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Marc Bungenberg | August Reinisch

Draft Statute of the Multilateral Investment Court

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Towards a Multilateral Investment Court

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The discussion about a Multilateral Investment Court was triggered by the increased public criticism towards traditional investor-state arbitration – be it *ad hoc* or institutional.[1] The debate prompted the EU to consider an alternative forum for the settlement of investor-state disputes. Different political parties in the EU Parliament proposed the establishment of a permanent investment court to replace traditional *ad hoc* arbitral tribunals.[2] The European Parliament then adopted a resolution calling for the establishment of a permanent Investment Court System (ICS) with an appellate structure in new agreements negotiated by the EU. The mid-September 2015 Commission draft text of the Transatlantic Trade and Investment Partnership (TTIP) Investment Chapter 'implemented' these ideas by proposing an 'Investment Court System'.[3] It was further elaborated on in the November 2015 Commission proposal for Investment Protection and Resolution of Investment Disputes in TTIP.[4] First ICS were then included in the February 2016 Comprehensive Economic and Trade Agreement (CETA) text agreed with Canada[5] and in the January 2016 agreement with Vietnam.[6] After the Court of Justice of the European Union (CJEU) rendered its *Singapore* Opinion, the text of the EU Free Trade Agreement (FTA) with Singapore was modified, one agreement became two, the old

1 Cf. e.g. Harten (2007); Schill (2007); Hachez and Wouters (2012); Kumm (2015); Cf. also the European Citizens 'Stop TTIP' initative (2017); Cf. for US opposition: Open letter by the Alliance for Justice to the US Congress (2015).

2 Group of the Progressive Alliance of Socialists and Democrats (S&D), Position Paper on investor–state–dispute settlement mechanisms in ongoing trade negotiations, 4 March 2015, available at https://www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304.pdf (accessed 07 December 2020).

3 Commission draft text TTIP – Investment, 16 September 2015, available at https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (accessed 07 December 2020).

4 See, Section 3: Art. 9 and Art. 10, EU's proposal for Investment Protection and Resolution of Investment Disputes of 12 November 2015 (TTIP), available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (accessed 07 December 2020).

5 See, chapter 8: Art. 8.27 and Art. 8.28, revised text of CETA made public on 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (accessed 07 December 2020).

6 See, Section B: Art. 3.38 and Art. 3.39, EU–Vietnam FTA Investment Chapter: Agreed text as of January 2016, published on 1 February 2016, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (accessed 07 December 2020).

fashioned *ad hoc* arbitration originally foreseen in the agreement was deleted and the ICS inserted.[7]

In addition to the bilateral investment court systems introduced in the CETA, the EU-Vietnam Investment Protection Agreement (IPA), the EU-Singapore IPA, and the EU-Mexico Global Agreement, it was stated in each agreement in almost the same wording that the respective Contracting Parties intend to switch each bilateral investment court system to a multilateral system:

> 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 (…) 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.[8]

In March 2018, the Council of the European Union (EU Council or Council) gave the Commission of the EU (EU Commission or Commission) a mandate to negotiate a Multilateral Investment Court (MIC).[9]

Furthermore, since July 2017, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III[10] has been discussing different options for the reform of Investor-State Dispute Settlement (ISDS).[11] UNCITRAL Working Group III was mandated to first, identify and consider concerns regarding ISDS; second, to consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to UNCITRAL.[12] Consensus to develop solutions (thus entering stage 3 of the UNCITRAL WG

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7 Bungenberg and Reinisch (2019), para. 42.

8 Article 8.29 'Establishment of a multilateral investment tribunal and appellate mechanism' CETA (fn. 5); Art. 3.41, EU-Vietnam IPA (draft for signature) as on 2 April, 2019; Art. 14, Section- Resolution of Investment Disputes, EU-Mexico Global Agreement (draft for signature) as on 2 April, 2019; Art. 3.9, EU-Singapore IPA (draft for signature) as on 2 April, 2019.

9 Council of the EU (2018).

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

11 UNCITRAL (2017 a).

12 UNCITRAL (2017 b), para. 264 and 447.

III mandate) was reached at the Thirty-seventh session in New York from 1–5 April 2019.[13] Altogether, it can be said that since the first proposal in spring 2015, the discussion about an ICS and multilateralisation has sparked an enormous debate.[14] Currently, UNCITRAL Working Group III has displayed different options for ISDS Reform, most of which might be considered concurrently. The proposed changes can be grouped into six categories:[15] (1) Tribunals, *ad hoc* and standing multilateral mechanisms, including an MIC;[16] (2) arbitrators and adjudicators appointment methods and ethics;[17] (3) treaty parties' involvement and control mechanisms on treaty interpretation;[18] (4) dispute prevention and mitigation;[19] (5) cost management and related procedures;[20] (6) third party funding.[21] Addition-

13 UNCITRAL (2019).

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

15 UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS), A/CN.9/WG.III/WP.166/Add.1., 30 July 2019.

16 See e.g. UNCITRAL Working Group III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020), A/CN.9/1044, 10 November 2020, paras 102ff; UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS): Submission From the European Union and ist Member States, A/CN.9/WG.III/WP.159/Add.1, 24 January 2019.

17 In this regard, see e.g. ICSID and UNCITRAL Secretariats are working on Code of Conduct for adjudicators, which is currently open to comments of stakeholders, <https://uncitral.un.org/en/codeofconduct> accessed 04 December 2020.

18 See e.g. UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS): Interpretation of investment treaties by treaty Parties, A/CN.9/WG.III/WP.191, 17 January 2020.

19 See e.g. UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS): Dispute prevention and mitigation - Means of alternative dispute resolution, A/CN.9/WG.III/WP.190; UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS): Multiple Proceedings and Counterclaims, A/CN.9/WG.III/WP.193, 22 January 2020.

20 See e.g. UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS): Security for cost and frivolous claims, A/CN.9/WG.III/WP.192, 16 January 2020.

21 See e.g. UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS): Third-party funding – Possible solutions, A/CN.9/WG.III/WP.172, 02 August 2019.

ally, the means of implementation of any proposal, for instance, through a multilateral convention has also been considered.[22]

This trend has been reinforced after the CJEU rendered its Opinion 1/17, confirming the compatibility of the CETA Investment Court System with the EU Treaties. The CJEU recalled that:

> 'an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions.'[23]

Against this backdrop, this introduction will lay out the way such an MIC could be established and look like. Explicit references are made to the proposed *Draft Statute of the Multilateral Investment Court*[24] (hereinafter *MIC Draft Statute*), which is the result of a three-year research project. It started with the study "*From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*", published in German in 2018.[25] This was followed by an English publication, whose second edition was published in 2020.[26]

1. General Considerations

Beyond the criticism against the existing model of ad hoc arbitration between investors and states, some concerns about the establishment of a standing court for the settlement of investment disputes have been

22 UNCITRAL Working Group III, Possible Reform of investor-State Dispute Settlement (ISDS): Multilateral Instrument on ISDS, A/CN.9/WG.III/WP.194, 16 January 2020.
23 CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 106.
24 Bungenberg and Reinisch (2020).
25 Bungenberg and Reinisch (2018).
26 Bungenberg and Reinisch (2019), available as an open access book at: https://link.springer.com/book/10.1007/978-3-662-59732-3 and https://library.oapen.org/handle/20.500.12657/23089 (accessed 07 December 2020).

raised.[27] The proposed MIC seeks to address all those concerns, demonstrating the feasibility of such a court. From the EU point of view, in addition to the basic values listed in Article 2 of the Treaty on European Union (TEU) of which the CJEU speaks as the EU constitutional framework,[28] the specifications of Article 21 TEU are decisive for the specific design of this new system.[29]

EU Commissioner Malmström mentioned the idea of a "Multilateral Court" for the first time on 18 March 2015 in the Committee on International Trade (INTA Committee) and at an informal meeting of the Council (Foreign Affairs) on 25 March 2015.[30] The European Parliament "share[d] the ambition of establishing, in the medium term, a multilateral solution to investment disputes."[31] The EU models subsequently suggested to incorporate the option of a two-tiered MIC as well as of a Multilateral Investment Appellate Mechanism (MIAM), both required to be permanent, with a pre-appointed judiciary according to rule of law standards.

With the *MIC Draft Statute*, we aim at illustrating options for the organizational and procedural design of an MIC. For the specific design of this new system, the requirements of Article 21 TEU are a decisive prerequisite from the EU's perspective.[32] As pointed out in Article 21 TEU, the "inter-

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27 See, Kaufmann-Kohler and Potestà (2016), para. 31 et seq. (Identifying the drawbacks that come with the introduction of a permanent dispute resolution body within an investment framework).

28 CJEU, Opinion 1/17, (fn. 23), para. 110.

29 Cf. Vedder (2011), pp. 122 et seq.

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

31 European Parliament resolution (2016), para. 68.

32 The significance and compulsory consideration of Article 21 TEU was last emphasised again by the Court of Justice of the European Union (CJEU) in its Singapore opinion, cf. CJEU, Opinion 2/15, *Singapore FTA,* EU:C:2017:376, paras. 142 et seq.: "One of the features of this development is the rule laid down in the second sentence of Article 207(1) TFEU that 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. Those principles and objectives are specified in Article 21(1) and (2) TEU […]. The obligation of the European Union to integrate those objectives

national law-friendliness" of European Union law[33] is also part of the constitutional EU framework: The EU legal order is "open" to international law, i.e. also for comprehensive international legal relationships and clashes of legal orders should be avoided as far as possible.[34] Nevertheless, multilateral problem solving is part of the primary engagement of the EU's constitutional framework.

At the same time, Article 21 TEU stresses the particular importance of complying with the EU's rule of law principle.[35] In light of these rule of law considerations, procedural equality of arms should be ensured.[36] For example, the G20 Guiding Principles for Global Investment Policymaking also provide that "dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse."[37] In various papers, the Council of Europe has developed basic requirements concerning the rule of law for judicial systems, which must be duly respected while designing the MIC.[38] Hence, drawing from those general considerations the structure of the new dispute settlement mechanism should pursue especially the following objectives, which are embodied in Article 28 MIC Draft Statute:

- procedures adhering to the rule of law,
- independence and neutrality of judges,
- publicly appointed judges,
- uniform interpretation of the law,
- efficient and expedient procedures,

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and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU."; See in regard to the relevance of rule of law considerations etc. CJEU 1/17, (fn. 23) paras. 105 et seq.

33 See for instance Aust (2017), pp. 106 et seq.

34 Lang (2018), p. 14.

35 Thereto in general, Schröder (2016) and Bungenberg and Hazarika (2019).

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

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

38 Cf. for instance Council of Europe (2014, 2016).

– protecting states' right to regulate,
– transparency.

Thus, legitimacy and the rule of law will be the yardsticks against which the MIC will be measured in terms of its legitimacy and acceptance. Fulfilling these objectives would satisfy the rule of law requirements which must be taken into account when formulating international legal protection and the legitimacy criteria.[39] Therefore, the highest conditions will have to be placed on the judicial appointment procedure, concerning personal integrity, independence, and qualification of the judges.[40] The importance of broad access to the respective court system is emphasized in the CJEU CETA Opinion.[41]

2. *Structure and Organization*

Concerning the possible structure and organization of an MIC, connecting it to existing institutions may be contemplated as well as establishing a new independent international organization.

In the CETA/TTIP discussion on the establishment of bilateral permanent judicial institutions to settle investment disputes, a preference for integrating them into the International Centre for Settlement of Investment Disputes (ICSID) system can be perceived. But integrating the MIC into the ICSID system is an unlikely option since the system does not provide for permanent judges or appeals.[42] Therefore, a direct institutional connection between the MIC and ICSID does not seem practical. Moreover, an amendment of the ICSID Convention, which would require unanimity, seems rather unrealistic.[43] States that explicitly oppose the MIC system are unlikely to agree on an amendment of the ICSID Convention.[44] It has also been suggested that an investment court should be integrated into the

39 Cf. for instance, Kastler (2017), p. 265.
40 See MIC Draft Statute, Part III (Articles 12–18).
41 CJEU, Opinion 1/17, (fn. 23), paras. 205 et seq.
42 See for instance Calamita (2017), pp. 611-624; Reinisch (2016) pp. 761-786.
43 Article 66 para. 1 ICSID Convention: "If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment."
44 American Bar Association Section on International Law (2016), p. 120.

World Trade Organization (WTO) Dispute Settlement System. However, this would require a fundamental change of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The WTO Dispute Settlement System is open to its members only, never to private persons, such as investors.[45] Besides, a substantive extension of WTO Law to allow access and protection of foreign investments has repeatedly failed in the past, as it happened during the Uruguay Round,[46] with one of the so-called Singapore Issues.[47] Integration into the WTO system thus also appears to be unrealistic at present.[48] The same applies to linking of the MIC to the International Court of Justice (ICJ) because, in addition to an extensive modification of the Court's jurisdiction, access to it would have to be made possible for natural and legal persons, i.e. the ICJ Statute would have to be extensively amended.[49] Thus, a connection of the MIC to existing organizations does not appear appropriate.

In addition, the model of a two-tiered MIC seems too difficult to integrate into the structure of existing organizations or courts. The modification of these existing systems, as apparent in UNCITRAL WG III, faces opposition from a number of states.[50] Therefore, Articles 1 and 5 MIC Draft Statute suggest that a new investment court should be designed as an independent international organization, i.e. based on an international treaty and equipped with its own organs and possessing international legal personality.[51] This meets the essential requirements for the functioning of an

45 Cf. Article 1.1 DSU: "[…] the settlement of disputes between Members […]." A change therefore would only be possible according to Art. X of the WTO Agreement.

46 Herrmann et al. (2007), para. 790.

47 Compare—decision of the General Council regarding the work program of the Doha agenda of 1.8.2004 (July package), WT/L/579.

48 See in this respect as well American Bar Association Section on International Law (2016), p. 129.

49 *Id.* p. 120.

50 While Canada, Singapore, Vietnam and Mexico i.a. are in full support of the MIC, a number of EU's big trading partners including the USA and Japan have not expressed their support at the UNCITRAL floor. See in this regard, Rosa-Luxemburg-Stiftung (2017), p. 31. Also see, IISD report on leaked documents revealing US concerns over the proposed MIC in talks with the United Kingdom, available at https://www.iisd.org/itn/2019/12/17/u-s-officials-raise-concerns-over-proposed-mic-in-talks-with-the-united-kingdom-documents-say/ (accessed 07 December 2020); and https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic) (accessed 07 December 2020).

51 See Bungenberg and Reinisch (2019), para. 9 et seq.

independent court, such as the functional immunity of the judges, financial equal treatment of the contracting parties, or the conclusion of host state and immunity agreements and the likes. Thus, pursuant to Article 2 MIC Draft Statute, in addition to establishing a legal seat in the constituent treaty, a headquarters agreement with the host state should be concluded.

However, this does not mean that the MIC could not share infrastructure with other bodies, courts, or institutions such as the International Tribunal for the Law of the Sea (ITLOS), the WTO, ICSID or the Permanent Court of Arbitration (PCA). Making use of the institutional expertise of ICSID and its facilities would, of course, be possible for the MIC even as an independent international organization. So far, the ICSID Secretariat has offered its support in non-ICSID arbitration procedures and has provided administrative support in procedures under UNCITRAL and other arbitration rules.[52] In this light, Article 2(2) MIC Draft Statute envisages the possibility of holding proceedings at the PCA or ICSID. Similarly, in an agreement between the MIC and ICSID or also the PCA or other arbitral institutions, logistical and staff support could be obtained. The MIC could, therefore, share infrastructure with other organizations that do not fully use their infrastructure either at an initial phase of the MIC or even in the long term.[53] In addition to ICSID in Washington and the PCA in

52 The Secretariat of the ICSID has been designated as the Secretariat for the Investment Tribunal and the Appeal Tribunal under Art. 3.09(16) and 3.10(14) EU-Singapore IPA (fn. 8), Art. 3.38(18) and 3.39(18) EU-Vietnam IPA (fn. 8), and Art. 11(17) and Art. 12(15) EU-Mexico Global Agreement (fn. 8) as on February, 2019; The ICSID Secretariat has also been recommended as an option by Katz (2016), p. 180; See also ICSID website, Case Administration for Non-ICSID cases, https://icsid.worldbank.org/en/Pages/Process/Non-ICSID-Arbitration.aspx (accessed 07 December 2020): "In addition to administering proceedings under the ICSID rules, the Centre is also available to administer arbitration cases under other rules, such as the UNCITRAL Arbitration Rules and ad hoc investor-State and State-State cases. These non-ICSID cases are submitted to ICSID by agreement of the parties either prior to the constitution of the Tribunal or once the Tribunal is constituted. On occasion, the Secretary-General of ICSID also serves as appointing authority of an arbitrator. The services rendered by the Centre in non-ICSID cases may range from limited assistance with the organization of hearings and management of the case finances to full secretariat services in the administration of the case concerned. Parties and Tribunals are free to elect the extent of the services desired."; For further discussion on the use of the ICSID Secretariat to support an Investment Court System, See, European Commission (2017), p. 36.

53 For a similar suggestion, See, European Commission (2017), p. 49.

The Hague, the ITLOS in Hamburg could be considered.[54] In any case, as far as infrastructure is concerned, a considerable amount of money could be saved and the infrastructure of other organizations and institutions could be used more effectively. Likewise, a cooperation of the proposed MIC Investment Advisory Center with the United Nations Conference on Trade and Development (UNCTAD), in particular, could be considered.

The MIC Draft Statute is conceived as an opt-in convention, this means a treaty open in the long term to accession of states and international organizations.[55] The MIC Draft Statute would constitute a treaty that should allow the accession of all states, independent customs unions or Regional Economic Integration Organizations (REIOs) as well as territories with independent powers (such as Hong Kong, Macao, or Taiwan) according to Article 4(2) MIC Draft Statute. This opt-in convention could also determine that the new court's jurisdiction extends to certain groups of old investment protection agreements between MIC Members as foreseen under Article 20(1) MIC Draft Statute. By joining the MIC, this would in part complement or even replace all other dispute resolution mechanisms provided for in bilateral treaties, which would mean that the existing investment protection agreement between MIC Members would not have to be

54 Cf. www.nienstedten.de/Burgerverein/Seegericht/body_seegericht.html: "The building […] had been constructed in the years 1997 to 2000 […]. The construction costs amounted to 123 million DM (80% were covered by the Federal Republic of Germany, 20% by the City of Hamburg, the operating costs are covered by the United Nations). […] The main building consists of 3 courtrooms, 25 offices for judges, 11 conference rooms, and 74 office rooms. Additionally lobby, library, study, catalogue room, storage room, a flat for the facility manager and a grand entrance hall. All rooms are electronically surveilled; the security department is staffed at all times. The used parts of the building cover 4755 m^2. In the center of the building in between the two main wings, the main round hall for court session is located, including a bench for the 21 judges. There are two minor halls, which can be connected with the main hall, so that a number of 240 persons in total can be seated. The latest technology, being able to include amendments, without any constructional changes, including four cameras and a media wall. Sound and image can be transported outside of the main hall. A room for video conferences allows hearings of witnesses from remote locations. Translation booths allow simultaneous translations in the six work languages of the UN, if necessary also other languages. A large conference room for the judges is also considered a "safe room" in case of crises. Besides there are two smaller conference rooms and rooms for the parties to the disputes and witnesses and a communications center."

55 See for instance also Kaufmann-Kohler and Potestà (2016), pp. 75 et seq; Bungenberg and Reinisch (2019), paras. 577 et seq.

renegotiated independently. The MIC Statute would, therefore, have the effect that MIC Members offer investors in their country a new possibility of dispute settlement by the MIC, and parallel *ad hoc* arbitration would be eliminated from the existing options. In any case, MIC Members could in part avoid classic *ad hoc* arbitration by consensually modifying the bilateral investment protection agreements between them.[56]

From an economic and practical point of view, an MIC only makes sense if a critical minimum number of contracting states has been achieved. Other international organizations such as the International Criminal Court used this option.[57] The statute establishing the MIC should only enter into force once it has a certain number of ratifications in order to prevent the mere addition of another dispute settlement institution without practical effect. Thus, Article 61 MIC Draft Statute proposes its entry-into-force after the deposit of the fortieth instrument of ratification.

In the long term, setting up an MIC may also require convincing 'heavyweights' in the area of the protection of foreign investment such as China or the US, in addition to the EU and its current 27 Member States of the advantages of such a system. Canada, Vietnam, Singapore, and Mexico have already committed themselves in this respect. In order to attract as many members as possible, the EU and its Member States can request accession to the MIC in negotiations with third countries. The EU has a very extensive network of association, stabilization, cooperation, free trade, and partnership agreements worldwide. In the wake of repeated renegotiations, it could be expected that EU-partner states would join the MIC.

Assuming that arbitration proceedings currently give rise to an administrative cost of approximately EUR 750,000 per case on average,[58] and that around 70 procedures a year are initiated, the use of only a part of this sum would be enough for the cost-neutral operation of an MIC. In the first calculations, the European Commission assumes that the maintenance costs of an MIC amount to approximately EUR 10 million per year.[59] Therefore, compared to the costs of current arbitrations, which are estimated by the

56 Bungenberg and Reinisch (2019), paras. 581 et seq.

57 Article 126 para. 1, Rome Statute of the International Criminal Court, requires 60 retifications; available at https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (accessed 07 December 2020).

58 Hodgson (2014), p. 1; Hodgson, Counting the costs of investment treaty arbitration, GAR News of 24.3.2014, Table 2.

59 European Commission (2017), p. 112.

OECD at an average of about USD 8 million,[60] the costs of the MIC should be significantly lower, and the duration of the proceedings should be reduced.[61]

The basic infrastructure costs and judicial staff salaries could be borne by the MIC Members, to varying degrees according to their share of global foreign investment. In this sense, pursuant to Article 7 MIC Draft Statute, each year the Plenary Body would allocate a portion of the budget to each MIC Member. In addition, court fees may be due, which can be calculated on the basis of e.g. the value in dispute and workload.

Finance and infrastructure-wise, also the proposed Investment Advisory Centre (IAC) could be financed through the MIC budget. Alternatively, funding could be secured through donations from its Members, which is how the WTO Advisory Centre is funded. In the context of world trade law, the WTO Advisory Center has had good experiences so far.[62] As suggested by Article 10 MIC Draft Statute, such an Advisory Center could support respondent states as well as small companies that do not have sufficient financial resources to afford a time-consuming and costly legal action before the MIC. Concerning the infrastructure, the IAC could simply be affiliated with UNCTAD; its current expertise in the area of investment protection could thus be extended.[63]

3. *The Institutional Structure of the MIC*

An international organization is characterized by its own organs. Similar to other international organizations, Part II (Articles 8—11) MIC Draft Statute provides for a Plenary Body, a bench of judges, a Secretariat, and an Advisory Center.

a) Plenary Body

As expressed in Article 8 MIC Draft Statute, Member States will be represented by their respective representatives in the Plenary Body, as is the case

60 Gaukrodger and Gordon (2012), p. 19.
61 Bungenberg and Reinisch (2019), paras. 603 et seq.
62 See for instance Advisory Centre of the WTO, www.acwl.ch/ (accessed 07 December 2020); Also see in this regard Bungenberg and Reinisch (2019), para. 192.
63 *Id.*, Advisory Centre of the WTO.

with the WTO.[64] This plenary organ would be responsible for the appointment of judges and would set the budget.[65] It could also adopt necessary secondary law, in particular procedural rules and determine the remuneration of judges, and the rules for increasing the number of judges.[66]

b) The Judges

The heart of the MIC would be the judicial bench. The introduction of an innovative selection and appointment procedure is the opportunity to counter allegations of bias and conflict of interest currently raised with party-appointed arbitrators. Judges at the MIC should be appointed for long periods of time, comparable to those at the European Court of Human Rights (ECtHR) or ICJ.[67]

There is no need that each MIC Member can appoint its own judge.[68] This consideration is also necessary for cost implications. 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.[69] Therefore, regional groups could be formed, as in the case of the ITLOS.[70] In that regard, Article 9 MIC Draft Statute foresees a bench of 24 judges, whose appointment should be made conditional on a regional criterion, as well as ensuring that all major legal systems are adequately considered in the selection of judges.[71] The promotion of diversity amongst judges should be considered a crucial criterion for the composition of the MIC bench. In this regard, the election process should ensure that the various legal sys-

64 Bungenberg and Reinisch (2019), para. 13.
65 *Id.*
66 *Id.*
67 Both the ICJ and ECtHR Judges are appointed for a term of 9 years each. In this regard see, Article 13 para. 1 ICJ Statute with the possibility of re-election; Article 23 para. 1 ECHR without the possibility of re-election.
68 For this purpose, the ICJ or ITLOS model is desirable, 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 (UNCLOS)-Member States). See in this regard, Article 3(1) ICJ Statute and Article 2(1) ITLOS Statute.
69 See, European Commission (2017) p. 40; UNCITRAL (2017), para. 35; and Alvarado Garzón (2019), p. 485.
70 See, Article 3(2) ITLOS Statute.
71 MIC Draft Statute, Part III, Articles 12—19.

tems are represented within the MIC bench.[72] Also, the judges should not just reflect the different legal systems and regions of the Members, but also reflect a gender balance, and at the same time have the highest professional qualifications.[73]

Concerning the full geographical representation of its members, the WTO approach can serve as a practical model. For instance, the Appellate Body members capture the full range of WTO Members,[74] including geographic distribution, levels of development, and legal systems.[75] By following this approach, appointed judges will reflect the membership of the MIC geographical spread, in such a way that the judges mirror the diverse legal and cultural background of the MIC Members. Consequently, selection of two judges of the same nationality must be precluded.[76] This can be achieved through an appointment of a certain number of judges per regional group,[77] a practice that is recognizable in the statutes of numerous

72 See, European Union (2019), para. 50; UNCITRAL Working Group III (2018 a), p. 6; Howse R (2017 b), p. 224.

73 See, 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 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."

74 See, Article 17.3 sentence 3 DSU: "The Appellate Body membership shall be broadly representative of membership in the WTO."

75 Weber O. (2007), 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."

76 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.

77 Mackenzie (2014), p. 744.

international judicial bodies.[78] This can be realized by allocating certain quotas of judges per regional group. For instance, 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).[79] Consequently, Article 12(4) MIC Draft Statute leaves the number of judges allocated to each regional group to further discussions.

Regarding the nationality of the judges, none of the models mentioned (ICJ, ITLOS, WTO Appellate Body) mandates the appointment of judges from a specific nationality, however, it is an informally recognized practice that certain states always have a judge of their nationality appointed when they nominate a candidate. For example, despite not having such a privilege conferred by the ICJ Statute, the five Permanent Members of the UN Security Council have always appointed an ICJ Judge (save for in 2017). This practice is also prevalent in the WTO Appellate Body where the US and the EU have always been represented since the inception of the WTO in 1995.[80] This kind of practice cannot be promoted in the MIC, the best practice will be to exclusively leave the appointment to MIC Members within the regional groups to decide within their caucuses who they send to the MIC. Thus, an appointment to the MIC should be based on regional representation as opposed to national.

It is worth noting that appointing the MIC judges based on regional representation entails the risk of deviating from the principle that only the most qualified candidate should get a judicial seat at the MIC. However, this is a lesser evil compared to the alternative, which is to allow a free choice of candidates in the name of getting the best to the MIC bench, since thereby politically strong states will usually be able to place their nationals on the bench, while developing countries may face real problems

78 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."

79 See https://www.itlos.org/en/the-tribunal/members/ (accessed 07 December 2020).

80 See, Mackenzie (2014), p. 745.

in this regard. Therefore, accepting the regional representation approach is a suitable compromise to ensure the MIC does not encounter a lack of support from states willing to become members but decline to, due to the fear of not been fairly represented.

The procedure for electing the MIC judges through the regional groups can also be modeled after the commonly accepted procedure of the ILC. ILC candidates, as is the case with the election of the ICJ Judges,[81] are assigned to specific regional groups.[82] From each regional group, the Plenary Body elects a certain number of candidates. In a similar vein, the election of MIC judges can be conducted by the MIC Plenary Body through regional groups. Each MIC Member represented in the Plenary Body would cast a vote for a candidate within their respective regional groups, and candidates with the highest number of votes within each regional group would be considered as elected judges to the MIC.[83]

Concerning the regional distribution of MIC judges, the initial 15 judges in the first instance could also follow the ICJ model.[84] Therein, 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.[85] Given that the EU Member States or EU

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81 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."

82 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."

83 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."

84 Noteworthy that the ICJ bench election procedure is not completely immune from criticism. See in this regard, Brower CN, Ahmad J (2018), p. 793.

85 See, https://www.icj-cij.org/court/index.php?p1%C2%BC1&p2%C2%BC2., (accessed 07 December 2020).

nationals will most probably have a high caseload at the MIC, and that in its early years the EU and its Member States will most likely constitute the majority of its membership, the EU should be fairly 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, in any case, every potential MIC Member should also be represented on the bench in a well-balanced and fair manner.

Pursuant to Article 9(2) MIC Draft Statute, the judges to be appointed to the MIC would have to demonstrate special expertise in public international law, especially international investment law, international dispute settlement, administrative, commercial and constitutional law. Moreover, according to Article 13 MIC Draft Statute, judges shall be available at all times and on short notice, and they must be impartial and independent. Appropriate procedures for the election and appointment of judges have to be adopted, for instance, a screening mechanism of judges should be in place to ensure that candidates meet these qualification requirements before their eventual appointment to the MIC bench.

In this regard, Article 12(2) MIC Draft Statute foresees a Screening Committee with the mandate to vet potential candidates who are nominated by the Members. This Committee will be formed by a sub-committee of the Plenary Body. The Screening Committee should specifically focus on the qualification, expertise, and general suitability (independence, integrity, and neutrality) of the candidates.[86] Such committees now exist for the CJEU[87]

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86 For instance, Article 36 para. 3 lit. c) Rome Statute (fn. 57) : "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.

87 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."; Consequently cf. 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.

and the ECtHR.[88] This extra layer in the appointment processs would serve as a safeguard against the possibility of politically motivated and non-transparent national nominations of candidates. This would, in turn, strengthen the legitimacy and acceptance of the MIC, and effect greater transparency and objectivity in the appointment procedure.[89] With this process, MIC Members will have no choice but to enforce a sufficiently high standard in their internal nomination procedure,[90] in line with the qualification standard set in the MIC Draft Statute, to ensure the success of their nominees in the Screening Committee. The candidates that have been successfully cleared by the Screening Committee will then be eligible to stand election before the Plenary Body in the regional group of their respective nationalities.

The MIC Draft Statute recognizes also the importance of a Code of Ethics and Code of Conduct for Judges. Accordingly, Article 8(4) MIC Draft Statute confers the power to adopt a Code of Ethics and Code of Conduct for Judges on the Plenary Body. These procedures can be based on the work of the Council of Europe, which has formulated basic requirements. The EU Commission's ICS proposal already contains a 'Code of Conduct for Members of the Tribunal, the Appeal Tribunal, and Mediators.[91] Similarly, the ICSID and UNCITRAL Secretariats have drafted a Code of Conduct for Adjudicators in ISDS.[92] These documents could be a good starting point for implementing a code of conduct in a future MIC.

Furthermore, the Code of Ethics should regulate *inter alia*:[93]

- independence,
- impartiality and neutrality,
- obligations for former judges after the termination of their terms,
- confidentiality,
- basic code of conduct to protect the reputation of the court,

88 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.

89 Cf. insofar Hackspiel (2015), Art. 255 TFEU, paras. 3 et seq.

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

91 Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce, Chapter II—Investment, Annex II, https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (accessed 07 December 2020).

92 See at <https://uncitral.un.org/en/codeofconduct> accessed 07 December 2020.

93 Cf. Bungenberg and Reinisch (2019), para. 137, (expounding on the rules of ethics for an MIC).

– sanctions in case of misbehavior, e.g. corruption of judges and their affiliates,
– other obligations.

Finally, pursuant to Article 17 MIC Draft Statute, the Judges will be appointed to chambers with an odd number of judges. The President of the MIC would assign the disputes to the chambers, taking into account the nationality of the Judges *vis-à-vis* the disputing parties. Only upon the determination of the Grand Chamber – composed by the President and Vice-Presidents of the MIC – disputes might be decided by all the Judges of the First Instance.[94]

c) Secretariat

Furthermore, the establishment of a Secretariat seems useful, which *inter alia* supports the judiciary, administers the proceedings, prepares translations, and devotes itself to the public relations work crucial to the transparency of the MIC.[95] As conceived in Article 11 MIC Draft Statute, the Secretariat is to consist of staff members headed by a Director-General appointed by the Plenary Body. The powers, duties and conditions of service of the Director General and the staff members shall be explicitly defined in the staff regulations to be adopted by the Plenary Body. In this regard, it is necessary that the powers and functions of the Director-General are clearly distinguished from those of the President of the Court.[96]

The Secretariat's functions do not have to be limited to administrative support, the Secretariat may also provide legal support to the MIC judges as foreseen in Article 11(3) MIC Draft Statute. Such legal support may include *inter alia* assisting the judges on expedient progression of procedures, and with tasks such as the preparation of memoranda and legal research. However, this legal support should under no circumstance include the drafting of decisions.[97]

In performing its functions and duties, the MIC Secretariat just like the bench of judges is purposed to operate as an organ independent of MIC Members' influence. Accordingly, the Secretariat shall not seek or accept

94 MIC Draft Statute, Article 17(5).
95 For instance, see in this regard 'Role of ICSID Secretariat', available at https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx, (accessed 07 December 2020).
96 Cf. Bungenberg and Reinisch (2019), para. 182.
97 *Id.* para. 179.

instructions from any government or any other authority external to the MIC, likewise Members shall respect its international character and refrain from influencing the Director-General or the Secretarial staffs of the MIC in the discharge of their duties.[98]

d) Investment Advisory Centre

Furthermore, the MIC Draft Statute foresees the establishment of an Investment Advisory Centre (IAC).[99] According to Article 10(2) MIC Draft Statute, this independent organ of the MIC is expected to provide legal assistance to small and medium-sized enterprises, and to developing countries. The aim is to assist them in the prevention and settling of disputes, including offering legal advice during the proceedings.

Developing countries could be at a structural disadvantage if they lack sufficiently trained officials to represent them if sued by multinational enterprises (MNEs) with huge financial means to hire the best expertise to pursue their claims before the Court.[100] Hence, one of the core objectives of the IAC is to provide training on international investment law and further education to the MIC Members.[101] Through the IAC, respondents can scale down their legal fees, including susceptibility to investment claims when they receive timely legal support and advice to help them avoid disputes or resolve them during the consultation phase, sparing them the costly trial. According to an UNCTAD Report, average legal defense costs range at USD 4.5 million.[102]

Small and Medium-sized Enterprises (SMEs) are also in the vulnerable class like some developing countries with low financial means to afford the legal expertise necessary to pursue an investment claim. Therefore, SMEs' access to the IAC will enable them to have the necessary legal support and advice vital to protect their investment interest in an MIC Member. This will be a good step forward in promoting access to an effective remedy for SMEs in the MIC, which from an EU point of view is a fundamental pre-

98 MIC Draft Statute, Article 11(4).
99 MIC Draft Statute, Article 10.
100 The European Commission (2017), p. 53 suggests that the Advisory Centre at the MIC could also assist developing and less-developed countries.
101 MIC Draft Statute, Article 10(3).
102 Hodgson (2015), p. 749.

requisite for the compatibility of any dispute resolution system with EU Law.[103]

However, in implementing the IAC, a strict separation of responsibilities and information between the IAC and other bodies of the MIC must be ensured,[104] in order to avoid issues of bias or confidentiality.[105] In this regard, Article 10(4) Draft MIC Statute requires the Plenary Body to draft rules that explicitly specify the role of the IAC, its duties, and provisions on confidentiality in the internal functioning and publication of information by the IAC.

4. *Basic Procedural Characteristics with Special Consideration of the Rule of Law*

The establishment of the MIC offers the possibility of a complete overhaul of procedural law in investment disputes. Essentially, the MIC is expected to provide for its own rules of procedure, adapted to the specific needs of the disputes to be expected, as well as its own recognition and enforcement mechanism for decisions. A number of procedural elements have been included in relevant agreements like the IPAs between the EU and Singapore, the EU and Vietnam, and in the EU-Mexico Global Agreement. These provisions already contain a number of innovative elements in investment protection in comparison to the existing agreements of the EU Member States, as well as to almost all other existing agreements. The MIC Draft Statute streamlines the provisions on jurisdiction and procedure of the MIC.

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103 See, Articles 6 and 13 of the ECHR, reaffirmed by Article 47 of the Charter of fundamental rights of the European Union: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"; Also see, CJEU, Opinion 1/17 (fn. 23), para. 221, (concerning the right of SMEs to have effective access to the CETA ICS, the CJEU reaffirmed that the approval of the CETA by the Union is dependent on the commitment by the Union to guarantee effective access to the envisaged tribunals for all EU investors subject to the CETA, which includes SMEs).

104 MIC Draft Statute, Article 10(4).

105 Bungenberg and Reinisch (2019), para. 190.

a) Jurisdiction

Pursuant to Article 30 MIC Draft Statute, the MIC shall be the judge of its own competence. Thus, the Court has the power to determine its own jurisdiction. The personal and subject-matter jurisdiction of the MIC should, for the most part, derive from the IIAs that have allegedly been violated.[106] Furthermore, the claimant and the respondent must both have consented in writing to the jurisdiction of the MIC.[107] In the case of the investor, this consent can be inferred from the submission of the claim itself.[108] As for the respondents, their consent to the jurisdiction of the MIC can derive from IIAs which explicitly provide for the MIC's jurisdiction; the MIC Draft Statute also stipulates its jurisdiction over already existing investment treaties, as long as the respondent is an MIC Member and the home state/territory has also ratified the MIC Statute.[109]

Finally on jurisdiction, although not covered in the MIC Draft Statute, it is necessary for MIC Members to decide whether the MIC jurisdiction extends to claimants who are from a non-MIC Member, and whether parties can establish the MIC's jurisdiction *ad hoc* if neither the investor nor the respondent is (from) an MIC Member. However, this should be accepted only if the rules on court fees are adapted accordingly. Secondary law could also regulate the admissibility of counterclaims, preliminary injunctions, and other interim relief as well as mass actions.

b) Procedural Law

As elaborated in Part V (section 3 and 4) of the MIC Draft Statute, the procedure of the MIC is two-tiered. Notably, as a Court that will certainly deal with issues of public interest, it is desirable that the practice of judicial investigation and limitation of the subject-matter of the dispute through 'Terms of Reference' such as in the WTO DSU or in ICC Arbitration,[110] is also integrated into the procedural practice of the MIC. For instance, for procedural efficiency, the MIC might restrict its substantive examination

106 MIC Draft Statute, Article 27.
107 MIC Draft Statute, Article 19(1).
108 MIC Draft Statute, Article 20(2).
109 MIC Draft Statute, Article 20(1).
110 Cf. Bungenberg and Reinisch (2019), para. 452 et seq. (Suggesting "practice of judicial investigation and limitation of the subject-matter of a dispute in the MIC).

to the issues in dispute raised in the request to initiate proceedings pursuant to Article 40 MIC Draft Statute. However, this is without prejudice to the parties' rights to submit additional claims or counterclaims pursuant to Article 34 of the Statute.

The MIC Draft Statute foresees an application procedure that grants parties the right to an efficient and expedient procedure, with prescribed procedural timelines.[111] Furthermore, the full-time employment of judges and their permanent availability should contribute to faster, more efficient, and thus less expensive procedures. To this end, Article 14 MIC Draft Statute provides a nine years period of appointment for the MIC judges to serve in office. Only in exceptional cases should a prolonged duration be permissible—as full-time judges hear the cases, the maximum duration of proceedings should be shorter than in *ad hoc* cases.

In order to achieve greater transparency in MIC proceedings, Article 8(4) MIC Draft Statute expressly affirms the incorporation of the UNCITRAL Rules on Transparency into the procedural rules of the MIC.[112] Therefore, the requirements of the UNCITRAL Transparency Rules must be adhered to in the MIC's practice. Procedural documents should, in principle, be published unless material interests such as trade secrets or security issues of the parties to the proceedings conflict with this. Proceedings before the MIC should be public and give third parties the opportunity to comment on pending cases. Hearings should be open to the public and third parties should have the opportunity to deliver statements. A procedure for the participation of third parties is already embedded in Article 55 MIC Draft Statute.

Furthermore, as enshrined in Article 44(5-6) MIC Draft Statute, decisions of the MIC shall be in writing and fully reasoned. Article 44(2) MIC Draft Statute also empowers the Court to dismiss a claim immediately if it has been found to be inadmissible, manifestly ill-founded or if there is a manifest lack of jurisdiction. This is aimed at preventing abuse of process or treaty-shopping and to reject clearly inadmissible or unjustified complaints at an early stage.[113]

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111 *See*, MIC Draft Statute, Article 42 (Time-Limits for Submission of a Claim); Article 43 (Time-Limits for Court of First Instance); Article 48 (Time-Limits for the Appellate Court).

112 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") (in force since 1 April 2014).

113 A number of procedural elements have been included in relevant IIAs like the EU-Canada (CETA) (fn. 5), EU-Singapore IPA (fn. 8), and EU-Vietnam IPA (fn. 8), in order to reject clearly inadmissible or unjustified complaints at an early

According to Article 27 MIC Draft Statute, the jurisdiction of the MIC is further subject to the fulfilment of other jurisdictional requirements in the underlying investment agreement. Therefore, even if a claimant satisfies both the personal and subject-matter jurisdiction of the MIC, the claim may still be dismissed on procedural grounds, for instance if it falls under the negative conditions of jurisdiction meant to exclude abuse of legal action or the so-called treaty-shopping under the underlying treaty.[114] Thus, additional procedural or admissibility requirements specific to each treaty could still prevent a claim from being heard before the MIC.

Also, according to Article 49(1) MIC Draft Statute, if none of the parties appeals a decision after 90 days of its issuance, then it becomes binding and enforceable. In case of an appeal, the filed appeal would suspend the binding effect of a decision by a chamber of First Instance until the appellate decision is rendered. The Appellate Court could review the facts as well as the legal reasoning of decisions.[115] Notably, in comparison to Article 52 ICSID Convention, Article 47(3) MIC Draft Statute grants the Appellate Court further competencies in addition to being able to annul decisions. It is desirable that the Appellate Court possesses extensive powers, such as the power to modify a decision, instead of remanding decisions back to the chamber of First Instance to decide again.

Concerning the cost of proceedings on the disputing parties, Article 54 MIC Draft Statute envisages that this will be determined by the MIC in accordance with the 'Regulations on Costs' adopted by the Plenary Body. Generally, the rule on cost distribution that the losing party has to bear the costs[116] should also be the applicable standard under the regulation. However, a limitation on reimbursement of legal fees by the unsuccessful party should be introduced to ensure that only the reimbursement of necessary costs is borne by the losing party.[117] In addition, the costs of proceedings should be allocated to the parties depending on the outcome of the case; for instance, Article 39(3) MIC Draft Statute foresees that the MIC may is-

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stage. See in this regard, Article 8.32 and 8.33 CETA (claims manifestly without legal merit, and claims unfounded as a matter of law); Article 3.14 and 3.15 EU-Singapore IPA (claims manifestly without legal merit, and claims unfounded as a matter of law); Article 3.44 and 3.45 EU-Vietnam IPA (preliminary objection, and claims unfounded as a matter of law).

114 Generally, Baumgartner (2016), pp. 114 et seq.

115 MIC Draft Statute, Article 46(g).

116 Bondar (2016), p. 46.

117 Bungenberg and Reinisch (2019), para. 320.

sue a decision of costs against the parties in case of a mutual withdrawal, or against the claimant or appellant in case of a unilateral withdrawal.

MIC Members should cover the permanent costs of the Court in accordance with Article 7 MIC Draft Statute (Budget of the MIC), as it would be difficult to allocate the costs to specific proceedings. Nevertheless, fixed MIC fees should be administered to shift part of the financial burden to the disputing parties. Importantly, small and medium-sized enterprises and individual investors should not be deterred from initiating legitimate cases before the MIC as a result of court fees. The Plenary Organ could later decide on details of financing of procedural costs and legal aid through secondary laws.

5. Applicable Law, Substantive Standards and Consistency of Decisions

The substantive law of the MIC shall be the applicable investment treaties and their respective standards of protection. A bilateral and fragmented network of over 3300 IIAs contains the substantive protection standards for foreign investments.[118] Notably, these agreements are retained in the MIC Draft Statute. As confirmed in Article 20(1) MIC Draft Statute, the '*Agreements included in Annexes X shall form an integral part of this Statute and are binding on the respective parties to the Agreements*'. Article 67 further states that '*a reference to this Statute or to one of its Parts includes a reference to the Annexes relating thereto*'. However, the dispute settlement mechanisms for disputes between foreign investors and states provided for in the individual agreements is replaced by the MIC. This reflects, among others, the view of the EU Commission to UNCITRAL Working Group III.[119]

Substantive standardization of the protection standards could take place at a later date if deemed necessary and feasible. So far, such attempts at material multilateralization had failed again and again, *inter alia*, within the framework of the OECD. In the interim, the presence of permanent judges at the MIC will promote consistency in the application of these protection standards. Due to the permanency of the deciding judges, a more uniform

118 See for instance the installation of UNCTAD, <International Investment Agreements Navigator | UNCTAD Investment Policy Hub> accessed 07 December 2020.

119 Submission of the European Union and its Member States to UNCITRAL Working Group III, 18.1.2019, Establishing a standing mechanism for the settlement of international investment disputes, paras. 35 et seq.

interpretation of substantive law is likely to be achieved. With the MIC, a corresponding mandate to as far as possible promote uniform interpretation is incorporated in the Statute.[120] Accordingly, Article 28(1)(d) MIC Draft Statute explicitly requires the judges to apply the protection standards uniformly and consistently, particularly where there exists sufficient uniformity in previous case law.

In the *CETA* Opinion, the CJEU was intensively concerned with the consideration of regulatory interests of states (right to regulate) in the application of the substantive protection standards.[121] For the avoidance of doubt, the Court made it clear that the Statute of an MIC could require adjudicators to take into account the "level of protection of the public interest" when applying existing IIAs. The latter will remain the basis for ISDS in any future form.

Notably, the MIC Draft Statute also recognizes the concerns about states' regulatory interests, and in this regard, Article 28(1)(e) explicitly provides that the MIC judges in the discharge of their duties shall take into account the Members' right to regulate. In CETA for instance, legitimate regulatory interests are excluded from the material scope of the protection against indirect expropriation without compensation in the annex,[122] so that general policy legislative measures, e.g. for ecological reasons, would never amount to indirect expropriation.[123] The most general standard of protection, namely the obligation to afford Fair and Equitable Treatment to foreign investors, is also given concrete form,[124] and the most important applications developed by legal practice are explicitly recognized.[125] Such an explicit limitation of investor rights seems to be the safest and least problematic way of preventing that individual standards would be interpreted too investor-friendly at the expense of the host countries.[126]

Additionally, the MIC Statute could contain an instruction to take general principles of international law into account. However, as the MIC would build on substantive rights of investors in existing agreements, it is to be considered whether the MIC should be given concrete interpretative maxims. For example, it would be conceivable to clarify in the relevant

120 See Bungenberg and Reinisch (2019), paras. 398 et seq. (on "harmonizing interpretation mandate" for the MIC).
121 CJEU, Opinion 1/17 (fn. 23) para. 152 et seq.
122 Annex 8-A to CETA (fn. 5).
123 Bungenberg and Blandfort (forthcoming 2020).
124 Art. 8.10 para. 2 CETA (fn. 5).
125 See for instance, Dumberry (2019), pp. 95 et seq.
126 See for instance, Titi (2014), pp. 299 et seq.

text of the agreement, namely in the preamble or in the annexes, that the investment protection standards are to be interpreted in a neutral and objective manner.[127] Also, certain concrete interpretation guidelines could be agreed between the contracting parties of the MIC as binding. Such interpretative guidance could, therefore, be included in the Annexes forming an integral part of the MIC Draft Statute.

EU Law should not qualify as applicable substantive law because of the special role of the CJEU in the EU's legal protection system. The CJEU has accepted this approach, with reference to corresponding approaches in the CETA Agreement, as a sufficient safeguard of the autonomy of EU Law.[128]

6. Decisions of the MIC and their Enforcement

The decisions of the MIC should be limited to (declaratory) findings of violations of applicable IIAs and the award of damages and/or compensation. For a new court to be acceptable for investors, decisions must be effectively enforceable. This is all the more true if a losing party does not voluntarily comply with the payment obligations arising from the adjudicative decision.

Decisions of multilateral courts can often be enforced, if at all, only to a very limited extent through existing enforcement mechanisms or conventions.[129] As the MIC procedure is not a procedure covered by the ICSID Convention, the enforcement mechanism of the ICSID Convention will not apply to MIC decisions.[130] Recourse to the New York Convention of 1958[131] will also raise uncertainty.[132] Enforcement pursuant to the New

127 See Bungenberg and Reinisch (2019), paras. 401 et seq.

128 CJEU, Opinion 1/17 (fn. 23), para. 136.

129 See in general, Bungenberg and Holzer (2019), pp. 75 et seq.

130 Convention on the settlement of investment disputes between States and nationals of other States, 575 UNTS 159; See also, Calamita (2017), 604 et seq.; Schreuer, Malintoppi, Reinisch and Sinclair (2009) p. 1105; Bungenberg and Reinisch (2019), paras. 495 et seq. (on decisions of the MIC within the meaning of ISCID Convetion).

131 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3.

132 See, Potestà (2018), p. 171 et seq.; Kaufmann-Kohler/Potestà (2016), para. 145 et seq.; Reinisch (2016), pp. 782 et seq.; On decisions of an Investment Court System, see UNCITRAL Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), A/CN.9/917, 20.04.2017, pp. 47 et seq.

York Convention would require that MIC decisions embody arbitral awards as defined by this Convention. Although this could be stipulated in the Statute (similar to Article 8.41(5) CETA), it is currently unclear whether such a provision would be accepted as binding by the domestic courts of the enforcement state, especially in a non-Member of the MIC.[133]

In light of the desire for legal certainty, the MIC Draft Statute incorporates its own enforcement mechanism in Part VI of the Statute, which would be more effective with a greater number of MIC Members. Notably, Article 58 MIC Draft Statute contains an innovative provision that envisages the establishment of a fund (enforcement fund) from which final judgments may be settled up to a maximum amount and to which all MIC Members have to contribute.[134] The claims against the respondent in the judgment can then be transferred to the fund. Such a system would be particularly conducive to small and medium-sized enterprises, which in many cases cannot afford to carry out years of enforcement proceedings against a respondent.

133 See in extenso, Galindo et al. (2019).

134 Bungenberg M and Holzer A (2019), Potential Enforcement Mechanisms for Awards of a Multilateral Investment Court, in: Ünüvar/Jemielniak/Dothan (eds), Investment Courts: Challenges and Perspectives, Special Issue EYIEL pp. 75-115.

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Draft Statute of the Multilateral Investment Court

by
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Foreword

This draft statute for a Multilateral Investment Court (MIC) is based on the study "*From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*" which was first published in 2018. It is meant to stimulate discussion and to demonstrate that it is possible to devise a statute for a MIC without major hurdles. This proposal does not contend that the current system is not working or should be replaced; it merely demonstrates that it is possible to have a new one.

Every issue and problem addressed herein may be handled in different ways. The drafters of the statute seek to show what is possible on the basis of current debates, crystallizing in UNCITRAL, UNCTAD and other fora. The proposed articles of the statute may be amended and streamlined and are expected to be supplemented by the enactment of secondary rules.

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Marc Bungenberg
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Preamble

The Parties to this Statute,

Considering the significance of robust investment relations for global economic development;

Bearing in mind the *consensus* achieved in the United Nations Commission on International Trade Law to develop solutions to concerns with investor-State dispute settlement;

Conscious of the need to devise a system which is subject to *democratic principles and scrutiny* and upholds the *rule of law* and the protection of *fundamental rights*;

Desiring to develop a system that facilitates *transparent* dispute settlement by *independent and neutral adjudicators* and ensures *consistent* application of substantive and procedural standards of investment protection;

Recognizing that an *accessible* and *procedurally efficient*, permanent investment court would serve the interests of investors, States and other stakeholders alike, and

Emphasizing the contributions that a multilateral dispute settlement mechanism can make to the *legitimacy*, coherence, and stability of investor-State dispute settlement,

Have agreed as follows:

Part I
Establishment of the Multilateral Investment Court

Article 1
Establishment of the Multilateral Investment Court

1. The Multilateral Investment Court ('the MIC') is hereby established.
2. The MIC is a permanent court in the form of an international organization. It shall exercise jurisdiction over all disputes related to the protection of investments referred to it in accordance with this Statute.

Article 2
Seat of the MIC

1. The seat of the MIC shall be located in ### ('the Host State'). The proceedings of the MIC shall be held at the seat of the MIC except as hereinafter provided.
2. Proceedings may be held, if the parties so agree,
   (a) at the seat of the Permanent Court of Arbitration, of the International Centre for Settlement of Investment Disputes, or of any other dispute settlement institution with which the MIC may make arrangements for that purpose; or
   (b) at any other place approved by the MIC.
3. The MIC shall enter into a headquarters agreement with the Host State, as well as into seat agreements with other States, which shall be negotiated by the Director-General of the MIC. Subject to approval by the Plenary Body, such agreement will be concluded by the President of the MIC on its behalf.

Article 3
General Structure of the MIC

The MIC shall have the following organs:
(a) The Plenary Body
(b) The Court of First Instance
(c) The Appellate Court
(d) The Advisory Centre
(e) The Secretariat

Article 4
Membership of the MIC

1. The original Members of the MIC shall be the parties which sign the present Statute and ratify it in accordance with Articles 59 and 60.
2. States and other international entities, which have the power to enter into investment agreements, may accede to the MIC.
3. The Plenary Body shall approve accessions by a two-thirds majority of the Members of the MIC.

Article 5
Legal Status and Powers of the MIC

1. The MIC shall have international legal personality and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The MIC shall exercise its functions and powers, as provided in this Statute, in the territory of each Member and, by special agreement, in the territory of any non-Member.

Article 6
Privileges and Immunities

1. The MIC shall be accorded such privileges and immunities as are necessary for the exercise of its functions. The privileges and immunities to be accorded by a Member to the MIC, its staff members, and the representatives of its Members shall correspond to those stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.
2. The judges of the MIC, the Director-General, and staff members of the MIC shall be immune during and after expiry of their terms of office from any legal proceedings regarding all acts conducted in connection with their duties.
3. In addition, the judges of the MIC and the Director-General shall enjoy the same immunity during their tenure on the MIC as enjoyed by the head of a diplomatic mission. This immunity may be waived only by an unanimous decision taken by a vote in a plenary of all judges of the MIC where immunity would impede the course of justice, and can be waived without prejudice to the interests of the Court. The judge whose immunity is under consideration will not be permitted to vote.

Article 7
Budget of the MIC

1. The annual budget of the MIC shall be prepared by the Director-General assisted by the Secretariat of the MIC in consultation with the President of the MIC.

2. The annual budget shall be put forward and approved by the Plenary Body with a two-thirds majority in a session where more than half of the Members of the MIC are present and voting.
3. The annual budget shall be borne by the Members as apportioned by the Plenary Body for the particular year. The proportion of the contribution to the budget by a Member will be determined by taking the proportion of foreign direct investment outflow of the particular Member in relation to the total foreign direct investment outflow of all MIC Members. Members of the MIC may be permitted to pay a reduced contribution or may be fully exempted from the payment of their contribution subject to approval by a ### (simple/qualified) majority of the Plenary Body.

Part II
Composition of the MIC

Article 8
The Plenary Body

1. There shall be a Plenary Body composed of representatives of all the Members, which shall meet regularly and as appropriate to ensure the functioning of the MIC.
2. The Plenary Body shall carry out the functions assigned to it by this Statute. The Plenary Body shall establish its own rules of procedure and adopt or modify the Rules of Procedure for the Court of First Instance, the Appellate Court, the Advisory Centre, and the Secretariat.
3. The Plenary Body has the power to undertake necessary amendments of the Statute through consensus and pursuant to Article 63 *et seq*. to ensure the proper functioning of the MIC. It may also adopt interpretations of the Statute by consensus, which will be binding on the other organs of the MIC.
4. The Plenary Body shall adopt: a code of ethics and a code of conduct for the judges of the MIC, rules of conduct and ethics for all staff members, and regulations on procedure to be followed for the registration, allocation and conduct of proceedings before the Court of First Instance and the Appellate Court, transparency, costs and Court fees. These regulations will be drafted in accordance with the principles of the rule of law and will implement the UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration.

5. The Plenary Body may adopt any additional regulations or guidelines necessary for the functioning of the MIC and its organs.
6. The Plenary Body may form different committees as required to perform its functions.
7. Decisions on regulations concerning the procedure to be followed by the MIC must be approved by two-thirds majority when consensus cannot be reached.
8. The Plenary Body shall elect a Chairperson. The Chairperson has the administrative function of presiding over the meetings of the Plenary Body and will serve for two years.

Article 9
Judges of the MIC

1. The MIC shall comprise initially 24 judges in full time office, no two of whom may be nationals of the same State. A judge who is considered a national of more than one State shall be deemed to be a national of the State in which he or she ordinarily exercises civil and political rights.
2. The judges shall be persons of high moral character, enjoying the highest reputation for fairness and integrity with recognised competence in the fields of public international law, especially international investment law and international dispute settlement, administrative, commercial and constitutional law.
3. A judge of the MIC shall not exercise any political or administrative function, or engage in any occupation of a professional nature during his or her tenure at the MIC unless exemption is granted by the Plenary Body, acting by a simple majority.
4. The number of judges of the MIC may be amended by a two-thirds majority of the Members in the Plenary Body.

Article 10
The Advisory Centre

1. The Advisory Centre shall have a separate budget allocated by the Plenary Body. It shall operate independently from other organs of the MIC through staff members appointed by the Plenary Body.
2. The Advisory Centre may upon request provide legal assistance for disputes before the MIC to:

(a) companies which are eligible for classification as Small and Medium Enterprises (SME) and
(b) all Members who are regarded as 'developing economies' pursuant to the Country Classification of the United Nations system.

3. The Advisory Centre may provide training on international investment law and further education to members of the MIC.
4. The Plenary Body shall draft rules, specifying the role of the Advisory Centre, its duties, and provisions on confidentiality in the internal functioning and publication of information by the Advisory Centre. The strict separation of responsibilities and information between the Advisory Centre and other bodies of the MIC must be ensured.
5. The Advisory Centre will cooperate with other international organizations and other entities working in similar areas as required to perform its functions.

Article 11
The Secretariat

1. The Secretariat of the MIC shall consist of staff members headed by a Director-General. The Secretariat may have internal departments as required to perform its functions.
2. The Plenary Body shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and terms of office of the Director-General and staff members. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with the regulations adopted by the Plenary Body.
3. The Secretariat shall perform the administrative functions for the operation of the MIC. Its duties, functions, working procedures, and responsibilities shall be specified in detail by regulations on procedure adopted by the Plenary Body. The Secretariat may provide administrative and legal support to the judges of the MIC.
4. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the MIC. The Director-General and all staff members of the MIC shall refrain from any action, which might adversely reflect on their position as officials of an international organization. The Members of the MIC shall respect the international character of the responsibilities of the Director-General and of the staff

of the Secretariat and shall not seek to influence them in the discharge of their duties.

Part III
The Judges, Court of First Instance, and the Appellate Court

Article 12
Nomination, Screening, and Election of Judges

1. Each Member of the MIC has the right to nominate candidates to a list for consideration to be elected as a judge of the MIC, through an internal selection procedure conducted by the Member.
2. The persons nominated to the list shall be evaluated by a sub-committee of the Plenary Body called the 'Screening Committee' for their suitability to be appointed as judges of the MIC on the parameters of professional qualifications, ethical standards, independence, and impartiality. The Screening Committee shall comprise seven persons chosen by the Plenary Body from among former judges of the MIC, members of national supreme and international courts, and lawyers of recognised competence. The Screening Committee may use additional criteria for the screening process as it deems fit and would seek to ensure that the persons who are finally selected represent the principal legal systems of the world.
3. The Screening Committee shall publish the names of the candidates who are eligible for election as judges of the MIC by classifying them in one of the following regional groups based on the nationality of the country which nominated them for the election: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe. The names will be published in an alphabetical order and each name will indicate the regional group which has the right to vote for the candidate.
4. The Members of a particular regional group in the Plenary Body will vote on the candidates eligible for election from their regional group with the aim to select an initial number of 15 judges, of which the following number of judges shall be chosen from each regional group:
   - Asia: ### judges
   - Africa: ### judges
   - Latin America and the Caribbean: ### judges
   - Western Europe and others: ### judges
   - Eastern Europe: ### judge

5. In addition to the judges elected under paragraph 4 above, each regional group will be allotted a quota of judges out of the remaining nine MIC judges who shall be elected as provided under Article 12(1 - 4) of this Statute and subject to any amendment under Article 9(4). The number of judges which can be elected by a regional group will be commensurate with the number of MIC Members present in the regional group as a share of the total number of MIC Members.
6. Each Member of the MIC has one vote, which may be exercised in the election process for the judges of the MIC. Legal entities that are Members of the MIC can exercise their right to vote having a number of votes equal to the number of votes of their members which are Members of the MIC. Based on the number of votes received and the quota allotted to the regional group, the persons who receive the highest number of votes in a particular regional group will be selected as judges of the MIC.
7. The appointed judges will take an Oath of Office before the Plenary Body before the commencement of their tenure.

Article 13
Conditions of Service of Judges

1. All persons serving as judges at the MIC shall be available at all times and on short notice.
2. Judges of the MIC shall receive an annual salary. The President and the Vice-President shall receive a special annual allowance. These salaries, allowances, and compensation shall be fixed by the Plenary Body. They may not be decreased during the term of office.
3. The judges of the MIC shall be impartial and independent. They shall not take instructions from any organization or government with regard to matters related to any dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.
4. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their impartiality and independence. Each judge shall declare to the President of the MIC any such activity which will be disclosed to the disputing parties of each case.
5. No judge of the MIC may act as agent, counsel, or advocate in any investment dispute for a period of two years after retirement or resignation as a judge of the MIC. No judge of the MIC may participate in the

adjudication of any case in which he or she has previously taken part as agent, counsel, or expert for one of the parties, or as a member of a national or international court, or in any other capacity. Any doubt concerning a direct or indirect conflict of interest shall be settled by decision of plenary of the judges of the MIC by an absolute majority of the judges. Where any such question concerns individual judges, these judges shall not take part in the decision.

Article 14
Duration of Appointment

1. The judges of the MIC shall be elected for a period of nine years without the possibility of re-election. Of the judges elected at the first election, the terms of eight judges shall expire at the end of three years and the terms of eight more judges shall expire at the end of six years. The judges whose terms are to expire at the end of three and six years shall be determined through a draw of lots to be conducted by the Chairperson of the Plenary Body immediately after the end of the first election.
2. The judges shall continue to hold office until they are replaced. They will, however, continue in office to complete any disputes that were under their consideration prior to their replacement unless they have been removed in accordance with Article 15(1) below.

Article 15
Resignation, Removal, and Replacement of Judges

1. A judge of the MIC may be removed from office in case of substantial misconduct or failure to perform his or her duties by an unanimous decision of all judges of the MIC except the judge under scrutiny.
2. A judge of the MIC may resign from his or her position through a letter addressed to the President of the MIC. A resignation of the President should be addressed to the most-senior Vice-President of the MIC as determined by age. The resignation shall become effective on the date of receipt by the President or the Vice-President.
3. In case of a judicial vacancy, the process of reappointment of judges will be conducted in the manner specified in Article 12 above, subject to the modification that only the group which elected the outgoing judge will be able to vote and elect a replacement in a special ad-hoc election.

4. A judge who has been appointed as a replacement of another judge under this Article shall remain in office for a duration of nine years except for judges who are appointed as replacements for judges elected with a shorter period of three years or six years after the first election. Judges who are appointed as a replacement for a judge with a shorter term period as provided under Article 14(1) will be eligible for re-election for a full term.

Article 16
President of the MIC

1. The judges of the MIC shall elect a President of the MIC by a confidential internal voting procedure with each judge having one vote.
2. The President of the MIC shall be elected for a term of three years with the possibility of one re-election.
3. The President of the MIC shall not be eligible to nominate himself or herself as a judge of the Appellate Court but may serve in this capacity when nominated after the completion of his or her term as a President of the MIC. Judges appointed to the Appellate Court will be ineligible to be simultaneously elected as President of the MIC, but they will retain the power to participate and vote in the election process of the President of the MIC.
4. The President of the MIC shall chair all sessions of the plenary of the judges of the MIC, supervise the functioning of the Director-General and the Secretariat, assign individual judges to the chambers of the MIC and its Appellate Court, assign disputes to the chambers of the MIC and its Appellate Court, supervise administrative functions of the MIC, and represent the MIC in its external relations.
5. The assignment of judges to the chambers of the MIC and its Appellate Court and the assignment of disputes to the judges shall be governed by Rules of Procedure to be drafted by the Director-General with the assistance of the Secretariat and adopted by the Plenary Body. The President will consider criteria such as gender and regional diversity as well as diversity of expertise of legal systems and subject area in addition to the guidelines provided under the Rules of Procedure adopted by the Plenary Body while assigning the judges to the chambers of the MIC and the Appellate Court.
6. The senior-most Vice-President of the MIC will perform the duties of the President until his or her re-election or when he or she is unable to do so.

Article 17
Chambers, Grand-Chambers, and Vice-Presidents of the MIC

1. The judges of the MIC shall be appointed to chambers with an odd number of judges to perform their judicial functions.
2. The President of the MIC shall assign disputes to a particular chamber while taking into consideration that disputes which have a particular Member or claimants that are nationals of a particular Member as a party shall not be referred to a chamber that has a judge having the nationality of the same Member or that the judge was originally nominated by.
3. Chambers with three or more judges shall select presiding judges of the chambers who shall also be Vice-Presidents of the MIC. The Vice-Presidents of particular chambers shall cease to perform that function when their chambers are reassigned, but may be eligible to be elected as Vice-Presidents of new chambers.
4. The President and the Vice-Presidents of the MIC will form the Grand Chamber of the MIC. A Vice-President who may no longer be holding the position due to a reassignment of chambers will remain a part of the Grand Chamber for all disputes which were commenced when he or she was a member of the Grand Chamber.
5. Upon determination by the Grand Chamber, all the judges of the Court of the First Instance may sit as a plenary to decide on disputes of substantial importance.

Article 18
Appellate Court

1. The President of the MIC shall appoint nine judges of the MIC to the Appellate Court of the MIC.
2. Judges appointed to the Appellate Court will remain judges of the Appellate Court for the remainder of their terms.
3. The judges of the Appellate Court will be appointed to chambers with an odd number of judges. Chambers with three or more judges will select a presiding judge of the chamber who will also be a Vice-President of the MIC. The Vice-President of a particular chamber will cease to perform that function when his or her chamber is reassigned, but may be eligible to be elected as a Vice-President of the new chamber.
4. The judges of the Appellate Court may sit in chambers or as a plenary body to decide on specific disputes assigned by the President of the

MIC. One of the judges may be elected as an ad-hoc President of the plenary body of judges of the Appellate Court for the particular dispute through a secret vote of the judges of the plenary.

5. The ad-hoc President of the plenary of the Appellate Court shall chair the proceedings of the plenary of the Appellate Court and perform any administrative functions as required.

Part IV
Jurisdiction

Article 19
Scope of Jurisdiction

1. The jurisdiction of the MIC comprises all disputes arising directly out of an investment of a national of a Member in the territory of another Member, which the parties to the dispute refer to the MIC through consent in writing. When the parties have given their consent, no party may withdraw its consent unilaterally.
2. For the purpose of this Statute a 'national of another Member' means:
   (a) any natural person who had the nationality of a Member other than the Member which is a party to the dispute on the date on which the parties consented to submit such dispute to the MIC as well as on the date on which the request was registered pursuant to Article 44(2); and
   (b) any juridical person which had the nationality of a Member other than the Member which is a party to the dispute on the date on which the parties consented to submit such dispute to the MIC as well as on the date on which the request was registered pursuant to Article 44(2).
   (c) For the purposes of this Statute, a juridical person with the nationality of a Member shall be
      i. an enterprise that is constituted or organised under the laws of that Member and has substantial business activities in the territory of that Member, or
      ii. an enterprise that is constituted or organised under the laws of that Member and is directly or indirectly owned or controlled by a natural person of that Member or by an enterprise mentioned under paragraph (i).

Article 20
Consent Requirement

1. A Member may express its consent to the jurisdiction of the MIC as required under Article 19(1) by communicating such consent in writing at the time of accession, acceptance or approval of this Statute. Unless otherwise stated, such consent shall extend to the dispute settlement provisions of the Agreements listed in Annexes X of this Statute, including future International Investment Agreements of Members to the MIC. The Agreements included in Annexes X shall form an integral part of this Statute and are binding on the respective parties to the Agreements.
2. A national of a Member may express its consent to the jurisdiction of the MIC by lodging a written request to initiate proceedings pursuant to Article 40.

Article 21
Jurisdiction over Investment Contracts

A Member and a national of another Member may consent in writing to submit to the jurisdiction of the MIC disputes arising out of an investment contract.

Article 22
State-to-State Disputes

1. Any legal disputes between Members of the MIC regarding the interpretation or application of the Agreements listed under Annexes of this Statute may be resolved through recourse to the MIC.
2. The applicable law for the resolution of any legal disputes arising under paragraph 1 shall be determined under the specific International Investment Agreement between the disputing Members.
3. Upon the parties' consent to the jurisdiction of the MIC pursuant to paragraph 1, such jurisdiction shall be exercised to the exclusion of any other remedy provided for in the specific International Investment Agreement between the disputing Members.

Article 23
Exclusivity of Jurisdiction

1. Consent of the parties to the jurisdiction of the MIC shall be deemed consent to the exclusion of any other remedy. A Member may require the exhaustion of local administrative or judicial remedies as a condition to its consent to jurisdiction of the MIC under this Statute.
2. The MIC will have the exclusive jurisdiction to adjudicate any dispute arising out of an investment agreement between two States that are both Members of the MIC. Where any investment agreement between two Members of the MIC calls for recourse to Investor-State Arbitration, the Members agree to regard it as prescribing recourse to the MIC.

Article 24
Transitional Clauses

1. Any dispute settlement proceedings which would fall under the exclusive jurisdiction of the MIC, but have already commenced prior to the establishment of the MIC may be continued.
2. No dispute may be brought before the MIC if such dispute is already pending before another dispute resolution mechanism.

Article 25
Prohibition of Diplomatic Protection

No Member shall give diplomatic protection, or bring an international claim, in respect of a dispute to which one of its nationals and another Member have consented to submit or have submitted to the MIC under this Statute, unless such other Member has failed to abide by and comply with the decision rendered in the dispute.

Article 26
Jurisdiction Ratione Temporis

The MIC shall have jurisdiction over investment disputes arising after the entry into force of this Statute, unless a Member has consented in writing to jurisdiction over disputes, which arose prior to the entry into force of this Statute.

Article 27
Additional Jurisdictional Requirements

The MIC does not have jurisdiction over disputes where the national of the other Member does not qualify as an investor as defined in the underlying International Investment Agreement, has not made an investment as defined in the underlying International Investment Agreement between the disputing parties, or does not fulfil other jurisdictional requirements of the underlying International Investment Agreement.

Part V
Procedure

Article 28
General Principles

1. The MIC establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Members in accordance with the principle of reciprocity and due process before an independent and impartial adjudicator. By performing their duties, the judges of the MIC shall:
   (a) adhere to the Rule of Law;
   (b) promote the transparency of the proceedings through application of the rules, *inter alia* on transparency, ethics and conduct which govern them;
   (c) ensure that the proceedings are carried out efficiently and expeditiously;
   (d) secure uniform and consistent interpretation of the law, taking into consideration previous decisions without establishing a doctrine of precedent, particularly where there exists sufficient uniformity in previous case law; and
   (e) take into account the Members' right to regulate.
2. The proceedings and functioning of all the organs of the MIC will adhere to the highest standards of the rule of law, transparency, and good governance. All proceedings shall be conducted in accordance with the provisions of this Part and, except as the parties otherwise agree, in accordance with the Rules of Procedure adopted by the Plenary Body in effect on the date of the proceedings.

Section 1
General Rules

Article 29
Use of Languages

1. The official language of the MIC shall be English.
2. All communications by and with the disputing parties or their representatives, including oral and written submissions, shall be conducted in the official language of the MIC.
3. Should the underlying investment agreement provide a different language for the conduct of dispute settlement or the disputing parties so agree, the presiding judge of the chamber may authorise the use of a different language.
4. If such authorisation is granted, the Secretariat shall make the necessary arrangements for the interpretation and translation into English of the parties' oral and written submissions, in full or in part, where the presiding judge of the chamber considers it to be in the interests of the proper conduct of the proceedings.
5. Any witness, expert or other person appearing before the MIC may use another language if he or she does not have sufficient knowledge of the official language. In that event, the Secretariat shall make the necessary arrangements for interpretation and translation.
6. The extra costs for interpretation and translation will be allocated by the MIC to the disputing parties.

Article 30
Competence-Competence

1. The MIC shall be the judge of its own competence.
2. Any objection by a disputing party that a dispute is not within the jurisdiction of the MIC shall be considered and decided by the judges at any stage of the dispute. A plea that the MIC does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to (a counterclaim or) an additional claim, in the reply to the (counterclaim or to the) additional claim. A plea that the MIC is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings. The MIC may, in either case, admit a later plea if it considers the delay justified.

Article 31
Applicable Law

1. The MIC shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the MIC shall apply such rules of international law as may be applicable.
2. The MIC may not submit a finding of *non liquet* on the ground of silence or obscurity of the law.
3. The provisions of paragraphs 1 and 2 shall not prejudice the power of the MIC to decide a dispute *ex aequo et bono* if the parties so agree. In such case, no recourse to the Appellate Court is available.

Section 2
Powers and Functions of the MIC

Article 32
Powers of the Judges

Judges may, if they deem it necessary at any stage of the proceedings:
(a) call upon the parties to produce documents or other evidence; and
(b) visit the scene connected with the dispute and conduct such inquiries there as it may deem appropriate.

Article 33
Default Decision

1. Failure of a party to appear or to present its case shall not be deemed an admission of the other party's assertions.
2. If a party fails to appear or to present its case at any stage of the proceedings, the other party may request the MIC to deal with the questions submitted to it and to render a decision. The MIC must satisfy itself, not only that it has jurisdiction, but also that the claim is well founded in fact and law. Before rendering a decision, the MIC shall notify and grant a period of grace to the party failing to appear or to present its case, unless it is satisfied or informed that that party does not intend to do so.

Article 34
Additional Claims and Counterclaims

Except as the parties otherwise agree, the MIC shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute.

Article 35
Provisional Measures

The MIC may, if it considers that the circumstances so require, order any provisional measures necessary to preserve the respective rights of either party.

Article 36
Proceedings under another International Agreement

Where a claim is simultaneously brought pursuant to this Statute and under 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 Statute,

the MIC may, 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 or order.

Article 37
Consolidation

1. When two or more claims that have been submitted separately to the MIC concern a common question of law or fact and arise out of the same events or circumstances, a disputing party or the disputing parties, jointly, may seek the establishment of a separate chamber of the MIC pursuant to this Article and request that such chamber issues a consolidation order ('request for consolidation').
2. The disputing party seeking a consolidation order shall first deliver a notice to all the disputing parties it seeks to be covered by this order.

3. If the disputing parties notified pursuant to paragraph 2 have reached an agreement on the consolidation order to be sought, they may make a joint request for the establishment of a separate chamber of the MIC and a consolidation order pursuant to this Article. If the disputing parties notified pursuant to paragraph 2 have not reached agreement on the consolidation order to be sought within 30 days of the notice, a disputing party may make a request for the establishment of a separate chamber of the Court of First Instance and a consolidation order pursuant to this Article.
4. The request shall be delivered, in writing, to the President of the MIC and to all the disputing parties sought to be covered by the order, and shall specify:
   (a) the names and addresses of the disputing parties sought to be covered by the order;
   (b) the claims, or parts thereof, sought to be covered by the order; and
   (c) the grounds for the order sought.
5. A request for consolidation involving more than one respondent shall require the agreement of all such respondents.
6. The President of the MIC shall, after receipt of a consolidation request, constitute a new chamber ('consolidating chamber') of the MIC which shall have jurisdiction over some or all of the claims, in whole or in part, which are the subject of the joint consolidation request.
7. If, after hearing the disputing parties, a consolidating chamber is satisfied that claims submitted concern a common question of law or fact and arise out of the same events or circumstances, and consolidation would best serve the interests of fair and efficient resolution of the claims including the interest of consistency of decisions, the consolidating chamber of the MIC may, by order, assume jurisdiction over some or all of the claims, in whole or in part.
8. If a consolidating chamber of the MIC has assumed jurisdiction pursuant to paragraph 7, a claimant that has submitted a claim to the MIC and whose claim has not been consolidated may make a written request to the MIC that it be included in such order provided that the request complies with the requirements set out in paragraph 4. The consolidating chamber of the MIC shall grant such order where it is satisfied that the conditions of paragraph 7 are met and that granting such a request would not unduly burden or unfairly prejudice the disputing parties or unduly disrupt the proceedings. Before the consolidating chamber of the MIC issues that order, it shall consult with the disputing parties.

9. On application of a disputing party, a consolidating chamber of the MIC established under this Article, pending its decision under paragraph 7, may order that the proceedings of unconsolidated chambers of the MIC addressed by the request of consolidation be stayed unless the former chamber has already adjourned its proceedings.
10. The unconsolidated chamber of the MIC shall cede jurisdiction in relation to the claims, or parts thereof, over which a consolidating chamber of the MIC established under this Article has assumed jurisdiction.
11. The decision of a consolidating chamber of the MIC established under this Article in relation to those claims, or parts thereof, over which it has assumed jurisdiction is binding on the unconsolidated chambers of the MIC as regards those claims, or parts thereof.
12. A claimant may withdraw a claim under this Section that is subject to consolidation and such claim shall not be resubmitted. If it does so no later than 15 days after receipt of the notice of consolidation, its earlier submission of the claim shall not prevent the claimant's recourse to dispute settlement other than under this Statute.
13. At the request of a claimant, a consolidating chamber of the MIC may take such measures as it sees fit in order to preserve the confidential or protected information of that claimant in relation to other claimants. Those measures may include the submission of redacted versions of documents containing confidential or protected information to the other claimants or arrangements to hold parts of the hearing in private. The consolidating chamber may adopt appropriate procedures for the consideration and transmission of such confidential information.

Article 38
Discontinuance

If, following the submission of a claim under this Statute, the claimant fails to take any steps in the proceeding during 180 consecutive days or such period as the disputing parties may agree, the claimant is deemed to have withdrawn its claim and to have discontinued the proceeding. The MIC shall, at the request of the respondent, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered, the authority of the MIC shall lapse.

Article 39
Withdrawal of a Claim

1. The parties may mutually decide or the claimant may unilaterally withdraw a claim at any stage of the proceedings before the Court of First Instance or the Appellate Court.
2. Any decisions which were under appeal before the Appellate Court will become final after withdrawal of the appeal as provided under Article 49 of this Statute.
3. The Court of First Instance or the Appellate Court may issue a decision of costs against the parties in case of a mutual withdrawal or against the claimant or appellant in case of a unilateral withdrawal.

Section 3
First Instance Proceedings

Article 40
Request to Initiate Proceedings

1. Any Member or any national of a Member wishing to institute proceedings at the MIC shall address a request to that effect in writing to the Secretariat which shall send a copy of the request to the other party.
2. The request shall contain information concerning the issues in dispute, the identity of the parties, and their consent to the jurisdiction of the MIC in accordance with the Rules of Procedure.
3. If a dispute resolution clause in the underlying International Investment Agreement provides for the completion of certain requirements before filing the request to initiate proceedings such as the observance of consultation periods, exhaustion of local remedies, or other similar procedures, the claimant must prove adherence to those requirements.
4. Upon receipt of the request to initiate proceedings, the Secretariat will inform the President of the MIC about the receipt of the claim and request an allocation of the claim. The President will then allocate the claim to a chamber while taking into account the guidelines prescribed regarding allocation of claims under this Statute and the rules framed under it.

Article 41
Inadmissibility of a Claim

A claim by an investor is inadmissible if the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

Article 42
Time-Limits for Submission of a Claim

1. Claims have to be submitted to the MIC within one year of the dispute having arisen or, in case of recourse to local remedies, within one year of completion of any domestic legal or administrative proceedings regarding the dispute.
2. Except for any special agreements between the Members, no claims should be accepted by the MIC beyond a 10 year period after the alleged violation had taken place.

Article 43
Time-Limits for Court of First Instance

1. In order to make the procedures more efficient, the period in which the Court of First Instance shall conduct its proceedings, shall, as a general rule, not exceed six months.
2. When the Court of First Instance considers that it cannot issue its decision within six months, it shall inform the parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. The period from the constitution of the chamber of the Court of First Instance to the issuance of the decision should not exceed nine months.

Article 44
Decision of First Instance and Formalities

1. The Court of First Instance shall generally hear disputes in chambers consisting of three judges.
2. Within 90 days of the assignment of a dispute by the President to a chamber, such chamber will decide whether the claim submitted is inadmissible, manifestly ill-founded or if there is a manifest lack of juris-

diction. If the chamber determines that these criteria are fulfilled, it will dismiss the claim immediately. Otherwise, it will be registered and the proceedings will be commenced in the same chamber.

3. First Instance chambers shall decide questions by a majority of judges.
4. Notwithstanding paragraph 1, the disputing parties may agree that a dispute be heard by a sole judge to be appointed at random, unless such judge has the same nationality as one of the disputing parties or was nominated to the MIC by a Member who is also a disputing party. The respondent shall give consideration to a request from the claimant to have the dispute heard by a sole judge, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made to the President of the MIC at the time of submission of the claim through the Secretariat.
5. Decisions of the First Instance chambers shall be in writing and shall be signed by the judges who voted for it.
6. Decisions shall deal with every question submitted to the Court of First Instance and shall state the reasons upon which they are based.
7. Any judges of a First Instance chamber may attach their individual or joint dissenting or separate opinions or statements of dissent to the decision.

Article 45
Notification Decision of First Instance

1. The Secretariat shall promptly dispatch certified copies of the decision to the parties. The decision shall be deemed to have been rendered on the date on which the certified copies were dispatched.
2. The Court of First Instance, upon the request of a party made within 45 days after the date on which the decision was rendered, may after notice to the other party decide any question which it had omitted to deal with in the decision, and shall rectify any clerical, arithmetical or similar error in the decision. Its subsequent decision shall become part of the original decision and shall be notified to the parties in the same manner as the original decision.

Section 4
Appellate Mechanism

Article 46
Grounds for Appeal

Either party may appeal the decision of a Chamber, Grand Chamber, or Plenary of the First Instance by an application in writing addressed to the Secretariat on one or more of the following grounds:

(a) that the MIC does not have jurisdiction to hear the dispute or that a claim is not admissible;
(b) that the First Instance has manifestly exceeded its powers;
(c) that there was corruption on the part of a judge of the First Instance;
(d) that there has been a serious departure from a fundamental rule of procedure;
(e) that the decision has failed to state the reasons on which it is based;
(f) that there are grave errors in the application or interpretation of applicable law; or
(g) that there are manifest errors in the appreciation of the facts, including the appreciation of the relevant domestic law.

Article 47
Appeal Procedure

1. The reasoned appeal must be submitted within 90 days after the date on which the decision was rendered. When appeal is submitted on the ground of corruption such application shall be made within 90 days after discovery of the corruption and in any event within three years after the date on which the decision was rendered.
2. The chamber of the Appellate Court constituted to hear the appeal shall generally consist of three judges randomly assigned by the President (Article 16(4 and 5)). Larger chambers or a plenary of Appellate Court judges may be called upon to decide on specific disputes which are deemed to be of high importance.
3. The Appellate Court may uphold, modify or reverse the decision of first instance or any part thereof.
4. The Appellate Court may, if it considers that the circumstances so require, stay the enforcement of the First Instance decision pending the appeal's decision. If a party requests a stay of enforcement of the First

Instance decision in its application, enforcement shall be stayed provisionally until the Appellate Court rules on such request.

Article 48
Time-Limits for the Appellate Court

As a general rule, the proceedings at the Appellate Court shall not exceed 90 days from the date a party submits its appeal to the date the Appellate Court renders its decision. When the Appellate Court considers that it cannot provide its decision within 90 days, it shall inform the parties in writing of the reasons for the delay together with an estimate of the period within which it will submit its decision. The proceedings shall not exceed 120 days.

Section 5
Final Decision

Article 49
Final Decision

1. A decision rendered pursuant to previous sections shall not be considered final and no action for enforcement of a decision may be brought until either:
   (a) 90 days from the issuance of the decision by the First Instance has elapsed and no appeal has been filed;
   (b) an initiated appeal has been rejected or withdrawn; or
   (c) the disputing parties are notified of the decision of the Appellate Court.
2. A final decision of the MIC has binding force between the parties and in respect of that particular case. It shall not be subject to any other remedy except those provided for in this Statute. Each party shall abide by and comply with the terms of the decision except to the extent that enforcement has been stayed pursuant to the relevant provisions of this Statute.

Section 6
Revision of a Decision

Article 50
Revision

1. Either party may request revision of a final decision by an application in writing addressed to the Secretariat on the ground of discovery of a fact of such a nature that decisively affects the decision, provided that the fact was unknown to the MIC and to the applicant when the decision was rendered and that the applicant's ignorance of that fact was not wilful or due to negligence.
2. The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the decision was rendered.
3. The MIC may, if it considers that the circumstances so require, stay enforcement of its original decision pending its revised decision. If the applicant requests a stay of enforcement of a decision in its application, enforcement shall be stayed provisionally until the MIC rules on such request within three months.

Section 7
Challenge of Judges

Article 51
Procedure for Challenge of Judges

1. If a disputing party considers that a judge has a conflict of interest, it may submit a notice of challenge to the President of the MIC. Any notice of challenge shall be sent to the President of the MIC within 15 days of the date on which the names of the judges adjudicating the particular dispute have been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at an earlier stage. The notice of challenge shall state the grounds for the challenge.
2. If, within 15 days from the date of the notice of challenge, the challenged judge has elected not to step down from the particular dispute, after receiving submissions from the disputing parties and after providing the challenged judge an opportunity to submit any observations,

the plenary of judges excluding the challenged judge will rule on the challenge by absolute majority in a reasoned decision.

Section 8
Other Provisions on Procedure

Article 52
Third Party Funding

1. In the event of third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the MIC 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.

Article 53
Determination of Appropriate Respondent

1. The judges of the MIC will consider any internal arrangements made by international organizations which represent multiple Members regarding the allocation of responsibility arising from a claim against a Member State of the organization or the organization itself.
2. The judges of the MIC may seek an opinion from an international organization regarding the allocation of responsibility between the organization and its members in respect of a claim. The final decision passed by the chambers of the Court of First Instance or the Appellate Court will reflect the arrangement made by the Member State and the international organization regarding the distribution of responsibilities.
3. If no arrangement is made by the international organization and its Member States within the specified period of time, then the First Instance or Appellate Court may choose to issue a decision requiring the international organization assume responsibility under the decision.

Article 54
Determination of Costs

The charges payable by the disputing parties for the use of the facilities of the MIC shall be determined by the MIC, according to the Regulations on Costs established by the Plenary Body.

Article 55
Experts and Third Parties

1. The Court of First Instance and the Appellate Court may consult experts to deal with questions regarding specialised areas.
2. After consultation with the disputing parties, the Court of First Instance may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the Court in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant or public interest in the proceedings. Each submission shall identify the author, disclose any affiliation, direct or indirect, with any disputing party, and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in the language of the arbitration and comply with any page limits and deadlines set by the tribunal. The Court shall provide the disputing parties with an opportunity to respond to such submissions and it shall ensure that the submissions do not disrupt or unduly burden the proceedings, or unfairly prejudice any disputing party.

Part VI
Enforcement

Article 56
Enforcement within MIC Members

1. Each Member of the MIC shall recognise a decision rendered pursuant to this Statute as binding and enforce the pecuniary obligations imposed by that decision within its territories as if it were a final judgment of a court in that State or international entity. A Member of the MIC with a federal constitution may choose to enforce such a decision

in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent State or international entity.

2. A party seeking recognition or enforcement in the territories of a Member of the MIC shall furnish to a competent court or other authority which such Member shall have designated for this purpose a copy of the decision certified by the Director-General. Each Member of the MIC shall notify the Director-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
3. Execution of a decision shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.
4. Third States which are not Parties to this Statute may commit themselves to recognise and enforce decisions rendered by the MIC in accordance with the rules set out in this Statute. The declaration of commitment may be made at any time to the Secretariat of the MIC.

Article 57
Enforcement in Non-MIC Members

The enforcement of MIC decisions in non-MIC Members will be governed by a separate treaty. The MIC Members are working towards the creation of such a treaty and are seeking to encourage the accession of third parties to that treaty in their international relations.

Article 58
Enforcement Fund

1. A fund for the enforcement of MIC decisions ('the Fund') is hereby established. The Fund shall be governed by administrative regulations to be adopted by the Plenary Body.
2. Upon accession to the MIC, MIC Members are obliged to contribute to the Fund. The minimum contribution will be determined by the Plenary Body.
3. In accordance with the administrative regulations governing the Fund, the Fund shall satisfy an MIC Member's obligation under an MIC decision by payment to a successful claimant up to a sum of XXX USD per

case upon request, if the claimant can demonstrate need for urgency of immediate payment of an awarded sum.

4. Upon satisfying or agreeing to satisfy a Member's obligation under an MIC decision by payment to the benefitting claimant, the MIC shall be subrogated to such rights or claims related to the respective decision as the holder of the decision may have had against the Member and other obligors. The subrogation shall be effected in the form of assignment.

Part VII
Final Provisions

Article 59
Signature

This Statute shall be open for signature on behalf of the entities mentioned in Article 4 and in accordance with the procedure thereunder.

Article 60
Ratification and Accession

This Statute shall be subject to ratification or accession by the entities referred to in Article 4 in accordance with their respective constitutional procedures. The instruments of ratification or accession shall be deposited with the Depository who shall transmit certified copies to all Members.

Article 61
Entry into Force

1. This Statute shall enter into force ### months after the date of deposit of the fortieth instrument of ratification.
2. For each Member acceding to this Statute after the deposit of the fortieth instrument of ratification or accession, the Statute shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession.
3. Upon its entry into force, each Member shall take such legislative or other measures as may be necessary for making the provisions of this Statute effective in their relations with other Members.

Article 62
Relation to other International Agreements

This Statute shall not alter the rights and obligations of Members which arise from other agreements compatible with this Statute and which do not affect the enjoyment by other Members of their rights or the performance of their obligations under this Statute.

Article 63
Amendment of the Statute

1. A Member may propose amendments to this Statute and request their consideration in the Plenary Body by written communication addressed to the Director-General, who shall promptly circulate such communication to all other Members.
2. If a majority of the Members reply favorably to the request within three months from the date of the circulation of the communication, the proposal shall be deliberated in the Plenary Body.
3. The Plenary Body should make every effort to reach agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted. The adoption of an amendment on which consensus cannot be reached shall require a two-thirds majority of Members in the Plenary Body.

Article 64
Entry into Force of Amendments

1. Each amendment shall enter into force 30 days after its adoption by the Plenary Body.
2. A Member which becomes a Party to this Statute after the entry into force of an amendment in accordance with paragraph 1 shall be considered as a Party to this Statute as so amended.
3. No amendment shall affect the rights and obligations under this Statute of any Member or of any of its constituent subdivisions or agencies, or of any national of such Member arising out of consent to the jurisdiction of the MIC given before the date of entry into force of the amendment.

Article 65
Review of the Statute

1. 10 years after the entry into force of this Statute, the Chairperson shall convene a conference, hereinafter referred to as Review Conference, to consider any amendments to this Statute.
2. At any time thereafter, at the request of a Member and for the purposes set out in paragraph 1, the Chairperson shall, upon approval by a majority of the Plenary Body, convene a Review Conference.
3. The provisions of Articles 63 and 64 shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 66
Denunciation

1. A Member may, by written notification addressed to the Depositary, denounce this Statute and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A Member shall not be discharged by reason of the denunciation from the financial and contractual obligations which accrued while it was a party to this Statute.
3. Denunciation of this Statute shall not affect any rights or obligations of that Member created through the execution of this Statute prior to its termination for that Member.

Article 67
Status of Annexes

The Annexes form an integral part of this Statute and, unless expressly provided otherwise, a reference to this Statute or to one of its Parts includes a reference to the Annexes relating thereto.

Article 68
Depositary

The Director-General shall be the depositary of this Statute and of the instruments of ratifications or accessions and amendments thereto. In exercise of his or her functions as a depositary, the Director-General shall:

(a) notify the Members of the date on which this Statute enters into force in accordance with Article 61;
(b) register this Statute with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly;
(c) notify the Members of signatures and deposits of instruments of ratifications and accessions to this Statute in accordance with Articles 59 and 60 respectively;
(d) circulate amendments adopted in accordance with this Statute to Members for ratification or accession in accordance with Article 63;
(e) notify the Members of the date on which any amendment of this Statute enters into force in accordance with Article 64; and
(f) notify the Members of any denunciations of this Statute in accordance with Article 66.

Article 69
Authentic Texts

The original of this Statute, of which the _____ texts are equally authentic, shall remain deposited with the Director-General, who shall send certified copies thereof to all Members.