European Federation for Investment Law and Arbitration

ENSURING THE EFFECTIVE RECOGNITION AND ENFORCEMENT OF MIC DECISIONS

SUBMISSION BY THE EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION (EFILA) TO THE UNCITRAL WORKING GROUP NO. III ON ISDS REFORMS*

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* The opinions expressed in this paper are those of EFILA and no other organization, institution, or law firm. The main contributors of this paper are: Gloria Alvarez, Saadia Bhatty, Nikos Lavranos, and Alexander Leventhal. For more information or any questions and comments, please contact the Secretary General of EFILA, Prof. Dr. Nikos Lavranos, n.lavranos@efila.org

European Federation for Investment Law and Arbitration

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Executive Summary

1. EFILA believes that an effective enforcement regime is paramount to the success of any eventual Multilateral Investment Court ("MIC") (if such a MIC should come into being upon the recommendation of the Working Group).

2. Because it believes that MIC decisions should not be subject to any enforcement gap (which may threaten the legitimacy of the ISDS system), EFILA remains skeptical that the New York Convention would be an effective short-term stopgap pending conclusion of a specific MIC enforcement regime. In addition, Working Group members should be wary of any undesired consequences on the commercial arbitration regime that may result from qualifying a MIC decision as an arbitral award.

3. EFILA recommends that Working Group members consider the phased application of a MIC regime (including a long-term enforcement regime) to ensure that no loss of faith in the ISDS system results from any short-term enforcement gap. In addition, EFILA recommends that Working Group members expressly consider addressing in the MIC enforcement regime the scope of the finality of any MIC decision, the scope of the *res judicata* effect of a MIC decision, and the role of domestic courts (and the scope of any exceptions to enforcement).

Introduction

4. This paper follows from EFILA's 15 July 2019 paper entitled "Ensuring Equitable Access to all Stakeholders: Critical Suggestions for the MIC"[1], in which EFILA examined four issues in relation to a potential MIC: (i) the appointment and selection of MIC judges, (ii) consistency of MIC decisions, (iii) access to justice for small and medium sized enterprises, and (iv) enforcement and recognition of potential MIC decisions. This paper will address in greater detail the last of those four topics, on the assumption that the Working Group would endorse, and proceed with, establishment of the MIC.

5. For any judicial system and for the objective of legal certainty, effective recognition and enforcement of foreign and international arbitral awards or judgments is of paramount importance – and investment treaty decisions are no exception. Currently, awards rendered by an investment treaty tribunal are generally either recognized and enforced under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). Throughout their six decades of existence, these instruments have built an effective and reliable enforcement regime that generally imposes a public international law obligation on national courts to recognize investment treaty awards and enforce them as though they were domestic court decisions of final instance, subject only to minor formalities.[2]

6. Under the MIC system, these instruments could become obsolete with respect to investment treaty decisions. One of the intentions underpinning the MIC is to resolve perceived deficiencies in the investor-State dispute settlement ("ISDS") system by replacing arbitration with a permanent court system. Yet, the enforcement regime – a product of over a half-century of

[1] See https://efila.org/wp-content/uploads/2019/07/EFILA-WG-III-submission-15-July-2019.pdf.

[2] See Richard Happ & Sebastian Wuschka, From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma, Indian Journal of Arbitration Law, vol. 6, n 1, 2017, 113, 120, who describe this as "a unique and potentially the strongest feature of arbitral awards compared to other judicial and quasi-judicial decisions."

diplomatic negotiation, scholarly work, and case law – which underpins the current ISDS system is of considerable value to stakeholders and engenders trust in that system. The European Union and other MIC proponents have proposed the creation of a *sui generis* enforcement regime for the MIC, using the New York Convention as a short-term stopgap pending ratification of that regime.[3]

7. EFILA believes that the recognition and enforcement regime under the MIC proposal merits significant reflection. This paper will (I) analyse whether the New York Convention could be used as a "short-term fix" to recognition and enforcement of MIC decisions and (II) make proposals for a viable long-term enforcement regime.

I. The Short-Term Fix: The Applicability of the New York Convention to MIC Decisions

8. The New York Convention governs the recognition and enforcement of foreign arbitral awards, irrespective of their classification as commercial or investor-State, amongst signatory states. It allows an arbitral *award* to elude the potential vagaries of domestic legal regimes, which may be applicable to the recognition and enforcement of foreign court decisions, and imposes a public international law obligation on contracting States to enforce an arbitral award. There are only limited grounds, under its Article V, on which an award *may* be refused enforcement.

9. The intention behind the establishment of the MIC is to move away from the current ISDS system of arbitration and replace it with a permanent "court" system. This rebranding may create potential issues for enforcement of the resulting decisions of that body. It is by no means certain whether a MIC decision will constitute an arbitral award under the New York Convention and therefore whether domestic courts would recognize and enforce a MIC decision under the New York Convention. Indeed, this remains a considerable topic of debate. Some have suggested that

[3] Submission of the European Union and its Member States in preparation for the thirty-seventh session of Working Group III (https://undocs.org/en/A/CN.9/WG.III/WP.159). Also, please see submission from the Government of the Russian Federation (https://undocs.org/en/A/CN.9/WG.III/WP.188/Add.1), para. 11; Submission from the Kingdom of Bahrain (https://undocs.org/A/CN.9/WG.III/WP.180), paras. 48-49.

Article I(2) of the New York Convention – which provides that "[t]*he term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted*"[4] – may allow application of the New York Convention to MIC decisions.[5] However, the intention of the New York Convention was to accommodate awards coming from specific arbitral institutions in jurisdictions where they were considered to be "permanent".[6]

10. EFILA is of the view that relying on the New York Convention as a stopgap enforcement process – while attractive – would not provide a viable short-term fix to the MIC's enforcement conundrum.

11. While the New York Convention provides no definition of an "arbitral award", State courts have identified a number of criteria that a MIC decision may struggle to meet. Most critical of these is the requirement that the award be rendered by a permanent arbitral body.

12. Under the current ISDS system, where arbitral awards fall outside the ICSID process, they will proceed to enforcement under the New York Convention on the basis that they are "*awards made by arbitrators appointed for each case*". Under the current proposal, the MIC would be a "*permanent arbitral body*" with a standing list of potential arbitrators or adjudicators. Unlike an arbitral tribunal, however, the MIC would be composed of judges directly or indirectly appointed by signatories to any MIC treaty, but not the investor, who would be the claimant in the arbitration.[7]

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[4] Article I(2) of the New York Convention, 1958.

[5] Gabrielle Kaufmann-Kohler and Michele Potestà, "*Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?*" CIDS- Geneva Center for International Dispute Settlement (June 2016), para. 154 ("**CIDS Report**"). The CIDS Report takes strength from the U.S. District Court decision where the District Court held that Iran-U.S. Claims Tribunal as "*permanent arbitral body*" under Article I(2) of the Convention. See *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. and others, U.S. District Court* (Central District of California), Decision of 14 January 1988, published in Albert an. van den Berg (ed.), Yearbook Commercial Arbitration, Vol. XIV (1989), pp. 763 et seq.. Also see Submission from the Kingdom of Bahrain, paras. 48 -49.

[6] See for example *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016), paras. 65-68.

[7] Submission of the European Union and its Member States, paras. 22-24.

13. This raises a potential enforcement issue under the New York Convention. MIC judges would be selected exclusively by the contracting States – not by investors. This may raise due process concerns in some jurisdictions, leading to denial of enforcement or recognition of MIC decisions: the right of both sides to the dispute to nominate and/or participate in the appointment of arbitrators is considered a hallmark of the arbitral process.[8] In France, for example, the *Cour de Cassation* has found that inequality of the parties in the appointment of arbitrators is a violation of public policy.[9] Therefore, a party could potentially resist enforcement on the basis that the MIC decision is against public policy under Article V(2)(b) or even under Article V(1)(b) or V (1)(d) of the New York Convention, which allows a contracting State to refuse enforcement where the award "*was not in accordance with the law of the country where arbitration took place*".[10]

14. While courts have recognized the decisions of the Iran-US Claims Tribunal as decisions rendered by a "*permanent arbitral body*" (and thus covered by the New York Convention) in at least three cases,[11] those decisions, which are now decades old, lack any discussion of whether the fact that one party to the dispute was not given the opportunity to choose the decision-maker would have an impact on the New York Convention's application. In addition, it bears noting that the Algiers Accords, which gave rise to the Iran-US Claims Tribunal, had a particular historical dynamic.

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[8] See generally Chapter 7: Selection and Removal of Arbitrators in International Arbitration in Gary Born, International Arbitration: Law and Practice (Second Edition) (2015) and Chapter 4. Establishment and Organisation of an Arbitral Tribunal in N. Blackaby et al (ed.), Redfern and Hunter on International Arbitration (Sixth Edition) (2015).

[9] See *Siemens AG 1 BKMI v Dutco Consortium Construction Co*., Cass. Civ. 1, 7 January 1992, Cour de Cassation, Case No. 89-18708 89-18726 ("*the principle of equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the dispute has arisen*") (our translation).

[10] The *travaux préparatoires* of the New York Convention mention the term "*permanent arbitral bodies to which the parties have submitted*" refers to voluntary arbitration only, as opposed to permanent tribunals to which parties were obliged to submit their disputes. See Albert Jan van den Berg, "Appeal Mechanism for ISDS Awards Interaction with the New York and ICSID Conventions", ICSID Review, vol. 34, n° 1, 2019, p. 179 , referring to ECOSOC 'Summary Record of the Eight Meeting Consideration of the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1958) UN Doc E/CONF.26/SR.8.

[11] They are: (a) The Dutch Supreme Court (*Société Européenne d'Etudes et d'Entreprises (S.E.E.E.) v. Federal Republic of Yugoslavia*, Supreme Court, Netherlands, 7 November 1975, I Y.B. Com. Arb. 195 (1976); (b) French Court of Appeal (*Société Européenne d'Etudes et d'Entreprises (S.E.E.E.) v. République Socialiste Fédérale de Yougoslavie*, Court of Appeal of Rouen, France, 13 November 1984, 982/82), (c) *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc., Court of Appeals*, Ninth Circuit, United States of America, 23 October 1989, 887 F.2d 1357.

15. In addition, the MIC proposal does not specify where the seat of the MIC would be for the purposes of the New York Convention. Under the New York Convention, the courts of the seat (or any place that considers itself a seat) would retain jurisdiction to set aside the award on a number of grounds. It is also important that the New York Convention expressly only applies to the "*recognition and enforcement of awards made only"* or *"deemed to made" "in the territory of another Contracting State*". While the concept of an "a-national award" may not be contrary to the New York Convention, to date, it has only been wholly embraced by one jurisdiction.[12] As a consequence, the lack of any clarity on the jurisdiction in which any MIC decision has been rendered could have a detrimental effect not only on the enforceability of MIC decisions, but on the consistency of MIC case law as State courts could set aside – or refuse enforcement or recognition of – MIC decisions due to disagreements on questions of jurisdiction and on the application of the New York Convention to any specific MIC decision.[13]

16. Using the ICSID Convention as a stopgap may run into similar difficulties. These difficulties have been addressed by members of the Working Group already – namely, the fact that Article 53(1) of the ICSID Convention expressly forbids appeals of awards.[14] In addition, we note that Article 54 only covers the enforcement of pecuniary obligations under an award.[15]

17. Proponents of using the New York Convention as an enforcement stopgap (or even a permanent solution) to enforcement of MIC decisions have called their approach one of "*evolutionary interpretation*."[16] This approach seeks to achieve through widespread judicial interpretation what

[12] See for example Alexander G. Leventhal, Le juge de l'exequatur devant la sentence internationale et la décision d'annulation, Les Cahiers de l'arbitrage (2018, Vol. 2).

[13] State courts themselves have disagreed on the recognition and enforcement of investor-State awards. Compare *Gold Reserve v. Venezuela* [2016] EWHC 153 (Comm) with *Gold Reserve v. Venezuela*, Paris Court of Appeal, 7 February 2017.

[14] Submission by the Kingdom of Bahrain, para. 62 and CIDS Report, para 138.

[15] See Daniel Robert Kalderimis, Noah Rubins, Ben Love, ICSID Convention, Chapter IV, Section 6, Article 54 in Loukas Mistelis (ed.) *Concise International Arbitration* (Kluwer International Law 2015).

[16] U.S. courts have treated Iran-U.S. Claims Tribunal as a "permanent arbitral body" under Article I(2) of the Convention. Similarly, U.S. Court of Appeals in the case of *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc*., Court of Appeals,

the MIC cannot achieve through widespread ratification by State governments and, in so doing, may carry two undesired consequences.

18. *First*, while the New York Convention seeks to create a uniform recognition and enforcement regime in international commercial arbitration,[17] the MIC expressly seeks to turn away from that paradigm (i.e. by creating a permanent *court* system).[18] Would an "*evolutionary interpretation*" of the New York Convention distort the application of that regime to its detriment and to the detriment of the objectives that the New York Convention has sought to put forward? For example, if a MIC decision could be covered by the New York Convention, would an arbitral award rendered by adjudicators chosen exclusively by one of the parties in a commercial arbitration (viewed in some jurisdictions as an offence to the fundamental principle of party equality[19]) also need to be found to satisfy the requirements of the New York Convention? Would this also potentially undermine trust in the commercial arbitration process where the supervision of a national court system in a "safe seat" is one of the lynchpins of that system?

19. *Second*, this approach assumes that all jurisdictions will adopt such an "*evolutionary interpretation*" in a uniform manner. For the reasons explained below, that proposition is unlikely. Relying on the New York Convention may ultimately result in a fractured system. Some jurisdictions embrace this "*evolutionary interpretation*" while others may shun it. In reality, the

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Ninth Circuit, United States of America, 23 October 1989, 887 F.2d 1357, held that the New York Convention "*applies to the enforcement of non-national awards*".

[17] Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, paras. 1 and 16. See also Dr. Reinmar Wolf (ed.), *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary*" (2nd Ed.,2019). See also E. Gaillaird, D. Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in* Practice (2008); L. Mistelis and D. Di Pietro, New York Convention: Introductory Remarks in L. Mistelis (ed.) *Concise International Arbitration* (Kluwer International Law, 2nd Ed., 2015).

[18] The proposals for reform had been formulated to bring in regime which was different from the current regime based on ICSID and New York Convention. See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session ("**Report of Working Group III**") (https://undocs.org/en/A/CN.9/1004/Add.1), para. 62.

[19] *See Siemens A.G. v. BKMI Industrienanlagen GmbH*, Court of Cassation, France, 7 January 1992, XVIII Y.B. Com. Arb. 140 (1993), In this case, the Court of Cassation held that an award which was rendered by a three-member tribunal, one of whom was appointed, under protest and with all reservations, jointly by the two defendants, should be set aside.

only way to ensure a uniform "*evolutionary interpretation*" of the New York Convention would be an amendment to the New York Convention. And if such amendment is required, would the creation of a specific enforcement regime for the MIC not be a better endeavour?

II. The Long-Term Fix: The Essential Elements of a MIC Enforcement & Recognition Regime

20. EFILA emphasizes that a MIC mechanism to adjudicate investor-state disputes will be as successful as the effectiveness of its enforcement mechanism. Setting out the guiding principles applicable to the decisions produced by the MIC is therefore of prime importance. Deliberations at the Working Group have also concurred that enforcement is a key feature of an effective system of justice.[20] In order to effectively make the MIC an effective system of justice, it is essential that certain principles are considered when envisaging this new adjudication mechanism.

21. The construction of an enforcement mechanism, either for a first-tier body (i.e. MIC) or a permanent appellate body, needs to ensure the delivery of justice by means of (i) a phased approach to the application of the MIC regime as well as specific guidance in the MIC Convention as to (ii) the binding nature and *res judicata* effect of decisions, and (iii) the scope of public policy control at domestic level (if any).

a. A Phased Approach to Application of the MIC Regime

22. A MIC enforcement regime – like the New York Convention – would take decades to build into a regime that offers comprehensive coverage across the globe. Today – over 60 years after its signing – the New York Convention is applied to the recognition and enforcement of arbitral awards in upwards of 160 states. While very few states do not apply the New York Convention today, it took time to build the New York Convention's "harmonized" regime. Even as late as the

[20] Report of Working Group III, para. 62.

40th anniversary of its signing, commentators bemoaned a fractured regime[21] and on the occasion of its 50th anniversary the discussion was that the harmonised regime is quite fragile and hence any amendments would be undesirable.[22]

23. It may be suggested that, so long as a MIC enforcement regime is applied in certain pro-enforcement jurisdictions (for example, European Union Member States, Canada, Singapore, Japan, Hong Kong, and some others), this would be sufficient to ensure that the MIC enforcement regime is an "effective" one. However, this underestimates respondent states' ability to "judgment proof" their assets in these States. Moreover, even though a critical mass of States have ratified the convention, exceptions to its applications may prevail by virtue of any reciprocity reservations (as was the case under the New York Convention[23]).

24. Because the MIC regime will only be as effective as its enforcement regime, the Working Group should therefore consider the necessity of a phased approach to the entire MIC regime. The Working Group should consider whether existing ISDS solutions (such as the ICSID and current arbitration systems) would need to remain in place pending ratification of a MIC enforcement regime by a critical mass of States. A gap in enforcement (if, for example, the MIC regime and its enforcement regime enter into effect too quickly without effective coverage) could lead to a loss of faith from investors that may be difficult to reverse once a critical mass of States *do* ratify the MIC regime.

25. The existence of parallel systems – investment arbitration, New York Convention and the MIC – would create more, not less, fragmentation. In order to avoid increasing fragmentation through

[21] The birth: forty years ago - Chaired by Dumitru Mazilu - Ambassador, Ministry of Foreign Affairs, Romania: Enforcing Arbitration Awards under the New York Convention, Experience and Prospects, the volume contains the papers presented at "New York Convention Day" on 10 June 1998 to celebrate the 40 anniversary of the Convention, United Nation Publications.

[22] See Albert Jan van den Berg (ed.) *50 Years of the New York Convention: ICCA International Arbitration Conference* (ICCA 2009).

[23] Chapter 2: Legal Framework for International Arbitration Agreements, in Gary B. Born , International Commercial Arbitration (Second Edition), 2nd edition (Kluwer Law International; Kluwer Law International 2014), paras. 342-344.

the existence of parallel systems – investment arbitration and the MIC – this may require suspending the application of the MIC until such a critical mass is achieved.

26. One example of a phased enforcement regime could be the following:

    a. The MIC enforcement treaty could include a provision amending the New York Convention as amongst signatories only in respect to the MIC in order to allow enforcement of MIC decisions in accordance with Article 41 of the Vienna Convention on the Law of Treaties and aligning consent to MIC as a consent to arbitration in accordance with Article II New York Convention.[24] This enforcement regime would come into effect provisionally once a critical mass (for example, 50 States) have signed (but not yet ratified) the MIC enforcement agreement. Until such time, the ISDS provisions of existing investment treaties would remain applicable.

    b. The MIC enforcement treaty would also include a long term enforcement provision modelled on the ICSID Convention, which would enter into force once a critical mass of States have ratified the MIC enforcement treaty. This would replace the provisional enforcement mechanism.

27. Such a phased enforcement regime would allow the MIC regime to enter into force as quickly as possible, with greatest effectiveness, without risking any enforcement gaps.

b. Finality & *Res Judicata* Effect

28. EFILA believes that the MIC enforcement regime should expressly state that a final decision produced by the MIC should be binding on the disputing parties. This means that a losing party has the legal obligation to comply with the decisions rendered by the MIC, whereas a winning party has the right to seek compliance with the decision. Finality means that once the final

[24] The North American Free Trade Agreement (NAFTA) contained a similar agreement in its Articles 1122(2)(b), 1130, and 1136.7.

decision has been produced, parties should not be able to seek any other remedy on the same legal dispute in another judicial forum.[25]

29. In this regard, the importance of establishing clearly the *ratione personae* scope of application (i.e. identifying the parties that are bound to comply with the final decision) is of particular importance given that finality will only extend to the parties to the final MIC decision.[26]

30. More precisely, a contracting State should notify its position regarding consent to MIC jurisdiction by subdivisions or government agencies. One easy-to-emulate example is ICSID Convention Article 25(3) according to which consent by a constituent subdivision or agency requires the approval of the State unless that State notifies the Centre that no such approval is required. This is particularly relevant when the dispute constitutes co-claimants or co-defendants.[27]

31. In addition, it is also important to clarify what types of MIC decisions will be subject to that binding force and finality – i.e. will the MIC regime cover preliminary decisions or orders rendered by the MIC as well as consent decisions? The MIC enforcement regime should consider whether interim decisions – and even procedural and provisional measures orders – could be binding on contracting States.[28]

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[25] UNCTAD/EDM/Misc.232/Add.8, UNCTAD, Dispute Settlement: 2.9 Binding Force and Enforcement (United Nations 2003). Note, however, that under Article 8.41 of the Comprehensive Economic Trade Agreement between Canada and the EU, disputing parties may only seek to enforce an award after annulment proceedings have completed or a certain minimum period has lapsed from the date of the award and no party has sought annulment.

[26] See for example Antonio R. Parra, The Enforcement of ICSID Awards in Enforcement of Arbitral Awards Against Sovereigns, Doak Bishop (ed.) (Juris 2009).

[27] See for example *Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador*), ICSID Case No. ARB/08/10.

[28] At present, the legal regime in relation to enforcement of interim measures remains fragmented. For a more thorough discussion, see Benoit Le Bars and Tejas Shiroor, "Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement" (2017) Indian Journal of Arbitration Law, p. 24. On the problems of enforcing "interim awards" or "orders" under the New York Convention, see Bernd Ehle, "Article I. Scope of Application" in Wolff (ed), The New York Convention (2019), paras 65 – 68; Dennis Solomon, '§ 2

32. Similarly, EFILA recommends that the Working Group include in its enforcement objectives an express indication of the scope of the *res judicata* effect of final and binding decisions.

33. *Res judicata* effect is also intertwined with the importance of defining *ratione personae* scope. This Working Group should carefully consider whether a decision against a constituent subdivision or agency would also have *res judicata* effect on other constituent subdivisions or agencies, the State itself, or even other States.

c. Conditions for Non-Enforcement & the Role of Domestic Courts

34. EFILA believes that the enforcement regime should clearly spell out the role of domestic courts and attempt to establish harmonized definitions of any limited exceptions to enforcement and recognition.

35. Even once the MIC enforcement regime is widely applied, it may still be subject to divergent interpretations that threaten the objectives of a harmonized enforcement regime. The New York Convention's public policy or arbitrability exceptions, for example, are subject to divergent interpretations in New York Convention jurisdictions.[29] Even Article 54(1) of the ICSID Convention, an unambiguous provision that requires member states to enforce the pecuniary obligations of an award under that convention "*as if it were a final judgment of a court in that State*", has been subject to varying interpretations. For example, in the United States, while recognition and enforcement of a domestic judgment may be done on an *ex parte* basis, an action to enforce an

International Commercial Arbitration: The New York Convention' in Balthasar (ed), International Commercial Arbitration (2016), § 2 paras 65-67.

[29] See for example Analysis of Article V(2)(b), UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), pp. 240 to 247; Chapter 7: Refusal of the Enforcement of Awards Ex Officio', in Marike R. P. Paulsson, *The 1958 New York Convention in Action* (2016), p. 222 et seq.; Margaret L. Moses, Chapter 11: Public Policy under the New York Convention: National, International, and Transnational in in Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019).

ICSID award is carried out *inter partes*, allowing a respondent state to resist recognition and enforcement of an ICSID award on the basis of the Foreign Sovereign Immunities Act.[30]

36. Following this thread of reasoning, this Working Group should consider whether the MIC regime would require contracting States to enforce the pecuniary obligations of decisions as though they were the decisions of domestic courts (as under the ICSID regime) or whether enforcement and recognition should be subject to limited exceptions (as under the New York Convention regime).

37. EFILA believes that an enforcement regime based on the ICSID regime is preferable. However, if the latter is chosen, the Working Group should consider the risk of diverging approaches and interpretations to treaty provisions – in particular, any public policy exception. An enforcement of MIC decisions under the New York Convention would depend on the particular perspective of the domestic court having jurisdiction over the enforcement and third States would retain some control over the recognition and enforcement of such a final decision.[31] In contrast, a mechanism built into the founding treaty for the MIC would enable the award to be subject to more "self-contained" or "automatic" enforcement. In the ICSID self-contained model, for example, public policy control is insulated from domestic legislation, as the procedure is generally exclusively governed by the ICSID Convention. If the MIC would exclusively establish a model similar to ICSID Convention, its proceedings would be mostly grounded in international law.[32]

[30] *Mobil Cerro Negro Ltd et al v. Bolivarian Republic of Venezuela*, Judgment of the Second Circuit, 11 July 2017. For discussion on ambiguity in interpreting Article 54(1) of the ICSID Convention. See also Aron Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review - Foreign Investment Law Journal, Volume 2, Issue 2, Fall 1987, pp. 287–334.

[31] See Richard Happ & Sebastian Wuschka, From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma, Indian Journal of Arbitration Law, vol. 6, n 1, 2017, 113, 124. Marc Bungenberg and August Reinisch, Recognition and Enforcement of Decisions, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, European Yearbook of International Law (Springer 2020).

[32] Alvaro Galindo, David Attanasio and Ana Maria Duran, Chapter 27: The New York Convention's Concept of Arbitration and Enforcement of Multilateral Investment Courts, in Katia Fach Gomez and Ana M. Lopez- Rodriguez (eds.), *60 Yeas of the New York Convention: Key Issues and Future Challenges*, (Kluwer Law International 2019) pp. 459-472.

38. EFILA believes that the proposals contained in this position paper address many concerns regarding the current proposal for a MIC enforcement regime.

39. EFILA reaffirms that the success of any proposed MIC system depends on the effectiveness of its enforcement regime.

40. Due concern must be had to ensuring that any short term or long term solution does not jeopardize trust in the resolution of disputes between investors and states or lead to undesired consequences for the existing arbitration enforcement regime, including with regard to commercial arbitration.

41. EFILA will continue to develop and expand this position paper in the coming months in order to further contribute constructively to the current work in this UNCITRAL Working Group.

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