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**

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