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.

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[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.

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