Chapter 6
The Pronouncement of Decisions and Its Consequences

It seems appropriate to start by considering the options of the effects and consequences of the decisions of international dispute settlement bodies, in general, and of investment arbitral tribunals, in particular, in order to make specific recommendations for the structuring of the decisions of an MIC. 459

6.1 Legal Effects of Decisions of International Dispute Settlement Bodies

In theory, a wide range of legal effects of decisions of international dispute settlement bodies exists, from pure declaratory decisions without a strict obligation to comply, to annulments with direct effect on the contested legal act, in the sense of decisions modifying a legal right. 460

In practice, however, there are usually hybrid forms, such as declaratory decisions, advisory opinions or decisions that oblige a party to perform a certain act which must be complied with in substance, or annulments that relate only to internal acts of the organisation, the acting body of which is a dispute settlement body. A genuine annulment of national rules by decisions of international courts and thereby modifying a legal right is practically non-existent and would probably also be contrary to the system. 461

Typically, proceedings before international courts lead to a decision which has declaratory effect but whose binding force for the parties to the dispute results in a clear obligation to comply with the decision.[1] That is, even if an international court 462

[1] Article 59 ICJ Statute in conjunction with Article 94 para. 1 UN Charter; Article 49 para. 1 ECHR; Article 296 para. 1 UNCLOS concerning the binding nature of decisions for the parties; Harris et al. (2009), p. 162 et seq.; Shaw (2014), p. 798.

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finds that a national legal act (law, administrative act, national judgment or other acts) is unlawful under public international law, the former remains unaffected but the responsible state has to ensure that the unlawfulness is abolished. For example, in the case of decisions of the ICJ or the ECtHR, this may lead to an international obligation to repeal the national legal act.[2]

463 The solution that states pay damages as an alternative to remove the international injustice is not found in decisions of the ICJ, but in some cases before human rights courts.[3] This was also discussed in the early investment arbitration practice when, in the course of the Libyan oil concession cases in the 1970s,[4] some arbitral tribunals permitted the expropriating state to elect for the option of compensation, even for expropriations in violation of international law, which in principle require restitution.[5]

464 If it is desirable from a policy perspective that the decisions of an MIC should also not be subject to secondary obligations to repeal national legal acts, this should be explicitly set down.[6]

465 For other international dispute settlement bodies, the legal effects of declaratory decisions may be even weaker. For example, WTO Panels and the WTO Appellate Body only have the power to find infringements, but not to order the removal of the illegal acts or alternatively, the payment of damages.[7] Rather, the power of the WTO

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[2]See e.g. ICJ, *Democratic Republic Congo v. Belgium*, ICJ Reports, 2002, p. 31 et seq. The ICJ finds the duty of Belgium to cancel a Belgian warrant of arrest instead of reversing the warrant as direct consequence of the decision; ECtHR (GC), No. 32772/02, *Verein gegen Tierfabriken (VgT) v. Switzerland (No 2)*, para. 85 et seq.; IACHR, *Aloeboetoe et al. v. Suriname*, Judgment, 10.9.1993, IACHR (Ser. C) No. 15 (1993).

[3]See e.g. ECtHR, No. 27527/03, *L. v. Lithuania*, Judgment, 11.9.2007, para. 74, where the ECtHR adjudicates the opportunity of compensation, if the required change in the law is not made within 3 months.

[4]*Libyan American Oil Company (Liamco) v. Libya*, Award, 12.4.1977, 62 ILR (1981) 140; *British Petroleum v. Libya*, Award, 10.10.1973 and 1.8.1974, 53 ILR (1973) 297.

[5]See *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libya,* (1979) 53 ILR 389, para. 111, and *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10.2.1999, para. 136 et seq., where the tribunals awarded such an option to be provided with mere financial compensation to the states.

[6]See e.g. Article 34 US Model BIT 2012: "1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution."; Art. 1135 NAFTA: "1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution."

[7]The WTO cannot adjudicate compensation, if the defendant party accepts this obligation voluntarily, cf. Article 22.2 DSU: "If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute

Dispute Settlement Body is limited to "recommending" the WTO Members a WTO compliant behaviour going forward. Should the latter fail to comply with these recommendations, only countermeasures ("trade retaliation") of the affected WTO Members can be approved, which allow them to compensate for the expected economic damage resulting from non-compliance with WTO rules and recommendations.

Of course, the above-mentioned collateral legal consequences of purely declaratory decisions have a steering effect, urging the disputing parties to implement the content of declaratory decisions to the extent that the unlawfulness is removed. **466**

Particularities of the effects of decisions arise in individual courts of regional economic organisations. Of particular note in this context is the CJEU. Its decisions in proceedings between Member States and in infringement proceedings brought by the Commission against Member States for breaches of EU Law are declaratory; however, the TFEU implies a clear obligation of states to remove the illegality found therein.[8] Far-reaching effects of judgments are found in the so-called actions for annulment, which are, however, only directed against acts of Union institutions. They lead to the repeal of secondary legislation of the Union.[9] However, this is a quasi-constitutional judicial control of the legal acts of the Union institutions. It is significant that even the CJEU has no comparable jurisdiction with regard to unlawful acts of the Member States. **467**

In summary, it can be said that general public international law does not foresee decisions of international judicial institutions that have a direct effect over national law. As a rule, there is only an obligation to remove any illegality of national legal acts under public international law and to comply with international obligations. This can also be mitigated by a mere liability for compensation. **468**

6.2 Effects of Decisions of Investment Arbitral Tribunals

The legal effects of the decisions of investment arbitral tribunals are generally not expressly included in the respective investment protection treaties. Rather, they result from the applicable rules of procedure or from the general public international law principles of state responsibility.[10] **469**

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settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements." See Bronckers and van den Broak (2005), p. 101.

[8] Article 260 TFEU.

[9] Article 264 TFEU.

[10] The International Law Commission lists the possibilities of "restitution, compensation and satisfaction" in Article 34 ILC Draft Articles on State Responsibility. The consequences of a

470 According to Article 53 ICSID Convention, ICSID arbitral awards are binding on the parties to the dispute and are not subject to appeal (except for the possibilities of annulment, interpretation and revision of errors in calculations provided for in the Convention).[11]

471 According to Article 34 para. 2 of the UNCITRAL Rules,[12] UNCITRAL awards are also final and binding, and are therefore not subject to appeal or other legal remedies in arbitration,[13] and must be implemented by the parties immediately.[14]

472 In addition, the rules of the ICC,[15] the LCIA,[16] and the SCC[17] contain provisions that declare the arbitral awards rendered under the respective arbitration rules as final and binding.

473 The same applies to some sectoral and regional treaties with investment protection chapters such as NAFTA[18] and the ECT, which, while referring in principle to various procedural rules, still specifically lay down the finality and binding force.[19]

474 This means, in practice, that arbitral tribunals can find violations of standards contained in investment protection treaties and determine compensation for lawful expropriations. For unlawful expropriations or other violations of investment protection standards, it can award damages or grant a decision (or award) for specific performance.

475 Ordering the restoration of the situation before the treaty infringement by arbitral tribunals would constitute an interference with the sovereignty of states. Therefore, arbitral tribunals have so far refused to order changes in national legal orders.[20] Even

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"specific performance" are not explicitly stated by the ILC Articles. Gray (1999), p. 419 et seq., assumes that the ILC "specific performances" can be subsumed as "restitution".

[11] Article 53 para. 1 ICSID Convention: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

[12] UNCITRAL Arbitration Rules 1976, 15 ILM 701 (1976), www.uncitral.org/uncitral/en/uncitraltexts/arbitration/1976Arbitration_rules.html; UNCITRAL Arbitration Rules (as adopted in 2013), www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[13] The UNCITRAL Rules accept an interpretation and correction of misspellings or miscalculations. The majority of all legal systems accept the opportunity of setting aside of an arbitral award for special reasons, following the UNICTRAL Model Law. Therefore, the finality of awards in national law of the *forum arbitri* is not absolute. See Caron and Caplan (2013), p. 740.

[14] Article 34 para. 2 UNCITRAL Arbitration Rules: "All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay."

[15] Article 35 para. 6 ICC Arbitration Rules 2017.

[16] Article 26 para. 8 LCIA Arbitration Rules 2014.

[17] Article 46 SCC Rules 2017.

[18] Article 1136 NAFTA.

[19] Article 26 para. 8 ECT.

[20] Cf. de Brabandere (2014), p. 184 et seq.; *LG&E v. Argentinia*, ICSID Case No. ARB/02/1, Award, 25.6.2007, para. 87: "[. . .] the judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty."

if under general public international law, according to Article 34 of the ILC Articles on State Responsibility,[21] compensation is a secondary form of redress which should only be effective in case of impossibility or inappropriateness of restoring the situation before the treaty infringement,[22] arbitral awards usually oblige states exclusively to pay damages.[23]

However, it is generally accepted that arbitral tribunals can also award non-monetary remedies in arbitral awards.[24] Opposite opinions in the literature justify the refusal of non-monetary remedies in investment disputes primarily with practical problems of the enforcement of such arbitral awards.[25] Although the ICSID Convention in Article 54 only regulates the enforceability of pecuniary obligations resulting from arbitral awards, it cannot be concluded that non-monetary remedies, such as a right to the fulfilment of treaty obligations, should not be granted by an ICSID tribunal.[26] Some ICSID tribunals[27] and non-ICSID tribunals[28] have seized the opportunity to award non-monetary remedies.[29] Since only financial compensation can be enforced through ICSID, an investor may need to have recourse to the New York Convention for the enforcement of non-monetary claims.[30] **476**

Limiting the available remedies under international treaty law is legally possible. A number of investment protection agreements have introduced such limitations on damages in order to exclude non-monetary remedies.[31] **477**

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[21] Article 34 ILC Articles on State Responsibility: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

[22] Permanent Court of International Justice, Factory at Chorzow, Judgment No. 13, 1927, p. 47; de Brabandere (2014), p. 179 et seq.

[23] McLachlan et al. (2008), p. 341; Gray (1987), p. 11; Brower and Brueschke (1998), pp. 473, 477; Toope (1990), pp. 165–167.

[24] McLachlan et al. (2008), p. 341; Schreuer (2004), p. 325; de Brabandere (2014), p. 187.

[25] See a summary of these critical opinions in Dermikol (2015), pp. 403, 408.

[26] Schreuer (2004), p. 325, bases his opinion on the *travaux préparatoires* and the international practice of arbitral tribunals.

[27] *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/02, Decision on Jurisdiction and Admissibility, 24.9.2008, para. 166-168; *ATA Construction v. Jordan*, ICSID Case No. ARB/08/2, Award, 18.5.2010; *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8.4.2013.

[28] *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/02, Decision on Jurisdiction and Admissibility, 24.9.2008, para. 166-168; *ATA Construction v. Jordan*, ICSID Case No. ARB/08/2, Award, 18.5.2010; *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8.4.2013.

[29] *Goetz and others v. Republic of Burundi*, ISCID Case No. ARB/95/3, Award, 10.2.1999, para. 136 et seq. is an interesting case concerning the possibility of awarding non-monetary legal remedies. As requested, the ICSID Tribunal awarded a two-tiered legal remedy: only if Burundi will not have fulfilled his contractual obligation to perform within a fixed period of time, Burundi would have to pay damages. Although there was an obligation for an act with legal consequences directly to national law, it could only be enforced voluntarily. This solution enables the state to decide autonomously, if a change in the law respectively performance of the contract or performance of damages could better be implemented.

[30] Schreuer et al. (2009), p. 1138 et seq.

[31] See e.g. Article 34 US Model BIT 2012; Article 1135 NAFTA; Article 26 para. 8 ECT.

478 Decisions of the MIC should essentially be limited to finding violations of investment protection standards and should have the power to award damages to the prevailing party. In addition, the power to determine the existence of a generally (not unlawful) indirect expropriation and to determine the amount of compensation due, which is usually enshrined in the individual investment protection treaties, should also be provided for.

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