8
Possibilities for the Establishment of an MIC and a Possible Connection to Existing Institutions and System Conformity

In light of the statements above and the very specific requirements that should be put on the MIC, acceptance of MIC judgments as arbitral awards in the meaning of the New York Convention in states where enforcement is sought, seems questionable. It follows that the best option for an effective MIC would be to establish it as an independent multilateral court, which should provide for its own procedural rules as well as enforcement provisions or even an own independent fund system.[1] 541

This would not only ensure a largely consistent application of the investment standards, but also an effective enforcement of MIC judgments. Such a multilateral court should be open for accession to other states and Regional Economic Integration Organisations (REIOs). 542

8.1 Practical Implementation of the Establishment of an MIC

The establishment of an international dispute settlement institution is usually accomplished by means of a treaty or other international agreement. For that, there are different basic models available. 543

Dispute resolution institutions are often designed as organs of international organisations, as independent international organisations themselves or also as mere bodies for the implementation or application of the treaty.[2] In this way, the 544

[1] For a similar recommendation see European Union (2019), para. 31.
[2] Giorgetti (2016), p. 890.

M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-662-59732-3_8

ICJ is a main organ of the UN,[3] the CJEU is an EU institution[4] and both the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) are subsidiary organs of the United Nations Security Council.[5] On the other hand, many international courts, such as the International Criminal Court, are designed as separate international organisations.[6] In addition, some international treaties foresee the establishment of dispute settlement mechanisms that are either established as permanent courts (ITLOS for the UN Convention on the Law of the Sea,[7] ECtHR for the ECHR[8]) or mere bodies for the application of the treaty (such as the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR)).[9]

545 In the field of investment dispute resolution, two institutions, although they do not exercise any dispute resolution function, but rather mere administrative bodies supporting activities for arbitral tribunals, are considered to be international organisations. This is clearly the case with ICSID, which was established by the Washington Convention of 1965 as an international organisation with explicit international legal personality.[10] The PCA is also an international organisation,

[3] Article 7 para. 1 UN Charter: "There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat." Article 1 ICJ Statute: "The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute."

[4] Article 13 para. 1 TEU: "[...] The Union's institutions shall be: the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as "the Commission"), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors."

[5] Giorgetti (2016), p. 892.

[6] Article 4 para. 1 ICC Statute: "The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." Schabas (2010), p. 94.

[7] United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc A/CONF 62/122 (1982), www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf; Boisson de Chazournes (2012), p. 111.

[8] Article 19 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the Control Machinery established thereby: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as the Court. It shall function on a permanent basis."

[9] Amerasinghe (1996), pp. 160 et seq.

[10] Article 18 ICSID Convention: "The Centre shall have full international legal personality." Schreuer et al. (2009), p. 59: "Despite close legal ties between the Centre and the World Bank, the Centre is an autonomous international organization, enjoying its own international legal personality."

founded by the Hague Convention in 1899.[11] Both international organisations are based on treaties, have states as members and are open to further parties.

For the establishment of the MIC, the creation of an independent international organisation by means of an international treaty (MIC Statute) would be the most appropriate option (see paras. 548 et seqq.).[12] The creation of an international organisation would ensure the essential points for the functioning of an independent court, such as functional immunity for the judges, equal financial treatment for the parties to the agreement, the conclusion of seat and immunity agreements etc. **546**

8.2 Structuring the MIC as an International Organisation

The legal situation of the MIC would be determined in the national legal arena by privileges and immunities. Immunity guarantees would secure its functionality. As an international organisation, the MIC would enjoy legal personality under international and national law. This would ensure that the MIC could conclude international treaties such as a seat agreement establishing the necessary privileges and immunities. At the same time, it could conclude contracts under national law, acquire assets and rent facilities etc. The latter aspect of a legal personality under national law is usually achieved by provisions, according to which an international organisation explicitly has the right to conclude private law contracts, to acquire assets and to initiate proceedings before state courts.[13] In numerous recent treaties that establish international organisations, international legal personality is also expressly foreseen.[14] The MIC should also follow this example. **547**

Central to the effective implementation of judicial independence would be a functional immunity from jurisdiction for the judges as seen in all international courts and quasi-judicial dispute resolution organs.[15] At the same time, the MIC, to **548**

[11] 1899 Convention for the Pacific Settlement of International Disputes, 29 July 1899, https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf; Daly (2012), p. 38.

[12] For a similar reference by the European Union which presumes the use of an instrument to establish the standing mechanism (the term used for the new investment court), see European Union (2019), paras. 27, 31, 35.

[13] Cf. Article 18 sentence 2 ICSID Convention: "The legal capacity of the Centre shall include the capacity: (a) to contract; (b) to acquire and dispose of movable and immovable property; (c) to institute legal proceedings."

[14] Cf. Article 18 sentence 1 ICSID Convention; Article VIII:1 WTO Agreement; Article 47 TEU; Article 4 ICC Statute.

[15] Cf. Article 21 ICSID Convention: "The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity; [. . .]." Article VIII WTO Agreement: "(3) The officials of the WTO and the representatives of the Members shall similarly be accorded by

whom decisions could be attributed to, should enjoy immunity from national court jurisdiction,[16] in order to avoid any interference with the independence of the MIC in its decision-making process through complaints before national courts.

549 Furthermore, it would be important to grant the other usual privileges and immunities to the MIC as well as the judges and other staff of the organisation. These include the right of free movement and residence, customs relief, exemptions from social security contributions etc.[17]

550 These also include tax exemptions, which should not be misunderstood as personal privileges of the judges and other staff of the MIC, but rather reflect the principle of equal treatment of MIC Member States.[18] Only an exemption from income taxation by the host state would ensure that the salaries of the judges and other staff of the MIC funded by the Member States would not disproportionally benefit the host state.

551 These privileges and immunities could already be stated in the basic treaty, in a separate privileges and immunities protocol or in a seat agreement. The United Nations Convention on Privileges and Immunities serves as a model for many other immunity agreements.[19] In particular, with regard to safeguarding judicial immunity, it would make sense to provide for this in a multilateral instrument (and not a mere bilateral seat agreement).

552 In principle, international organisations have a permanent seat.[20] This distinguishes them, *inter alia*, from arbitral tribunals. The seat of the MIC should be at the place where the Secretariat works and the Plenary Body meets.[21] In any case, in

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each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO. (4) The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947." Article 19 ICJ Statute: "The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities." Article 51 ECHR: "The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder."

[16]Cf. Article 20 ICSID Convention "The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity."

[17]See in this respect the detailed explanations of Reinisch (2016a).

[18]Kunz (1947), pp. 860 et seq.; Martha (2016), pp. 219 et seqq. An exemption from taxes was also proposed for the judges of the Arab Investment Court under Art. 28(4) of the Unified Agreement for the Investment of Arab Capital in the Arab States, 1980.

[19]Ruffert and Walter (2015), para. 184; Reinisch (2016b), pp. 1048–1068.

[20]Article 3 para. 1 ICC Statute: "The seat of the Court shall be established at The Hague in the Netherlands ('the host State')." Article 22 para. 1 ICJ Statute: "The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable." Article 28 para. 5 Arab Investment Court Agreement: "The seat of the Court shall be at the permanent headquarters of the League of Arab States and shall not be transferred unless the Court takes a substantiated decision to convene its sessions or undertake its functions in another location."

[21]Ruffert and Walter (2015), para. 189.

the interest of better international acceptance of the MIC, the option of providing for several seats could also be considered. If necessary, organs of the MIC could be connected to the existing infrastructure of other international organisations and courts (see para. 560 et seqq.). A seat for the Plenary Body could be located in Geneva, as the representatives of the Members of the General Council of the WTO, which are likely to be identical with the representatives of the Members of the MIC Plenary Body, are already present there. In addition, it should be discussed whether, with a large number of member states from all continents, several locations for the conducting of negotiations on all continents should be considered.

553 The relationship of the MIC with the host state should be regulated in a seat agreement, in which the balance between the MIC's interest in effective work as well as the economic and security concerns of the host state can be found.[22] The MIC Statute, which could already incorporate immunity rules, should therefore be supplemented with further seat and immunity agreements concluded with, *inter alia*, the host state of the MIC. These contain rules on:

- the protection of the facilities of the MIC; protection of the MIC staff, including their immunity;
- a guarantee of the free movement of persons of judges and other staff;
- dispute settlement in connection with the seat agreement; and
- questions of tax exemption.

554 It would also be possible to conclude a main seat agreement and to regulate the details regarding e.g. the meetings of the Plenary Body, or to regulate the establishment of the negotiation venues in an open or undefined way so that further concretization of it is possible through secondary law.

555 Furthermore, it could also be determined with regard to the seat that for instance the President of the Court must also live at the seat of the MIC.[23]

8.3 Connection to Existing Institutions

556 The model examined here of a two-tiered MIC is in principle difficult to integrate into the structure of existing models. In addition to the establishment of an independent international organisation, the connection to existing institutions would also come into question.

557 In the CETA/TTIP discussion on the establishment of bilateral permanent judicial institutions to settle investment disputes, a preference for the integration in the ICSID system is shown. This is reflected, in particular, in the idea that the decisions of the planned "courts" can be considered as ICSID arbitral awards. However, as has

[22] Ruffert and Walter (2015), para. 193.

[23] Cf. e.g. Article 22 para. 2 ICJ Statute: "The President and the Registrar shall reside at the seat of the Court."

already been pointed out (see para. 498), even if such an *inter se* modification of the ICSID Convention would be allowed, such modified arbitral awards would only be seen as ICSID awards by the modifying parties. Therefore, the essential advantage of the ICSID Convention, namely automatic enforceability in all member states, would be lost. The parties to the ICSID Convention that do not participate in the modification are not obliged to enforce such modified arbitral awards from a CETA or TTIP court. Therefore, a direct institutional connection between the MIC and ICSID does not seem practical. Moreover, an amendment of the ICSID Convention that requires unanimity seems rather unrealistic,[24] especially because some states that explicitly oppose the MIC System are unlikely to agree on an amendment of the ICSID Convention.[25]

558 It has also been suggested that an investment court should be integrated into the WTO Dispute Settlement System. However, this would require a fundamental change of the DSU. The WTO Dispute Settlement System is open to its members only, never to private persons, i.e. investors.[26] In addition, in the past, a substantive extension of WTO Law to allow access and protection of foreign investments has repeatedly failed, as it happened during the Uruguay Round[27] with one of the so-called Singapore Issues.[28] An integration into the WTO System thus also appears to be unrealistic at the present time.[29]

559 The same applies to a connection of the MIC with the ICJ because, in addition to an extensive change of jurisdiction of the ICJ, access to the Court would have to be made possible for natural and legal persons, i.e. the ICJ Statute would have to be extensively amended.[30]

560 This does not preclude, however, making use of the institutional expertise of ICSID and its facilities etc. That would of course be possible for the MIC as an independent international organisation. So far, the ICSID Secretariat has offered its support in non-ICSID arbitration procedures and has provided administrative support in procedures under UNCITRAL and other arbitration rules.[31]

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[24] Article 66 para. 1 ICSID Convention: "If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment."

[25] American Bar Association Section on International Law (2016), p. 120.

[26] Cf. Article 1.1 DSU: "[...] the settlement of disputes between Members [...]." A change therefore would only be possible according to Art. X of the WTO Agreement.

[27] Herrmann et al. (2007), para. 790.

[28] Compare—decision of the General Council regarding the work program of the Doha agenda of 1.8.2004 (July package), WT/L/579.

[29] See in this respect as well American Bar Association Section on International Law (2016), p. 129.

[30] American Bar Association Section on International Law (2016), p. 120.

[31] The Secretariat of the ICSID has been designated as the Secretariat for the Investment Tribunal and the Appeal Tribunal under Art. 3.09(16) and 3.10(14) EU-Singapore IPA (draft for signature), Art. 3.38(18) and 3.39(18) EU-Vietnam IPA (draft for signature) and Art. 11(17) and Art. 12

Similarly, in an agreement between the MIC and ICSID or also the PCA or other arbitral institutions, logistical and staff support could be obtained. The MIC could therefore share infrastructure with other organisations that do not fully use their infrastructure either at an initial phase of the MIC or even in the long term.[32] In particular, during an initial phase when the amount of cases is not yet foreseeable, it could be beneficial to use hearing facilities and secretarial support from such existing institutions, to avoid setting up expensive court infrastructure. After the initial phase, the average number of procedures could be more easily estimated and the judicial bench could potentially be expanded (see paras. 111 et seqq.). During an expansion phase, the court could acquire its own premises once the longer-term sharing of infrastructure with other institutions or organisations no longer seems possible. **561**

Here, in addition to ICSID in Washington, the ITLOS in Hamburg or the PCA with its various locations could be considered.[33] It would certainly also be necessary to decide whether to have the seat of the MIC in a state that is unlikely to show any interest in membership in the near future. In any case, as far as infrastructure is concerned, a considerable amount of money could be saved or infrastructure of other organisations and institutions could be used more effectively. The money saved in **562**

(15) EU-Mexico Global Agreement (draft for signature) as on February, 2019; The ICSID Secretariat has also been recommended as an option by Katz (2016), p. 180; See also ICSID website, Case Administration for Non-ICSID cases, https://icsid.worldbank.org/en/Pages/Process/Non-ICSID-Arbitration.aspx: "In addition to administering proceedings under the ICSID rules, the Centre is also available to administer arbitration cases under other rules, such as the UNCITRAL Arbitration Rules and ad hoc investor-State and State-State cases. These non-ICSID cases are submitted to ICSID by agreement of the parties either prior to the constitution of the Tribunal or once the Tribunal is constituted. On occasion, the Secretary-General of ICSID also serves as appointing authority of an arbitrator. The services rendered by the Centre in non-ICSID cases may range from limited assistance with the organization of hearings and management of the case finances to full secretariat services in the administration of the case concerned. Parties and Tribunals are free to elect the extent of the services desired." For further discussion on the use of the ICSID Secretariat to support an Investment Court System, See, European Commission (2017), p. 36.

[32]For a similar suggestion, See, European Commission (2017), p. 49.

[33]Cf. www.nienstedten.de/Burgerverein/Seegericht/body_seegericht.html: "The building [. . .] had been constructed in the years 1997 to 2000 [. . .]. The construction costs amounted to 123 million DM (80% were covered by the Federal Republic of Germany, 20% by the City of Hamburg, the operating costs are covered by the United Nations). [. . .] The main building consists of 3 courtrooms, 25 offices for judges, 11 conference rooms, and 74 office rooms. Additionally lobby, library, study, catalogue room, storage room, a flat for the facility manager and a grand entrance hall. All rooms are electronically surveilled; the security department is staffed at all times. The used parts of the building cover 4755 m^2. In the center of the building in between the two main wings, the main round hall for court session is located, including a bench for the 21 judges. There are two minor halls, which can be connected with the main hall, so that a number of 240 persons in total can be seated. The latest technology, being able to include amendments, without any constructional changes, including four cameras and a media wall. Sound and image can be transported outside of the main hall. A room for video conferences allows hearings of witnesses from remote locations. Translation booths allow simultaneous translations in the six work languages of the UN, if necessary also other languages. A large conference room for the judges is also considered a "safe room" in case of crises. Besides there are two smaller conference rooms and rooms for the parties to the disputes and witnesses and a communications center."

this way could be invested in first-class staffing: full-time judges, a Secretariat and an Advisory Centre.

563 It has also been proposed[34] that the project of judicial multilateralisation of an investment dispute settlement system should be promoted with support of UNCITRAL,[35] OECD and UNCTAD,[36] since these organisations are very interested in reforming ISDS and are already active in the area of ISDS investment protection. As mentioned above and is well known UNCITRAL mandated its Working Group III in 2017 to discuss a reform of investment arbitration. Working Group III is now working on relevant solutions to be recommended to the UNCITRAL Commission.[37] Especially a structural reform with an MIC is now "on the table". UNCTAD could bring development perspectives into the discussion.[38] In addition, the ILC could be involved in the work. Likewise, cooperation of the proposed MIC Advisory Center, particularly with the UNCTAD could be considered.

8.4 Entry into Force of the MIC Statute Only with a Minimum Number of Members

564 Like with the International Criminal Court, for instance, it might make sense that the MIC Statute only enters into force after a certain number of ratifications.[39] If only a small number of states are on board for the MIC project, just another ISDS system would emerge alongside the existing ones. Therefore, it should be determined that a certain number of states must ratify an MIC Statute before it can enter into force.

565 A minimum number of 40 members should be foreseen. In addition to the EU and its 28 Member States, eleven more states would have to be convinced of joining the MIC. The EU is already negotiating or is about to start negotiations for a large number of agreements, all of which should also include investment protection (China, Myanmar, Japan, Mexico, Indonesia, the Philippines).[40] The agreements

[34] American Bar Association Section on International Law (2016), pp. 120 et seq.

[35] See especially UNCITRAL (2017).

[36] See reference to work by UNCTAD in UNCITRAL (2018), paras. 23 et seqq.

[37] See UNCITRAL (2019).

[38] American Bar Association Section on International Law (2016), p. 121.

[39] Cf. e.g. Article 126 para. 1 Rome Statute: "This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

[40] See in this respect Overview of FTA and other Trade Negotiations, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf; European Commission (2015), pp. 32 et seqq.

with Vietnam, Mexico, Canada and Singapore have already included a commitment to a multilateral approach.[41]

In the future, therefore, the EU should, in its negotiations of trade, general economic and association agreements, urge its partners to actively participate in the establishment of the MIC and thus strive for their membership thereto. In particular, investment chapters in such agreements or pure investment agreements could provide for (exclusive) jurisdiction of the MIC where appropriate and motivate the respective party to the agreement to join the MIC. **566**

At the same time, the EU can invite its Member States and, as at least parts of the IIAs of the Member States concern exclusive Union competences, also authorise them[42] to agree on the MIC in new negotiations or renegotiations of their investment agreements as the court having jurisdiction over future disputes.[43] Here, the Commission's Impact Assessment Study has already indicated that, if the MIC would have jurisdiction for all EU and EU Member States agreements, already half of the existing international investment agreements worldwide would be covered.[44] **567**

8.5 Establishment of MIC Jurisdiction by Explicit Modification of Existing and Future IIAs

The considerations above are based on the assumption that the existing IIAs will remain largely in force, i.e. existing IIAs will be modernised and Member State agreements will gradually be replaced with EU agreements. It should therefore be shown how this particular substantive network could be linked to a two-tiered MIC at dispute resolution level. To clarify once more: the substantive protection standards would not be found in the MIC Statute, but would in principle continue to be present in other international treaties and obligations. The immediate use of the existing IIA-network has the advantage that in the case of existing agreements, no negotiations on protection standards need to take place. **568**

[41] Art. 3.41, EU-Vietnam IPA (draft for signature) as on 2 April, 2019; Art. 14, Section – Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019; Art. 8.29, Comprehensive Economic and Trade Agreement, OJ L 11, 14.1.2017, p. 23; Art. 3.12, EU-Singapore IPA (draft for signature) as on 2 April, 2019.

[42] Cf. Article 2 para. 1 TFEU: "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

[43] The Netherlands has already included a reference to the Multilateral Investment Court in Art. 15 of its Draft BIT, 2018.

[44] European Commission (2016a, b).

8.5.1 *Conclusion of New IIAs and FTAs with Investment Chapters*

569 Firstly, the establishment of MIC jurisdiction should take place through express determination of its jurisdiction in new agreements of the EU and of other states who wish to promote this new system. The EU negotiates free trade and/or investment protection agreements or prepares negotiations with a large number of states.[45] First of all, it should be determined in the MIC Statute that, in the future, all newly concluded agreements of the MIC Members in the area of investment protection should foresee the exclusive possibility of dispute resolution by the MIC. As a result, in their international treaty negotiations, all Members should endeavour to promote the extension of the MIC membership in the future (by way of a memorandum of understanding).

570 In this context, it could be explicitly stated in future agreements concluded by the EU that, after its establishment, the MIC alone has jurisdiction to settle claims of investors.[46] In addition, the investment court system foreseen in the previous agreements could automatically lose its jurisdiction or its jurisdiction could pass on to the MIC as soon as it has been established. Transitional provisions should also be foreseen, as it is likely that the EU will negotiate further agreements, until the MIC is established and operational.

571 In addition, the agreements should stipulate that the parties to the agreement would actively participate in the negotiations on the establishment of a MIC and become members too. Furthermore, in new EU free trade and/or investment protection agreements, it should be provided for that in the future both parties to the agreement would actively participate in the promotion of a multilateral investment protection system and thus make the MIC the subject of negotiations with third countries ("snowball system").

[45] See in this respect recently European Commission (2015), pp. 32 et seqq.

[46] For a subsequent discussion on the need to promote the ability of the MIC to deal with disputes based on existing and future agreements, See, European Union (2019), para. 35.

8.5.2 *Renegotiation and Reform of Existing EU Economic Agreements*

Secondly, existing trade agreements of the EU (association agreements, framework agreements,[47] pure FTAs,[48] partnership agreements[49]) are constantly reformed and renegotiated. In the event that investment protection is agreed with the respective partners, the respective party to the agreement should be requested to join the MIC.[50] For example, the agreement with Mexico has now been complemented with an investment protection chapter with reference to a Multilateral Dispute Settlement Mechanism.[51] This could then also establish the jurisdiction of the MIC for investment protection matters. **572**

8.5.3 *Inclusion of "IIA Networks" of the Member States in the Establishment of MIC Jurisdiction*

Thirdly, in the renegotiations of their BITs, Member States should be obliged by the EU (based on its competence by virtue of Article 207 TFEU) to replace the existing ISDS systems contained therein with a reference to the jurisdiction of the MIC. This could be practical once there are more precise ideas about the design of the MIC, in particular once the requirements for its jurisdiction are determined. It could then come to an instrumentalisation of the IIAs of the Member States; the Member States could each use their bargaining power to reform long-term agreements with their treaty partners and encourage them to include the MIC. **573**

In the future, after the establishment of the MIC, a clause could be included in the modified IIAs of the Member States to the effect that only the MIC (upon its establishment) has jurisdiction to decide investment disputes based on the IIAs of the Member States. **574**

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[47]Cf. e.g. Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one Part, and the Socialist Republic of Viet Nam, of the other Part, OJ L 329 of 3.12.2016, p. 8.

[48]Cf. e.g. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 of 14.5.2011, p. 6.

[49]Cf. e.g. Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, OJ L 329 of 3.12.2016, p. 45; Council Decision (EU) 2016/1850 of 21 November 2008 on the signature and provisional application of the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part, OJ L 287 of 26.10.2016, p. 3.

[50]A discussion on insertion of relevant clauses during the process of re-negotiation can be seen in European Commission (2017), pp. 50 et seqq.

[51]Cf. European Commission (2015), pp. 35 and 37. The draft of the EU-Mexico Global Agreement released on 21 April, 2018 contains a reference to a Tribunal along with an obligation on the parties to support the establishment of a Multilateral Dispute Settlement Mechanism.

575 In addition, it could be provided in the renegotiations that both parties to the respective agreement, if they have not yet done so, commit to join the MIC and, in agreements with other states, advocate for an exclusive establishment of MIC jurisdiction ("snowball system").

576 The aim here could be to link at least part of the approximately 1400 EU Member State IIAs to the MIC dispute settlement system and thus thereby contribute to the gradual increase of MIC membership.[52]

8.6 The MIC Statute as Opt-In Convention for the Modification of Existing IIAs

577 As stated above, the MIC should preferably be established as a separate international organisation. This requires the conclusion of an international treaty, the MIC Statute. The MIC Statute could be designed as an opt-in convention. With each accession, the MIC would at least supplement other dispute settlement mechanisms. The text of the existing IIAs between MIC Members would then not have to be modified or renegotiated. The MIC's jurisdiction could be justified by means of an opt-in convention similar to the Mauritius Convention,[53] whereby States could be obliged by the MIC Statute to offer dispute resolution by the MIC, at least additionally for

[52]List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries OJ C 149 of 27.4.2016, p. 1 according to which the United Kingdom currently has concluded 94 bilateral investment agreements.

[53]United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention on Transparency), signed on 10.12.2014, entered into force on 18.10.2017. The Mauritius Convention allows the application of the new UNCITRAL transparency rules in investor state arbitration proceedings also in cases of IIAs, which have been concluded in the past. The UNCITRAL Rules on Transparency will always apply, for example, in arbitration proceedings to which Germany is one of the parties (after the Mauritius Convention has been ratified by Germany), if the other contracting parties of the respective IIAs did as well ratify the Convention or if the claimant investor suing the Federal Republic of Germany agrees to the application of the Convention. Necessary condition for the application of the transparency rules in investor state arbitration proceedings is either that both parties to the respective IIAs have ratified the Mauritius Convention or that the defending state has ratified the Convention and the investor agreed on the application of the transparency rules. Cf. Article 2 Mauritius Convention: "The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a)." "Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency."

future disputes.[54] The MIC Statute and the accession thereto could thus already give the MIC jurisdiction to resolve investment disputes.[55]

578 One directly related question is whether joining the MIC Statute would also constitute an opt-out of ISDS options that were previously provided for in IIAs. This would depend in principle on whether only one or all the parties to the agreement of the respective IIAs join the MIC. In the event that not all parties to an IIA join the MIC Statute, the use of the MIC by investors could only be foreseen as an additional option, meaning that an opt-in would not directly result in an opt-out. If all parties to an IIA join the MIC, a corresponding amendment of the IIA could follow if this opt-out option is provided for in the MIC Statute. Possibly the MIC Statute could also foresee an optional clause allowing for Member States to opt out of dispute resolution, meaning that each individual Member of the MIC could decide whether to accept the MIC as exclusive or additional dispute resolution option for its IIAs.[56]

579 Indeed, it would be desirable to design the jurisdiction of the MIC as comprehensively as possible and to prescribe an opt-out of other ISDS as a consequence of an opt-in. The financing of the MIC among other aspects would also benefit from the above—once the MIC is established, its Members should not be sued before another forum and additional legal costs should not incur there. The possibility to specify negative admissibility requirements in the MIC statute should be considered since legal protection cannot be provided in certain cases. The members of the MIC and at the same time the parties to the IIAs in question would agree that legal protection should not necessarily exist in every case. An opt-in should therefore in practice lead to an opt-out.

8.6.1 The Standard Case: Consensus on the Establishment of MIC Jurisdiction

580 Under the MIC Statute (as an opt-in convention), the MIC should have jurisdiction over actions brought against the EU or its Member States (assuming that the EU and its Member States are parties to the MIC Statute) if the third state where the plaintiff investor comes from (and the investor bases his claim on an IIA of his home country with the EU or (one of) its Member States) is also a party to the MIC.[57] In any event,

[54] A discussion on the possibility of use of an Opt-in Convention was also made in European Commission (2017), p. 50.

[55] An option similar to the Opt-in for future disputes for the MIC was proposed in Art. 30, Unified Agreement for the Investment of Arab Capital in the Arab States, 1980, through which jurisdiction of the Arab Investment Court could extend to any agreement related to an investment within the League of Arab states subject to the agreement of the parties.

[56] For a discussion by the Commission on the issue see European Commission (2017), p. 51.

[57] A similar view has been expressed in European Commission (2017), p. 50; European Union (2019), para. 35.

in this case, the MIC should be added as a further dispute settlement option without any problem.

581 Regarding agreements already concluded in the past, dispute settlement by an MIC is obviously not foreseen, even though about 90%[58] of IIAs in force contain an ISDS mechanism. However, with the MIC Statute, jurisdiction of the MIC could be extended to existing investment protection agreements and dispute resolution systems that exist pursuant to them.[59] The precondition should be that the respondent is an MIC Member and the investor comes from a state who is party to the MIC. In this case, a consensual amendment (of a bilateral treaty through a multilateral treaty) would be presumed.[60]

582 It must at least be discussed whether or not, due to the frequently used sunset clauses in IIAs,[61] the possibility to fall back on traditional *ad hoc* arbitration (as has generally been provided for in IIAs up until now) can be ruled out.[62] According to Article 30 para. 3 VCLT, states are allowed to modify treaties that have been concluded between them. In this respect, multilateral treaties can also amend bilateral treaties if both parties to the bilateral treaty are also parties to the multilateral treaty.[63] Sunset clauses should not be an obstacle.[64] These are of limited use as by virtue of their wording, classification and purpose, they normally refer to the unilateral termination of agreements by one party, not to the consensual modification of the content of the treaty.[65]

583 As was the case in the Mauritius Convention, it should be stipulated that an establishment of MIC jurisdiction through MFN clauses is precluded.[66] The absence of such provisions would lead to significant legal uncertainty, as discussions on the

[58] Gaukrodger and Gordon (2012), p. 10.

[59] This view is also supported by European Commission (2017), p. 50; European Union (2019), para. 35.

[60] Cf. Article 39 VCLT: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

[61] Article 13 para. 3 German Model Treaty 2009: "In respect of investments made prior to the date of termination of this Treaty, the provisions of Articles 1 to 12 above shall continue to be effective for a further period of twenty years from the date of termination of this Treaty." See as well Article 30.9 para. 2 sentence 1 CETA: "Notwithstanding paragraph 1, in the event that this Agreement is terminated, the provisions of Chapter Eight (Investment) shall continue to be effective for a period of 20 years after the date of termination of this Agreement in respect of investments made before that date."

[62] Nowrot (2016), pp. 227 et seqq.; Voon et al. (2014), pp. 451 et seqq.; Binder (2016), pp. 976 et seqq.; Wackernagel (2016), pp. 11 et seqq.

[63] OECD (2015), p. 31.

[64] States have tried to work around the problem through means such as amending the treaty to delete the sunset clause and then terminating the treaty. On this, See, Busse and Lange (2018), p. 335.

[65] Cf. as well Kaufmann-Kohler and Potestà (2016), p. 82.

[66] Article 2 para. 5 Mauritius-Convention: "The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention."

scope of MFN clauses have been going on for a long time and[67] judicial interpretation is not uniform.[68]

In addition, those joining the MIC should keep registers at the MIC Secretariat, which should also be published and include of every concluded treaty that shall be covered by the jurisdiction of the MIC. **584**

8.6.2 *Exceptional Cases: Jurisdiction of the MIC Even if the Home State of the Investor Is Not an MIC Member?*

Jurisdiction could also exist simply by means of MIC membership of the respondent state, once the possibility of unilateral consent to dispute settlement is expressly foreseen in the MIC Statute (see paras. 201 et seqq.). **585**

The inclusion of an option to bring a claim and thus establish jurisdiction in the opt-in convention in the case of non-membership of the respondent state *ad hoc* should be rejected in principle, but is possible. **586**

If neither the home state of the investor, nor the host state of the investment were members of the MIC, it would also be possible to use an *ad hoc* agreement to establish jurisdiction. However, this is to be rejected in principle.[69] **587**

If one decides to follow the above mentioned possibilities despite the concerns expressed, the MIC Statute should at least provide for the possibility of the jurisdiction of the MIC through an *ad hoc* compromis. Here, special rules on cost allocation should be provided for. This scenario could also lead to problems with the enforcement of decisions under the system set out in the MIC Statute; use of the proposed **588**

[67]The discussion concerns on the one hand the question if an investor may claim a more favourable dispute settlement clause in a BIT of the host state with a third state or if the possibility to bring a claim in this respect does only apply to material protection standards. On the other hand, especially the EU is of the opinion that MFN clauses should generally not offer the possibility to "import" better standards from third state treaties, but need to be restricted to prohibit factual unequal treatment of third state nationals. A broad interpretation of the MFN clause would lead to investors claiming the most favourable dispute settlement clause within a BIT of the host state with a third state. See in this respect, among others, Waldermann (2015), pp. 75 et seqq.

[68]The possibility of investors to refer to MFN clauses, agreeing: ICSID, Case No. ARB/97/7, *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction of 25.1.2000, para. 64; ICSID, Case No. ARB/03/10, *Gas Natural SDG, S.A. v. The Argentine Republic*, Decision of the Tribunal on Preliminary Questions on Jurisdiction of. 17.6.2005, para. 31; rejecting this possibility: ICSID, Case No. ARB/03/24, *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction of 8.2.2005, paras. 183 et seqq.; ICSID, Case No. ARB/02/13, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction of 9.11.2004, paras. 113 et seqq. In detail in this respect e.g. Stompfe (2016), pp. 273 et seqq.; Chalamish (2009), pp. 323 et seqq.; European Union (2017), para. 23.

[69]A discussion for use of the MIC through *ad hoc* procedures is seen in European Commission (2017), p. 51.

fund system to settle awards in cases brought under *ad hoc* proceedings should be ruled out in any case.

8.6.3 Jurisdiction of the MIC in Case of Multilateral IIAs

589 The MIC Statute could also apply to further multilateral treaties, such as the ECT.[70] If possible, it should be adopted in the future as an exclusive dispute settlement option in the field of investment protection.

590 However, this would require that all Energy Charter Member States join the MIC. These include the EU itself and most of its Member States, as well as third states. It should also be possible for individual Member States of the ECT to unilaterally recognise the jurisdiction of the MIC for proceedings based on the ECT against them.

8.6.4 Summary of the Establishment of MIC Jurisdiction

591 The MIC should determine that there is jurisdiction under the MIC Statute,

(a) if, in the future, *i.e.* following the entry into force of the MIC Statute and accession thereto, an IIA has been concluded between those MIC Members[71];
(b) if an IIA has been concluded in the past between two MIC parties (consensual jurisdiction for existing treaties; a list of these treaties should also be sent to the MIC Secretariat for reasons of legal certainty; this does not mean this list should be exhaustive);
(c) if an MIC Member State has named an IIA in its list (unilateral establishment of jurisdiction for existing treaties)[72]; and
(d) if an IIA has not been named in the list of an MIC Member State, but is acknowledged as an *ad hoc* ground for jurisdiction by the respondent.[73]

592 For the future, it could also be considered that a ground for jurisdiction can exist

(e) if jurisdiction over an Investor State Contract is recognised in the ICS and the involved state is an MIC Member, or
(f) if jurisdiction over an ICS, although not recognised in the ICS, is subsequently recognised by a *compromis* and the involved state is an MIC Member.

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[70] The European Commission has also considered the possibility of including the ECT within the ICS system, on this see, European Commission (2017), p. 27.

[71] As explained in paras. 247 et seqq., in such a case another ISDS-possibility might be excluded by the later amending treaty.

[72] As explained in paras. 579 et seqq. The MIC is in principle only one of several ISDS-possibilities.

[73] These alternatives could as well be covered by the before mentioned alternatives.

8.7 Transitional Provisions and System Conformity of the MIC

As stated earlier, existing IIAs should largely remain in force, *i.e.* existing IIAs should be revised and modernised, and agreements of the Member States should be gradually replaced by EU agreements. The MIC would be added to the system as an alternative or new and exclusive dispute settlement option, or could replace it entirely, but it should not establish substantive protection standards. **593**

The MIC Statute could also be seen as an amendment to the EU-Vietnam IPA and CETA (see para. 247), or as a subsequent multilateral agreement, amending bilateral agreements between certain parties to the agreement (see also to that extent Articles 30 paras. 3 and 41 VCLT). In any case, in future EU agreements, it should already be stipulated that the respective foreseen bilateral dispute settlement mechanisms cease to be in force and are replaced by MIC jurisdiction once the MIC Statute enters into force and the respective party to the agreement, in addition to the EU, has joined the MIC.[74] At the same time, transitional provisions should already be made in future EU agreements in case the MIC takes over elements of its work in the future. In the case of the transfer of jurisdiction from bilateral ICS in EU agreements; the MIC Statute could also function as an amendment treaty of that EU agreement if the respective partners of the EU also become MIC Members. Corresponding detailed amendments to existing bilateral treaties could be set out in protocols and declarations to the MIC Statute. **594**

In that regard, it could be foreseen that dispute settlement procedures that have already been initiated are completed by the respective bilateral dispute resolution system in the respective instance, but that a legal remedy would only be possible before the appellate instance of the MIC. Future EU agreements may already foresee explicit transitional provisions in the text of the agreement. **595**

Transitional provisions are also necessary for judges that have already been appointed based on bilateral agreements—if the ICS foreseen in these agreements are replaced by the MIC. These provisions should be adopted on a case-by-case basis, depending on the agreement. In the remuneration system for CETA-ICS-judges,[75] which is to be adopted by the mixed CETA Committee, it should already be stipulated that from the moment that the MIC is established or the bilateral ICS loses its jurisdiction, no new complaints can be initiated and no further retainer payments will be made. **596**

When new members join the MIC Statute, the financing scheme must be adjusted accordingly. Representation in the Plenary Body is also immediately possible. Since accession does not involve market access obligations, as in WTO Law, but only the recognition of the MIC as (exclusive) permanent court for clearly defined types of disputes, the respective MIC accessions should be unproblematic to negotiate. **597**

[74] A similar view has been expressed by the Commission in European Commission (2017), p. 58.

[75] Cf. Article 8.27 para. 12 CETA: "In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee."

598 An expansion of the MIC jurisdiction to investment disputes under the ECT is currently only partially possible because it is a multilateral agreement with 53 members at this point in time. At best, a supplementary jurisdiction of the MIC could be accepted if both the respondent MIC Member as well as the host state of the complaining investor are members of the MIC (in the meaning of Article 41 para. 1 lit. b VCLT). Specific difficulties could arise here if there is an intra-EU dispute, but this is not considered at this point.

599 Mediation procedures in existing IIAs should remain untouched, i.e. mediation based on existing IIAs is still possible.[76] However, it could be provided that the MIC also offers a mediation procedure, including the appointment of mediators. In this respect, a mediation center could be set up as sub-unit of the MIC which would then only have subsidiary jurisdiction in cases where no provisions on this topic exist in the bilateral IIAs.

600 The MIC could also provide in its Statute that its jurisdiction is extended to investor-state contracts, insofar as these name the MIC as a dispute settlement forum (and if the respondent state is a member of the MIC).[77] This study does not assume, however, that investor-state contracts are part of the applicable law of the MIC.

601 The multilateralisation of dispute settlement mechanisms could be complemented in the future by a multilateral convention that provides for protection standards, but at the same time also emphasises the stronger and more explicit balancing of investor interests and regulatory interests of investors and states, as is already the case in recent IIAs, and foresees the MIC as a forum with jurisdiction regarding dispute settlement. Such a convention could be open to future accession of more and more members.

8.8 Working Language and Language of Proceedings at the MIC

602 For financial reasons, provisions on the working languages and languages of proceedings of the MIC should be established. An excessive number of working languages and languages of proceedings would considerably increase the respective procedural costs in individual cases, as translation for judges etc. would then have to be provided. Usually, English is the official and working language of most international organisations. Furthermore, the vast body of literature on public international law as well as international investment protection is written in English. Alternatively, it is possible that the MIC Statute allows the parties to the dispute to determine the language of the proceedings, in agreement with the deciding Chamber, and that the MIC Statute only specifies the working language of the Secretariat and the Plenary Body.

[76] The need for support for dispute avoidance mechanisms such as mediation is also seen in European Union (2019), para. 12.

[77] A view supporting such a proposal can be seen in European Union (2019), para. 35.

8.9 Cost Distribution in the New System

The financing of the expected permanent costs of the MIC should be regulated, *i.e.* the costs of the employees of the Secretariat, the judges as well as the necessary infrastructure in form of buildings, equipment etc. From an economic perspective, the MIC only makes sense for a critical mass of Member States, if they divided the costs of such a permanent court among each other. The annual costs for the International Criminal Court are estimated at approximately EUR 130 million,[78] for the WTO Secretariat with more than 600 employees at approximately CHF 198 million.[79] The CJEU and the General Court (GC), with 75 judges, 11 advocates-general and some 2170 additional employees, needs up to EUR 380 million and the ITLOS costs approximately EUR 20 million for a period of 2 years. For the MIC, an amount in the low double-digit millions should also initially be estimated.[80] **603**

Although these court costs are not to be considered insignificant, the MIC will certainly be able to reduce the average cost per dispute resolution procedure. For example, costs caused by the large number of judges in bilateral investment courts, could be saved as well as those costs incurred by the international community through other arbitration fees.[81] In light of the fact that average administrative costs (tribunal fees and secretary fees) are currently estimated at EUR 750,000,[82] an MIC with a minimum number of members should in any case not lead to additional costs within the current system. On the contrary, if it were possible to increase efficiency through the acceleration of proceedings, this would also lead to a decrease in other costs (mostly counsel fees), which are currently estimated at approx. EUR 4 million per party involved in the dispute.[83] Irrespective of the fact that a sufficient amount of states in reality would incur only limited additional costs, the MIC would not only offer a possibility to compensate for the shortcomings of the ISDS system, but also to counter balance deficits of the ICS as it is foreseen under CETA, and thus win acceptance of international jurisdiction over investment disputes. **604**

The MIC should be financed primarily, just like other international organisations, through contributions of its members, i.e. the parties to the agreement.[84] Expenditure **605**

[78]Resolution on the Programme budget for 2015, the Working Capital Fund for 2015, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2015 and the Contingency Fund, ICC-ASP/13/Res.1 of 17.12.2014; Jakobsson (2015).

[79]WTO, Secretariat and budget, www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_chap9_e.pdf.

[80]The EU Commission opines that the cost for a MIC would be close to EUR 10 million per year. On this see European Commission (2017), p. 112.

[81]Hodgson (2014a), p. 3 assumes arbitration tribunal costs of about US$373.200 per proceeding and party.

[82]Hodgson (2014b), p. 1; Hodgson (2014a), Table 2.

[83]Commission (2016).

[84]The allocation of costs among members has also been supported by the EU Commission in European Commission (2017), pp. 54 et seqq. See also Garcia-Bolivar (2015), p. 398.

would determine the necessary amount which should be collected proportionally from the members. Similar to the WTO,[85] the proportion that MIC Members have to bear could be calculated by taking the proportion of foreign direct investment of a state in relation to the total investment volume of all MIC Members. In order to determine the respective numbers, it is possible to make use of surveys made by the International Monetary Fund (IMF),[86] World Bank[87] or UNCTAD.[88] Proposals to impose or transfer the entire court costs to the parties to the dispute should be rejected. However, the parties should certainly be involved in financing by virtue of paying court fees, which are of course dependent on *inter alia* the amount involved in the dispute, as is also determined by a large number of national court cost rules.[89] The members, however, should provide the basic funding.

8.10 Overview of the Necessary Agreements and Secondary Instruments

606 Overall, among others, the following agreements and secondary legislation appear necessary for the establishment of an MIC:

- Statute of a Multilateral Investment Court, including a Code of Conduct (MIC Statute);
- Immunity agreements between the Member States of the MIC (Agreement on Privileges and Immunities of the MIC);
- Seat agreement between the MIC, with its own legal personality, and the host state;
- Procedural rules for the first and second instance;
- Rules of procedure, including rules of conduct, for the Secretariat;
- Guidelines for the necessary contents of a statement of claim;
- Guidelines for the conduct of oral proceedings;
- Guidelines on the court costs;
- Guidelines on security deposits;
- Retirement and pension provisions for the staff of the MIC.

[85]Cf. https://www.wto.org/english/thewto_e/secre_e/contrib_e.htm.

[86]Cf. Coordinated Direct Investment Survey (CDIS), http://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5.

[87]Cf. http://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS.

[88]Cf. http://unctad.org/en/Pages/DIAE/Investment%20and%20Enterprise/FDI_Stocks.aspx.

[89]Cf. e.g. Article 3 para. 1 Gerichtskostengesetz (Court Fees Act): "Die Gebühren richten sich nach dem Wert des Streitgegenstands (Streitwert), soweit nichts anderes bestimmt ist." [Unofficial English translation: "The fees are calculated according to the value of the subject matter of the dispute (value of the dispute), if not foreseen otherwise."].

References

Amerasinghe CF (1996) Principles of the institutional law of international organizations. Cambridge University Press, Cambridge

American Bar Association Section on International Law (2016) Investment Treaty Working Group, Task Force Report on the Investment Court System Proposal. Initial Task Force Discussion Paper of 16.10.2016

Binder C (2016) A treaty law perspective on intra-EU BITs. J World Invest Trade 17:964–983

Boisson de Chazournes L (2012) The international tribunal for the law of the sea. In: Giorgetti C (ed) The rules, practice, and jurisprudence of international courts and tribunals. Martinus Nijhoff, Leiden, pp 111–132

Busse D, Lange S (2018) European Law and Investment Treaties. In: Legum B (ed) The Investment Treaty Arbitration Review. Law Business Research Ltd., London, pp 333–346

Chalamish E (2009) The future of bilateral investment treaties: a de facto multilateral agreement? Brooklyn J Int Law 34:303–354

Commission JP (2016) How much does an ICSID arbitration cost? A snapshot of the last five years. Kluwer Arbitration Blog of 29.2.2016

Daly W (2012) Permanent court of arbitration. In: Giorgetti C (ed) The rules, practice, and jurisprudence of international courts and tribunals. Martinus Nijhoff, Leiden, pp 37–73

European Commission (2015) Trade for all – towards a more responsible trade and investment policy, COM (2015) 497

European Commission (2016a) Establishment of a Multilateral Investment Court for investment dispute resolution, Inception Impact Assessment, Roadmap of 1.8.2016. http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf

European Commission (2016b) Impact assessment on the establishment of a Multilateral Investment Court for investment dispute resolution. Consultation Strategy of 30.9.2016. http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.pdf

European Commission (2017) Impact assessment – multilateral reform of investment dispute resolution, SWD(2017) 302 final, 13.9.2017

European Union (2017) Possible reform of Investor-State Dispute Settlement (ISDS). Submission from the European Union, A/CN.9/WG.III/WP.145, 12 December 2017

European Union (2019) Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, 24 January 2019

Garcia-Bolivar OE (2015) Permanent Investment Tribunals: the momentum is building up. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the Investor-State Dispute Settlement System. Brill Nijhoff, Leiden, pp 394–402

Gaukrodger D, Gordon K (2012) Investor-State Dispute Settlement: a scoping paper for the Investment Policy Community. OECD Working Papers on International Investment 2012/03

Giorgetti C (2016) International adjudicative bodies. In: Katz Cogan J, Hurd I, Johnstone I (eds) The Oxford handbook of international organizations. Oxford University Press, Oxford, pp 881–902

Herrmann C, Weiß W, Ohler C (2007) Welthandelsrecht, 2nd edn. C.H. Beck, München

Hodgson M (2014a) Counting the costs of investment treaty arbitration. GAR News of 24.3.2014

Hodgson M (2014b) Costs in investment treaty arbitration: the case for reform. Transnl Disp Manage, 1

Jakobsson N (2015) The 2016 ICC budget – more money, more problems? Justice Hub of 17.9.2015. https://justicehub.org/article/2016-icc-budget-more-money-more-problems

Katz RL (2016) Modeling an International Investment Court after the World Trade Organization Dispute Settlement Body. Harv Negotiation Law Rev 22:163–188

Kaufmann-Kohler G, Potestà M (2016) Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?

Kunz JL (1947) Privileges and immunities of international organizations. Am J Int Law 41:828–862
Martha RSJ (2016) Exemptions from taxes, customs duties, and prohibitions on imports and exports (Article II Sections 7–8 General Convention). In: Reinisch A (ed) The conventions on the privileges and immunities of the United Nations and its specialized agencies. Oxford University Press, Oxford
Nowrot K (2016) Termination and renegotiation of international investment agreements. In: Hindelang S, Krajewski M (eds) Shifting paradigms in international investment law, pp 227–265
OECD (2015) Developing a multilateral instrument to modify bilateral tax treaties, Action 15 2015 Final Report. OECD Publishing, Paris
Reinisch A (ed) (2016a) The conventions on the privileges and immunities of the United Nations and its specialized agencies. A commentary. Oxford University Press, Oxford
Reinisch A (2016b) Privileges and immunities. In: Katz Cogan J, Hurd I, Johnstone I (eds) The Oxford handbook of international organizations. Oxford University Press, Oxford, pp 1048–1068
Ruffert M, Walter C (2015) Institutionalisiertes Völkerrecht, 2nd edn. C.H. Beck, München
Schabas WA (2010) The International Criminal Court: a commentary on the Rome Statute. Oxford University Press, Oxford
Schreuer CH, Malintoppi L, Reinisch A, Sinclair A (2009) The ICSID Convention: a commentary. Cambridge University Press, Cambridge
Stompfe P (2016) Die Gestaltung und Sicherung internationaler Investor-Staat-Verträge in der arabischen Welt am Beispiel Libyens und Katars. Nomos, Baden-Baden
UNCITRAL (2017) Possible future work in the field of dispute settlement: reforms of investor-State dispute settlement (ISDS), Note by the Secretariat of 20.4.2017. https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/69/PDF/V1702369.pdf?OpenElement
UNCITRAL (2018) Possible reform of investor-State dispute settlement (ISDS) Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018
UNCITRAL (2019) Report on Working Group III (Investor-State-Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), A/CN.9/970
Voon T, Mitchell AD, Munro J (2014) Parting ways: the impact of mutual termination of investment treaties on investor rights. ICSID Rev 29:451–473
Wackernagel C (2016) The twilight of the BITs? EU Judicial Proceedings, the consensual termination of intra-EU BITs and why that matters for international law. Beiträge zum Transnationalen Wirtschaftsrecht Heft, p 140
Waldermann C (2015) Theorie investitionsrechtlicher Meistbegünstigung. Nomos, Baden-Baden

Chapter 9
Standalone Appeal Mechanism: "Multilateral Investment Appeals Mechanism" (MIAM)

A purely multilateral Appellate Body was recently proposed as an alternative to the two-tiered court model—a MIAM.[1] In this variant, the first phase of *ad hoc* arbitration as practiced so far, be it an ICSID, UNCITRAL or SCC procedure, should be retained.[2] Nevertheless, a uniform multilateral judicial Appellate Body or quasi-judicial Appellate Body should be added. However, in contrast to the proposals, in particular those made in the context of ICSID in 2004 and 2005 as well as approaches in other recent US IIAs, this should be characterised by tighter organisational structures and a panel of judges appointed for a longer period of time. This is to achieve more consistency in decision-making practice. **607**

This variant of the structure of a multilateral appeal mechanism is very much oriented at the WTO Dispute Settlement Model.[3] In addition to creating a rule based regime,[4] one of the main innovations of the reform of the dispute settlement system with the establishment of the WTO was an institutional enlargement with the addition of a permanent Appellate Body. The purpose of creating the Appellate Body was in particular to ensure consistency and stability of decision-making by seven permanent members of the Appellate Body. **608**

[1] A similar appellate body has been discussed *inter alia* in European Commission (2017), p. 28; UNCITRAL (2018), para. 42. A discussion on appeals proposals is also seen in Bottini (2015), pp. 455 et seqq.

[2] A similar recommendation has been made in UNCITRAL (2018), para. 42.

[3] A discussion on use of a model similar to the WTO Appellate Body can also be seen in McRae (2010), pp. 382 et seqq.; Lee (2015), pp. 480 et seqq.

[4] Cf. among others Cass (2001), p. 50.

M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, https://doi.org/10.1007/978-3-662-59732-3_9

9.1 Organisational Structure of the MIAM

609 The Members of the MIAM should be the same as those of the MIC (see paras. 77 et seq.).

610 Like the MIC, a permanent appellate mechanism should be established with a Plenary Body, Judges and a Secretariat.

611 The Plenary Body (see paras. 80 et seqq.) should represent the members of a MIAM. Its main task would be the election of judges and the adoption of procedural rules as secondary law.

612 For the judges of an Appellate Mechanism, there should be no other requirements in terms of qualification than those which have been already set out for the two-tiered solution (see paras. 124 seqq.). The same applies to the independence of the judges and the ethical standards to be observed (see paras. 130 et seqq.). They should be permanently available, which means that they are comparable to judges of other international courts and can only engage in secondary employment that over time does not prevent them from exercising their judicial activity and that does not jeopardise their independence.[5]

613 The judge's election/appointment by the Plenary Body should also be the main factor for the future acceptance of this mechanism.[6] The considerations applicable for the selection of judges for the MIC could also be applicable here (see paras. 84 seqq.). The judges should reflect the traditions of the various legal systems. Therefore, a sufficiently large number of judges should be appointed. Since up to nine appeals judges are already designated for the EU's bilateral agreements, a total of nine judges should be considered for the MIAM, while the composition could be geared towards that of the ICJ.[7]

614 An Appellate Mechanism should also be supported by a Secretariat. However, the Secretariat should be configured in a manner that it is correspondingly smaller (see paras. 177 et seqq.).

615 The establishment of an International Investment Law Advisory Centre only for the appeals instance, is only recommended to a limited extent. This is because the main work related to the case has already been done during the *ad hoc* arbitration. Furthermore, representatives for the parties who have familiarised themselves with

[5]The need for permanent employment and availability of adjudicators has also been recommended in European Union (2019), para. 16; European Commission (2017), p. 42. The members of the Appeals Tribunal in the EU-Vietnam IPA (Art. 3.39(13)) (draft for signature), EU-Singapore IPA (Art. 3.10(10)) (draft for signature) and EU-Mexico Global Agreement (Art. 12(11)) (draft for signature) as on February, 2019, are also required to be available at all times and are paid a monthly retainer fee for the purpose.

[6]A discussion on the procedure for election of judges based on the proposal and agreement of the contracting parties is seen in European Union (2019), para. 22. On the other hand European Commission (2017), pp. 46 et seq. prescribed appointment of judges through an independent body.

[7]The European Union also prescribes geographical and gender diversity in the standing mechanism for dispute settlement, European Union (2019), para. 21. Diversity in the MIC has also been considered as an essential part for impartiality in a future MIC by Gomez (2018).

the case and acted on behalf of the parties, should in most cases, for substantive, and financial reasons, also be entrusted with representing their client in the appellate instance.

9.2 General Procedure of the MIAM

The appeals procedure against investor-state arbitration decisions should begin with the filing of the appeal against the arbitral decision by one or both of the parties of the first-instance arbitration. **616**

An appeal through the MIAM should temporarily suspend the validity of the arbitral award or the first instance decision of an investment court system (e.g. CETA or EU-Vietnam IPA).[8] At the same time, it should also eliminate the possibility of an appeal against the arbitral decision before national courts, for example in the process of recognition and enforcement.[9] An arbitral tribunal under the ICSID Convention would have to decline jurisdiction in case there is a consensual amendment of the IIA excluding ICSID arbitration. **617**

However, proceedings under other arbitration rules would still be possible and desirable. Of course, such decisions would continue to be enforceable in third countries that are members of the New York Convention but not of the MIAM. Nonetheless, it could be problematic that first-instance arbitral awards could continue to be enforced in non-MIAM Member States. They can, thus, undermine the appeal possibilities of a respondent MIAM state in the MIAM. This could be ruled out in cases where the home state of the investor as well as the respondent are members of the MIAM. The MIAM Statute could stipulate that enforcement of an arbitral award under the New York Convention in third countries would only be possible after the appeal period has expired. It would thereby lead to an amendment of the IIA underlying the dispute. Amendment of the IIA between two MIAM Members by the MIAM Statute as a subsequent treaty between the two states, could require first-instance tribunals to state in their arbitral awards that they are provisional and not enforceable under the New York Convention (see Article V para. 1 lit. e NYC). The awards would become final only after (a) the expiration of the Appeal Deadline under the MIAM or (b) an arbitral tribunal after a final decision taking into account MIAM's legal interpretation, declares it to be a final and enforceable decision within the meaning of New York Convention.[10] However, it **618**

[8]The CETA (art. 8.28(9)), EU-Vietnam IPA (Art. 3.54(1)) (draft for signature), EU-Singapore IPA (Art. 3.19(1)) (draft for signature) and EU-Mexico Global Agreement (Art. 29(8)) (draft for signature) as on February, 2019, provide for a provisional award which becomes final after a definite time period (90 days) if it is not appealed in the Appeals Tribunal.

[9]Kaufmann-Kohler and Potestà (2016), pp. 71 et seq.

[10]A clear statement that an award of the investment tribunal will not become enforceable until the appeals procedure is completed is seen in the CETA (Art. 8.28(9)(c)), EU-Singapore IPA (Art. 3.22

cannot be ruled out that non-member state countries will consider the arbitral award as final and allow it to be enforced.

619 In order for the suspensory effect to occur during the enforcement process, the IIAs serving as the basis of arbitration would have to be supplemented accordingly; and this could also be provided for in the MIAM Statute (see para. 247). Security may also be sought from the claimant.[11] The right of intervention of third parties must be clarified (see para. 346).[12] Non-involved third parties could have the option to comment or submit their opinion, in line with the general principles of transparency (see paras. 326 et seqq.). However, since third party opinions are likely to lead to delays, caution should be exercised here, especially in cases where such a possibility as mentioned above was not provided for. Given that in principle there should be awareness about ongoing arbitration proceedings, short time limits could be stipulated in case (there is possibility to submit a comment or opinion), as well as limitations on the scope of this possibility.

620 Any jurisdiction of the MIAM in an arbitration which has already been initiated at the time of its establishment should be possible only by consensus of the claimant investor and the respondent (then MIAM Member).

621 MIAM appeals procedures do not seem possible in the case of ICSID proceedings. They are in contradiction to Articles 53 and 54 ICSID Convention.[13] An amendment to the ICSID Convention through the MIAM Statute should be rejected, as the inclusion of an appeal body in ICSID proceedings would contradict the aim and purpose of the ICSID Convention, i.e. to bring about immediate enforcement without further review of the content of the judgment.[14] The MIAM Statute could therefore at most provide that ICSID arbitration proceedings in actions against a MIAM Member by claimants from other MIAM Member States would no longer be possible.

622 Appeals against decisions in arbitration proceedings under other arbitration rules except the ICSID Convention should only be possible within a short time limit. If no legal appeal is filed within this period, the judgment will become final. Here, a 1-month appeal period could be set, with the option of an additional 1-month

(1)) (draft for signature) and EU-Mexico Global Agreement (Art. 31(1)) (draft for signature) as on February, 2019.

[11] Article 29 para. 4 section 3 Investment Chapter TTIP draft: "A disputing party lodging an appeal shall provide security for the costs of appeal and for the amount provided for in the provisional award." Similar provisions are seen in Art. 3.19(5) EU-Singapore IPA (draft for signature), Art. 3.54(6) EU-Vietnam IPA (draft for signature) and Art. 30(4) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[12] Third party submissions have been permitted under the provisions of the treaty under Art. 3.19 (6) EU-Singapore IPA (draft for signature), Art. 3.54(7) EU-Vietnam IPA (draft for signature) and Art. 30(5) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[13] Similar views have been expressed by Tams (2006), p. 12; Schreuer (2018), p. 156.

[14] According to this Calamita (2017), pp. 585 et seqq.

deadline for the declaration of grounds of appeal.[15] To prevent abuse, a Court (misuse)[16] fee could be considered for abusing the possibility of appeal (see para. 306). However, in case of abuse, the necessary expenses incurred by the opposing side for the purpose of legal defense should be reimbursed.

The grounds of appeal should indicate the scope of the appeals as well as the appellant's allegations of infringement and the grounds on which the appellant bases its view. **623**

The MIAM should decide by judgment. **624**

The MIAM should be able to confirm, modify or reverse the decisions of the initial main proceedings.[17] It is questionable whether the Appellate Body could also be given the opportunity to remand cases back to the tribunal for the purpose of modifying the decision[18] with the obligation to reassess the case taking into account the legal interpretation of the MIAM.[19] However, as already stated (see para. 351), the introduction of a possibility to remand back a case is to be viewed critically, particularly because the overall duration of the proceedings would be extended. Additionally, where required, an arbitral tribunal outside the new multilateral appeals body would be required to make a (second) decision "taking into account the MIAM legal opinion". **625**

However, a remanding of cases could also have advantages. A decision made by an arbitral tribunal which when reconsidering the case, has possibly taken the legal interpretation of the MIAM into account, would then be available. An execution of such a decision under the New York Convention could be possible. However there would be no possibility for enforcement under the ICSID Convention in this scenario (see paras. 496 et seqq.). **626**

The MIAM should be given extensive investigative powers to enable full autonomous decision-making as an authority empowered with jurisdiction for establishment of facts. This is even more necessary if no power to remand the case is provided to the MIAM. **627**

The appeal proceedings should be divided into a written and an oral procedure. Facts and evidence already submitted in the earlier initial arbitral proceedings **628**

[15]Similar as well in WTO-DSU, cf. Working procedures for appellate review, Rule 20. A 90 day period for appeal has been prescribed under the CETA, EU-Singapore IPA (draft for signature), EU-Vietnam IPA (draft for signature) and EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[16]Foreseen like this in Article 32 BVerfGG (Act on the Federal Constitutional Court); if the there mentioned misuse fee amounting up to €202,600 is enough, must be left open.

[17]Article 8.28 para. 2 CETA: "The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on: [...]". Similar provisions are seen in Art. 3.19(3) EU-Singapore IPA (draft for signature), Art. 3.54(3) EU-Vietnam IPA (draft for signature) and Art. 30(2) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[18]Compare Article 8.28 para. 7 lit. b) and para. 9 lit. c) sublit. iii) CETA.

[19]An explicit possibility for referral back to the initial tribunal for re-consideration based on the Appeals Tribunal's decision is seen in Art. 3.55(4) EU-Vietnam IPA (draft for signature), Art. 3.19 (3) EU-Singapore IPA (draft for signature) as on February, 2019.

should, in principle, be taken into account. It is up for discussion whether statements and evidence that were not introduced in the initial arbitration proceedings could be introduced now. From the point of view of process efficiency, this would not be preferable.

629 There should be the opportunity to withdraw the appeal at any time. However, a decision on costs should also be possible at the request of the appellant. The withdrawal of the appeal should result in the discontinuation of the suspensive effect of the appeal and, at the same time, the loss of the right to a new appeal.

9.3 Specific Issues

9.3.1 Duration of Proceedings

630 The WTO Dispute Settlement Procedure provides for a maximum of 60 days for an appeal proceeding but in no case should it take longer than 90 days.[20] The duration for a MIAM appeals procedure duration should also be kept short as it is staffed with full-time judges.[21] In any case, the principle of accelerated proceedings should apply. In individual cases, however, the respective chamber should be free to extend the duration of the appeals procedure for important reasons.

631 Should it come to repetitive procedural extensions due to an overburdening of the appeal mechanism, this would be an indication for the Plenary Body to increase the number of judges of the MIAM.

9.3.2 Scope of Examination and Investigative Jurisdiction

632 In the WTO Dispute Settlement Procedure, the jurisdiction of the Appellate Body is limited to the legal issues dealt with in the panel report and the corresponding interpretation of the law by the Panel.[22] The appeal procedure primarily serves the

[20] Article 17 para. 5 DSU: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

[21] An 180 day time period for completion of appeals proceedings is seen in in Art. 3.19 (4) EU-Singapore IPA (draft for signature), Art. 3.54(5) EU-Vietnam IPA (draft for signature) and Art. 30(3) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[22] Article 17 para. 6 DSU: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

objective of legal control. The ICSID Secretariat proposals of 2004 stated that there should be a possibility to appeal against decisions based on the reasons given in Article 52 ICSID Convention as well as for a "clear error of law" or "serious error of fact".[23] In addition to the reasons set out in Article 52 of the ICSID Convention,[24] an appeal "due to errors in the application or interpretation of the applicable law, due to manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law" is provided for in CETA.[25] In WTO Law, very serious errors can lead to the annulment of a panel report.[26] Here it is criticised that two different concepts—annulment and appeal—would be mixed together.[27] However, it is not clear why an appeal panel should not be allowed to deal with both these concepts.

633 The applicable law in MIAM appeals also includes procedural law, which means that there should be a possibility for review of compliance with the procedural principles by the arbitral tribunal in the first instance proceedings. The question of whether fact-finding was properly carried out in the first instance should also be considered as a question of law, namely whether an "objective appreciation of the facts" has been carried out.[28] Additionally, a review of whether there were "serious errors of fact" should be specifically made.

634 In principle, it should be clarified whether a reference to Article 52 ICSID Convention should be made—and if so, whether the interpretation of this provision by ICSID arbitral tribunals should be given greater consideration. Alternatively, it must be clarified whether the reasons of annulment listed in Article 52 ICSID Convention and not included in the MIAM Statute should be included (see paras. 557 et seqq.). The jurisdiction of the MIAM should in principle be limited to arbitral decisions. It must be clarified whether the MIAM should also be given jurisdiction to annul the arbitral decision. In situations of bias of individual arbitrators in the initial arbitral proceedings, a distinction should be made between requests for suspension in an ongoing procedure and subsequent annulment (see para. 347).

635 As stated, the determination of the applicable substantive law can either be at the level of the Rules of Procedure of a Dispute Settlement Body or may be governed by

[23] ICSID Secretariat (2004), Annex, p. 4.

[24] Article 52 para. 1 ICSID Convention: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[25] Article 8.28 para. 2 CETA: "The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)."

[26] Ohlhoff (2003), C.I.2., para. 106.

[27] EFILA (2016), pp. 29 et seq.; American Bar Association Section on International Law (2016), p. 78.

[28] According to Ohlhoff (2003), C.I.2., para. 106.

the applicable bilateral and multilateral investment protection treaties. In this respect, the applicable law in the case of the MIAM should primarily be determined by the law already applied by the arbitral tribunal. However, it should also be possible to assess, within the scope of MIAM's jurisdiction of review, whether the Arbitral Tribunal has applied the "right" substantive law in a justifiable manner.

9.3.3 Chamber and Plenary Decisions

636 The MIAM should be able to form chambers. Only "for good reason" should one of the disputing parties be able to request a plenary decision. Plenary decisions are of significant importance and prevent substantive differences in divergent decisions of different chambers.

637 The ICSID proposal provided for an appeal panel of 15 judges of different nationalities.[29] The WTO Appellate Body, however, has only seven members who decide in each case in chambers of three judges.[30] This relatively small number of appellate body members appears to have had no negative impact on the acceptance of the WTO DSU system so far. Based on this, it was also determined in CETA that decisions will be made in the Appellate Body in divisions of three.[31] In certain situations, chambers of 5, 7 or 9 judges could be formed. In case of the EU-Vietnam IPA, the EU-Singapore IPA and the EU-Mexico Global Agreement, the number of members of the appellate tribunal has been fixed at 6 with the possibility for formation of divisions consisting of 3 members.[32] If chambers are introduced, an obligation requiring exchange of views between all judges of the MIAM could be stipulated, as is the case with the WTO Appellate Body.[33]

[29]ICSID Secretariat (2004), Annex, p. 3: "Such a set of ICSID Appeals Facility Rules could provide for the establishment of an Appeals Panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre. The terms of the Panel members would be staggered. Eight of the first 15 would serve for three years; all others would be elected for six year terms. Each member would be from a different country. They would all have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties."

[30]Article 17 para. 1 sentence 3 DSU: "It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation."

[31]Article 8.28 para. 5 CETA: "The division of the Appellate Tribunal constituted to hear the appeal shall consist of three randomly appointed Members of the Appellate Tribunal."

[32]See, Art. 3.10 EU-Singapore IPA (draft for signature), Art. 3.39 EU-Vietnam IPA (draft for signature) and Art. 12 EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[33]Working procedures for appellate review, Rule 4.3: "In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members. [. . .]." In this sense, Alvarado Garzón (2019), p. 491.

9.3.4 Decision on the Bias of Arbitrators in the Initial Arbitral Proceedings and MIAM

The judges of the MIAM could be given the power to decide on the bias of arbitrators in the initial arbitral proceedings. The content of the IIAs and the arbitration rules underlying the first instance proceedings could be modified by the MIAM Statute if the home state of the claimant investor and the respondent state are both MIAM Members. If only the respondent state is a member, this jurisdiction will not be applicable (for the *inter se* amendment of multilateral treaties, see para. 498). **638**

The potential bias of judges of the MIAM should be decided by a third party, such as the ICJ.[34] Alternatively, test for bias could be delegated to another MIAM chamber or to the MIAM judge's plenary.[35] For the latter option, it is an additional advantage that a solution is found "within the system", but at the same time, this could also lead to lower objectivity in the decisions. **639**

9.3.5 Precedence Created by Second-Instance Judgments?

In principle, a precedent of MIAM judgments should only be accepted with regard to the interpretation of specific provisions of the agreement on which a specific decision was taken. In addition, such a binding effect could probably only be accepted for the MIAM, but not for future arbitration based on IIAs. However, it could be assumed that a MIAM can definitely contribute more to the formation of principles in investment protection law and, to that extent, to greater consistency in this area of law.[36] **640**

[34]Cf. as well American Bar Association Section on International Law (2016), Executive Summary & Conclusions and Recommendations, p. 14. Cf. Article 8.30 para. 2 CETA: "If a disputing party considers that a Member of the Tribunal has a conflict of interest, it shall send to the President of the International Court of Justice a notice of challenge to the appointment. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge."

[35]The EU-Singapore IPA (Art. 3.11) (draft for signature), EU-Vietnam IPA (Art. 3.40) (draft for signature) and EU-Mexico Global Agreement (Art. 13) (draft for signature) as on February, 2019 provide that challenges based on conflict of interest against a Member of a Tribunal or Appeal Tribunal will be heard by the President of the Tribunal or Appeal tribunal respectively. Challenges against the President of each tribunal is heard by the President of the other tribunal (Tribunal and Appeal Tribunal).

[36]See in this respect as well Kaufmann-Kohler and Potestà (2016), p. 69; Sauvant (2016), p. 29; Howard (2017), pp. 47 et seq.; UNCITRAL (2018), paras. 36 et seqq.; Li (2018), p. 948.

9.4 Decisions Rendered by the MIAM

641 Judgments of MIAM should have no direct effect on national law. As a rule, international courts and arbitral tribunals merely have an obligation to eliminate any identified international law infringements of national legal acts. This can also be mitigated by a mere obligation to indemnify, as is generally the case in investment protection law. In addition, the power to determine the existence of (unlawful) indirect expropriation and to determine the due amount of compensation should be stated in the individual investment protection agreements.

9.5 Enforcement of MIAM Decisions

642 The possibility for enforcement of decisions of a standalone appellate authority instead of an MIC would be difficult to estimate because it depends on the configuration of this appellate authority.

643 Judgments of the MIAM, in line with the criteria already set out for the MIC will not, be considered to be enforceable under the ICSID Convention. Enforcement of decisions under the ICSID Convention will continue to be subject to the above-mentioned obstacles: the ICSID Convention does not provide for an appeal and the decision of such an authority cannot in any case constitute an ICSID arbitration award. A modification of this provision between two states would be conceivable (see para. 498).

644 Whether an option for enforcement under the New York Convention is available is subject to great legal uncertainty and depends on the perspective of the specific national court.[37] If it concerns an appeal against arbitral awards rendered by ordinary arbitral tribunals, the condition of a voluntary submission of the parties could be fulfilled as the jurisdiction of the tribunals deciding in the first instance would be based on an established basis.

645 It is questionable whether, if the MIAM modifies or confirms the first-instance award, is it still an arbitral award that is enforceable under the New York Convention (see paras. 500 et seqq.). The conditions for the election of judges should certainly be also crucial for the qualification of an arbitral award in the sense of the New York Convention or as a judgment of an international court. If this is done by a plenary body and if the judges are full-time judges, it seems difficult for the decision to qualify as an enforceable award under the New York Convention (see paras. 516 et seqq.).[38]

646 However, the situation may be different if the case would be remanded to the original arbitral tribunal for a "reassessment taking into account the legal interpretation of MIAM", after being decided by the mechanism. In this case, it could be an

[37]For further discussion on status of appellate awards see, Potesta (2018), pp. 176 et seqq.

[38]Regarding this problem, see Kaufmann-Kohler and Potestà (2016), p. 70.

arbitral award within the meaning of the New York Convention, since ultimately in this situation an arbitral tribunal will make the final decision in every case.

A mere multilateral appeal would not pose any particular challenges to the finality and binding nature of decisions. Enforcement of an award under the New York Convention would only be possible if the decision is final, after the Appellate Body has finally ruled or when the time limit for appealing the first-instance award has expired. **647**

If a defeated MIAM Member appeals an arbitral award rendered under the ICSID Convention or the New York Convention, this may result in a decision which would no longer be enforceable under the ICSID Convention or the New York Convention and therefore fall outside the scope of application of those enforcement instruments, even if the appeal procedure is successful. Considering this situation an effective enforcement system should also be created in the MIAM Statute, so that a MIAM Member could not ultimately defend enforcement by a mere appeal to an arbitral award in the sense of the ICSID Convention or the New York Convention. The establishment of a stand-alone system comparable to the ICSID Convention or the New York Convention would therefore make sense for the MIAM due to the uncertainties mentioned. For this, however, a new convention for the recognition and enforcement of decisions of the MIAM would have to be developed. The ratification of such a separate recognition and enforcement convention by non-MIAM Member States would, however, be unlikely. Hence, an enforcement system under the MIAM Statute should be considered, but only the parties to this agreement would be bound. **648**

The enforcement fund appears to be a good way to offset this disadvantage. As an alternative, securities should be provided before an appeal, equal to the amount of the sum awarded in the arbitral award, plus legal costs.[39] **649**

The enforcement fund proposed above in the sense of a "security account" for the settlement of claims for damages arising from MIC decisions must therefore also be examined for the MIAM (see para. 539). **650**

9.6 Possibilities for Setting Up a MIAM

9.6.1 Establishment as an Independent International Organisation

An acceptance of MIAM decisions as arbitral awards within the meaning of the New York Convention seems quite questionable, as already discussed for the MIC alternative. As with the MIC, specific requirements should be laid down for the **651**

[39]The EU-Vietnam IPA (Art. 3.54(6)) (draft for signature) states that the Appellate Tribunal may determine the amount of security required to be posted based on the circumstances of the case.

appointment of judges and to support the proceedings before a MIAM, a Secretariat should be established.

652 The best option for an effective MIAM would be to establish it as an independent multilateral court of appeal in the sense of an independent international organisation. As an international organisation, a MIAM would enjoy legal personality under international and national law.[40] The MIAM Statute as a treaty should provide for both its own procedural law and its own enforcement provisions. The establishment of an international organisation would ensure the essential requirements for the functioning of an independent tribunal, such as functional immunity for judges, financially equal treatment of the state parties, the conclusion of a seat and immunity agreement and the like (see para. 547).

653 A connection to existing institutions is not desirable. Changes to the ICSID Convention to include this system in the ICSID framework would require unanimity, therefore such an option seems unrealistic,[41] especially as states that explicitly oppose the MIAM system are unlikely to agree to an amendment of the ICSID Convention.[42] Integration into the WTO system also appears to be unrealistic at the present time (see paras. 558 et seqq.).

654 However, an agreement between the MIAM and ICSID or the PCA or other arbitration institutions regarding support in terms of logistics and personnel could be envisaged. For example, a separate Secretariat of the MIAM could be dispensed with and the MIAM Secretariat tasks could be dealt with externally.[43] Hearing facilities and Secretariat support from existing institutions, such as the ITLOS, could be used.

655 Additionally, the project of judicial multilateralisation of an investment dispute settlement system with the support of OECD, UNCITRAL and UNCTAD should be promoted (see para. 563).[44]

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[40] Cf. Article 18 sentence 1 ICSID Convention; Article VIII:1 WTO Agreement, Article 47 TEU, Article 4 Rome Statute.

[41] Article 66 para. 1 ICSID Convention: "If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment."

[42] American Bar Association Section on International Law (2016), p. 120.

[43] For example, the Secretariat of the ICSID has been designated as the Secretariat for the Investment Tribunal and the Appeal Tribunal under Art. 3.09(16) and 3.10(14) EU-Singapore IPA (draft for signature), Art. 3.38(18) and 3.39(18) EU-Vietnam IPA (draft for signature) and Art. 11(17) and Art. 12(15) EU-Mexico Global Agreement (draft for signature) as on February, 2019.

[44] American Bar Association Section on International Law (2016), pp. 120 et seq.

9.6.2 Necessity of a Minimum Number of Members

A multilateral court of appeal should be open to accession by other states and REIOs. The MIAM Statute should only come into effect after a certain number of ratifications, for reasons of composition of the panel and greater acceptance of MIAM judgments. Such a step will also create guidance for subsequent arbitration practice, cost distribution etc. **656**

A MIAM makes sense for the EU even with only a minimum number of states. The new generation of agreements, such as the CETA and the EU-Vietnam IPA already contain an investment Court system which would then be replaced by the MIAM. **657**

From an EU perspective, all new agreements could provide MIAM jurisdiction. If the MIC system cannot be realised, it would need to be discussed whether the MIAM should still be set up. In their negotiations and renegotiations of trade, general economic, investment protection and association agreements, the EU and its Member States should ask the other parties to actively participate in the establishment of a MIAM. The EU and its Member States should seek the membership of the third states in a MIAM. **658**

9.6.3 Establishment of MIAM Jurisdiction

9.6.3.1 Establishment of MIAM Jurisdiction by Explicit Amendment of Existing Treaties and Through IIAs Concluded in the Future

The foregoing considerations are based on the premise that existing EU member state IIAs remain largely in force, which means that these existing IIAs will be modernised and Member State agreements will gradually be replaced by EU agreements. It is therefore necessary to show how this particular substantive network can be linked to a purely multilateral appeal system at the dispute settlement level. The immediate use of the existing IIA network has the advantage that the negotiating parties and the parties to the agreements of the EU and its Member States can be invited to join the MIAM through negotiations. **659**

An establishment of MIAM jurisdiction should be made by expressly declaring its jurisdiction in new agreements of the EU with other states that want to promote this new system. For this purpose, the MIAM Statute should stipulate that in future, all newly concluded agreements of the MIAM Members will provide for the possibility of appeal against the initial arbitral tribunal decisions at the MIAM. MIAM Members will endeavour in their treaty negotiations to promote the extension of the MIAM Member circle (in the sense of a declaration of intent). **660**

In that regard, it should be explicitly stated in agreements to be concluded by the EU that, after the establishment of a MIAM, that it alone will have jurisdiction over appeals against arbitral decisions and first-instance decisions of the ICS and that it, **661**

consequently, constitutes the ICS Court of Appeal.[45] Provisions should be made for the second instance of the ICS established in the bilateral EU Agreements to give up their respective jurisdiction and to transfer jurisdiction to a MIAM as soon as it is established and operational. Corresponding transitional rules are not provided for in either CETA or in the EU-Vietnam IPA—so far—but they should be included. The MIAM Statute would also be able to act as an amendment treaty to the EU agreements with non-member states regarding the transfer of jurisdiction of the second instance of the bilateral ICS in the agreements involving the EU to the MIAM, if the respective parties to the agreements with the EU also become MIAM Members. The required detailed changes of the existing bilateral treaties could be set out in protocols and declarations to the MIAM Statute.

662 Additionally, it should be stipulated in the EU agreements that the parties to the agreement will actively participate in and join the establishment of a MIAM. Further, the new EU free trade and/or investment protection agreements that will be negotiated in the future with third countries should also stipulate that both parties to the agreement will actively participate in the promotion of a multilateral investment protection system ("snowball system").

663 Existing EU agreements will be reformed, renegotiated etc. It should be specified that in the future, the EU will also include the MIAM in all reform negotiations of existing treaties. For investment disputes, the EU shall take into account the membership of its partners in the MIAM. For example, the agreements with Mexico and South Korea could be complemented by investment protection chapters,[46] which also provide for a jurisdiction of the MIAM for legal remedies in investment protection matters.

664 In the long term, EU Member States could also use their bargaining power to reform old agreements with their respective parties to the agreement, encourage them to become members of MIAM, introduce legal remedies in the field of investment law, and also to work in agreements with other states to establish MIAM's jurisdiction ("snowball system").

665 The modified Member State IIAs could in turn include a clause stating that MIAM, after its establishment, has the jurisdiction to decide on legal disputes in investments on the basis of Member States IIAs.

666 Part of the Member States' IIAs could therefore, in the long term, after amendment, establish a jurisdiction of the MIAM Appellate Body.[47]

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[45] A possibility for appeal of Investor State Dispute Settlement Awards has been foreseen *inter alia* in Art. 29, India-Belarus BIT, 2018; Art. 28(10), USA-Uruguay BIT, 2005; Art. 28(10), USA-Rwanda BIT, 2008; Annex 8-E, Chapter 8, Canada-Republic of Korea FTA, 2014.

[46] See European Commission (2015), pp. 35 and 37. The pending negotiations with Mexico and the already available investment protection chapter do nevertheless not include indications how the dispute settlement mechanism should be designed.

[47] List of the bilateral investment agreements referred to in Article 4 para. 1 of Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third

9.6.3.2 MIAM Statute as an Opt-in Convention to Amend Existing IIAs

667 The MIAM Statute could also be designed as an opt-in convention. With each accession of the parties to an IIA, MIAM would complement other dispute resolution mechanisms established in the respective IIA. This applies in all cases where both/all parties to the disputed IIA are also members of the MIAM. The MIAM could have jurisdiction if, in the context of legal proceedings against the EU or its Member States (assuming that the EU and its Member States are parties to the MIAM), the third country where the complaining investor comes from (and the investor refers to IIAs of its home country with the EU or its Member State(s)) is also a party to the MIAM. In this case, a consensual treaty amendment (a bilateral treaty through a multilateral treaty) can be assumed.[48]

668 The existing IIAs between MIAM Members, then would not have to be explicitly amended or renegotiated. Consequently, MIAM's jurisdiction could be based on an opt-in convention comparable to the Mauritius Convention[49]—insofar as the MIAM Statute is concerned—and the MIAM Statute obliges states to additionally offer an opportunity to appeal by MIAM. The MIAM Statute and accession to it would then give MIAM jurisdiction to appeal against decisions of arbitral tribunals or the first instance of an ICS.

669 Comparable to the Mauritius Convention, it should be foreseen that the establishment of MIAM jurisdiction via MFN clauses is excluded.[50] In addition, those who accede to the MIAM should submit lists to the MIAM Secretariat, which should state all their respective agreements which establish MIAM jurisdiction. These lists should also be published.

670 The new opt-in convention could establish the jurisdiction of MIAM, as the Mauritius Convention does,[51] for example if only the EU and its Member States as respondents are party to MIAM but not the state of origin of the claimant, a "unilateral offer of application"[52] could be made by the member states through an

countries, OJ C 149 of 27.4.2016, p. 1 according to which the United Kingdom currently has concluded 94 bilateral investment agreements.

[48]Cf. Article 39 VCLT: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

[49]United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency), has been concluded on 10.12.2014 and entered into force on 18.10.2017.

[50]Article 2 para. 5 Mauritius Convention: "The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention."

[51]Cf. Article 2 para. 2 Mauritius Convention: "Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency."

[52]So Kaufmann-Kohler and Potestà (2016), p. 86.

opt-in convention which could be accepted by the respondent. This alternative would, however, unlike a unilateral establishment of jurisdiction within a two-tiered solution, raise considerable additional problems. Therefore, it would have to be stated exactly as to at what time the jurisdiction of the MIAM should be constituted by acceptance of the unilateral offer, that is, for example, whether by filling a claim against a MIAM Member (which also provides a "unilateral offer") the full acceptance of the jurisdiction of MIAM by the claimant and the respondent would take place at the same time. In this context, in the interest of legal certainty for both the investor and the respondent, it would need to be clarified as soon as possible to whether the MIAM should be competent in such a case.

671 In principle, the *ad hoc* inclusion of an appeal and thus the establishment of jurisdiction in the case of non-membership of the respondent should be rejected. In particular, there would be no incentive to join MIAM if *ad hoc* decisions were taken on whether or not to recognise jurisdiction in appeal proceedings.

672 The MIAM Statute could also apply to multilateral treaties such as the ECT and be agreed upon as a future Appellate Body in the field of investment protection. However, this would require either an explicit amendment of the ECT in accordance with Article 42 ECT with three quarters of the parties to the agreement, but the amendment would only apply to the parties that approved it. Alternatively, an *inter se* modification of the ECT by individual parties in accordance with Article 41 VCLT could again be an option. In any event, in the case of non-ICSID proceedings, MIAM jurisdiction may be assumed if both the respondent and the home state of the complaining investor are members of MIAM (within the meaning of Article 41 para. 1 lit. (b) VCLT). According to Article 16 ECT no deterioration of the legal positions of investors may occur through subsequent treaty modifications.[53] However, the introduction of an additional appeal may hardly be considered as deterioration, if otherwise substantive protective positions as well as the fundamental ISDS possibility remained untouched. In addition, ICSID procedures based on the ECT would still be possible with the corresponding direct ICSID enforcement mechanism. A problem with investment protection proceedings in the area of the ECT would be that the first-instance arbitral decisions would continue to be enforceable in third countries.

673 In doing so, the MIAM Statute should specify that there is a particular jurisdiction:

[53] Article 16 ECT: "Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favorable to the Investor or Investment."

a) if, in the future, which means after the MIAM Statute enters into force and on accession thereto, an IIA is concluded between MIAM States and an investment arbitration is carried out on the basis of this IIA;
b) if an IIA has in the past been concluded between two MIAM Member States and a consensual establishment of jurisdiction for that existing agreement has been given by the MIAM Statute (a list of these agreements should be sent to the MIAM Secretariat for reasons of legal certainty; lists do not have to be exhaustive) and an investment arbitration is carried out on the basis of this IIA; and
c) where applicable, if an IIA has been designated in the list by a MIAM Member State (unilateral establishment of jurisdiction for already existing treaties), which then presents the problem, at which time the jurisdiction of MIAM must be accepted by the investor and on the basis of this IIA investment arbitration is carried out.

9.7 Transitional Provisions and System Conformity of a MIAM

674 The MIAM Statute should be seen as an amendment to existing agreements such as the EU-Vietnam IPA and CETA (see paras. 247 et seqq.), since this is a later multilateral agreement amending the bilateral agreements among certain parties to the respective agreement (see in that regard, Article 30 para. 3 and Article 41 VCLT). However, future EU agreements should state that the respective bilateral dispute settlement mechanism should be modified and amended by the jurisdiction of the MIAM for appeal when the MIAM Statute enters into force and the respective party has joined the MIAM together with the EU. At the same time, transitional provisions should be included in the agreements of the EU under negotiation, in the event that MIAM commences to operate in the future. In that regard, provision may be made for dispute settlement procedures already pending in the respective ICS system to be terminated by the respective bilateral dispute settlement system in the respective instance, but an appeal can only be lodged before the MIAM.

675 In addition, transitional provisions should be made for judges of the second instance of an ICS already appointed under bilateral agreements, provided that this second instance is to be replaced by the MIAM; for example, the CETA ICS judicial remuneration system adopted by the Joint CETA Committee[54] may already indicate that once the MIAM enters into force, it will no longer be allowed to appeal to the relevant CETA ICS and therefore for the CETA judges concerned, no further retainer fee will be paid from a certain date on.

676 When new members join the MIAM Statute, the financing quotes must be adjusted accordingly. Representation in plenary should immediately be possible.

[54]Cf. Article 8.27 para. 12 CETA: "In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee."

Since MIAM accession will not involve market access obligations as in WTO Law, but only the recognition of MIAM as a court of appeal for clearly regulated types of disputes, a MIAM accession should be a matter of unproblematic bargaining.

677 MIAM could also provide in its Statute for jurisdiction to be extended to investment disputes based on investor-state contracts. The freedom of contract when concluding an investor-state contract includes the freedom of selection of dispute settlement options.

9.8 Working and Procedural Language of the MIAM

678 For cost reasons, provisions on the working and procedural languages of the MIAM must be regulated. As with the MIC, there are good reasons for using English as a working language (see para. 602).

9.9 Costs of the New System

679 The rules on financing the expected permanent costs of the MIAM, i.e. the staff of the Secretariat, the judges, as well as the necessary infrastructure in the form of facilities, equipment etc., will have to be drafted. From an economic point of view, MIAM makes sense only with a critical mass of Member States sharing the costs of such a permanent Appellate mechanism. For example, it would certainly reduce the cost of having a large number of judges in EU bilateral investment tribunals, if the second instance of the respective investment court system could be closed and the MIAM takes over their task.[55] At a manageable cost, MIAM offers a way to compensate for the currently discussed deficiencies within the existing ISDS system, but also as stated in the context of CETA ICS, to ensure greater acceptance in international investment protection procedures.

680 The MIAM, like other international organisations, should be financed primarily by members' contributions, i.e. by the parties to the agreement. Expenditure would determine the necessary amount, which should be collected proportionally from the members. Similar to the WTO,[56] the quota of MIAM Members could be calculated by the proportion of foreign direct investment in relation to the share of total investment of all MIAM Members.

681 With regard to the question of whether court fees should be established, reference may be made to the comments on the MIC (see paras. 306 et seqq.).

[55]Hodgson (2014), p. 3 assumes cost amounting to US$373,200 per procedure and party.

[56]Cf. https://www.wto.org/english/thewto_e/secre_e/contrib_e.htm.

9.10 Overview of Necessary Agreements Etc.

The following agreements and secondary legislation, among others, appear necessary for the establishment of a MIAM: **682**

- Statute of a Multilateral Investment Appellate Mechanism including a code of conduct for the judges (MIAM Statute);
- Immunity agreements between the Member States of the MIAM (Agreement on the Privileges and Immunities of the MIAM);
- Seat agreement between the MIAM (with its own legal personality) and the host state
- Procedural rules of the MIAM;
- Guidelines for the essential content of an application;
- Guidelines for the conduct of oral proceedings;
- Guidelines on court costs (if applicable);
- Guidance on security;
- Retirement provisions for the MIAM staff.

References

Alvarado Garzón AE (2019) Designing a multilateral investment court: blueprints for a new route in investor-state dispute settlement. ZEuS 22:475–500

American Bar Association Section on International Law (2016) Investment Treaty Working Group, Task force report on the investment court system proposal, initial task force discussion paper of 16.10.2016

Bottini G (2015) Reform of the Investor-State Arbitration Regime: the appeal proposal. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the Investor-State Dispute Settlement System. Brill Nijhoff, Leiden, pp 474–495

Calamita NJ (2017) The (in)compatibility of appellate mechanisms with existing instruments of the investment treaty regime. J World Invest Trade 18:585–627

Cass DZ (2001) The "Constitutionalization" of international trade: judicial norm-generation as the engine of constitutional development in international trade law. Eur J Int Law 12:39–78

EFILA (2016) Task Force Paper regarding the proposed International Court System (ICS) of 1.2.2016

European Commission (2015) Trade for all – towards a more responsible trade and investment policy, COM (2015) 497

European Commission (2017) Impact assessment – multilateral reform of investment dispute resolution, SWD(2017) 302 final, 13.9.2017

European Union (2019) Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, 24 January 2019

Gomez KF (2018) Diversity and the principle of independence and impartiality in the future Multilateral Investment Court (MIC). Law Pract Int Courts Trib 17:78–97

Hodgson M (2014) Counting the costs of investment treaty arbitration. GAR News of 24.3.2014

Howard DM (2017) Creating consistency through a World Investment Court. Fordham Int Law J 41:1–52

ICSID Secretariat (2004) Possible improvements of the framework for ICSID arbitration. Discussion Paper of 22.10.2004
Kaufmann-Kohler G, Potestà M (2016) Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? – Analysis and roadmap
Lee J (2015) Introduction of an appellate review mechanism for International Investment Disputes: expected benefits and remaining tasks. In: Kalicki JE, Joubin-Bret A (eds) Reshaping the Investor-State Dispute Settlement System. Brill Nijhoff, Leiden, pp 394–402
Li C (2018) The EU’s proposal regarding the establishment of the Investment Court System and the response from Asia. J World Trade 52:943–966
McRae D (2010) The WTO Appellate Body: a model for an ICSID appeals facility? J Int Dis Settlement 1:371–387
Ohlhoff S (2003) Streitbeilegung in der WTO. In: Berrisch HJ, Prieß GM (eds) WTO-Handbuch. C.H. Beck, München, pp 677–749
Potesta M (2018) Investment arbitration, challenges and prospects for the establishment of a Multilateral Investment Court: Quo Vadis enforcement. In: Klausegger C, Klein P et al (eds) Austrian yearbook on international arbitration 2018, pp 157–178
Sauvant KP (2016) The evolving international investment law and policy regime: ways forward. Policy Options Paper, ICTSD & WEF
Schreuer C (2018) Multiple proceedings. In: Gattini A, Tanzi A, Fontanelli F (eds) General principles of International Investment Arbitration. Brill Nijhoff, Leiden, pp 152–167
Tams CJ (2006) An appealing option? The debate about an ICSID appellate structure, essays in transnational economic law, No. 57
UNCITRAL (2018) Possible reform of investor-State dispute settlement (ISDS) – note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018

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