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).

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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.

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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.

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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).

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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-

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

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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).

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– 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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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).

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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.

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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).

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– 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.

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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.

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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.

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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).

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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

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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.

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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.

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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.

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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.

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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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