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**

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[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.

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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.

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[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.

81 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.

82 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]

83 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.

4.1.2.1 Appointment of Judges Through the Plenary Body

Number of MIC Judges

84 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

[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.

88 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.

89 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.

90 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

[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

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[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]

95 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.

Diversity Among Judges

96 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

[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.

99 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.

100 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.

101 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.

102 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

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[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]

[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

106 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.

Adoption of Internal Procedural Rules, Budget etc.

107 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.

Interpretation, Including Subsequent/Authentic Interpretation

108 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.

109 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)).

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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.

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[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

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

> 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]

125 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]

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

[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.

[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

130 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]

131 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.).

132 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).

4.1.3.4 Ethics

133 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

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[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.

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

- 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.

138 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.

139 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]

140 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.

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

[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

143 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.

144 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]

4.1.3.6 Remuneration

145 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.

146 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

[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

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[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

150 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.

4.1.3.9 Parallel Engagements

151 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

[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

156 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

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

160 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]

4.1.3.14 Removal from Office

161 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.

162 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.

[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

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[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

176 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.).

4.1.7 Secretariat

177 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.

178 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.

179 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

[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

188 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.

189 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.

190 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.

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

192 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]

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[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.

200 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.

201 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.

202 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]

203 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

[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

209 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:

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

210 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.

211 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.

212 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.

213 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.

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

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*

219 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]

220 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:

221 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.).

222 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:

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[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.

229 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.

Dismissal of Inadmissible Claims and Claims Without Merit

230 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]

[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

234 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.

235 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]

236 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.

Avoiding Treaty Shopping

237 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.

238 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

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[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

242 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]

243 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]

244 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]

4.2.2 Relationship of the MIC to Other Courts and Arbitral Tribunals

245 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

[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.

251 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]

4.2.3 The Relationship with Domestic Courts

252 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.

253 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.

254 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,

[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.

[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

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[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

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[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

290 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.

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

292 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.

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

293 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]

[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.

297 Secondary legislation determining the appropriate respondent should specifically 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

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.

300 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.

301 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).

302 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.).

303 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]

Right To Be Heard Before the Court

304 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

[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

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[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]

320 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.

321 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

[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

326 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.

327 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]

328 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

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[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

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[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

333 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

[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

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[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

[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).

347 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.

348 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.

349 In the second instance, too, decisions should be rendered by judgment.

350 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]

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[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.

355 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.

Scope of Review and Investigative Competence

356 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

[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.

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[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.

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